NORTH CAROLINA COURT OF APPEALS REPORTS

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[1] Appointed 1 January 1971 to succeed P. C. Froneberger, retired.
[2] Retired 30 June 1971. Succeeded by Lacy H. Thornburg 27 July 1971.
[3] Deceased 20 June 1971.
[4] Term expired 30 June 1971.
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[6] Deceased 5 August 1971.
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[1] Retired 31 July 1971. Succeeded by Kenneth A. Griffin 2 August 1971.
[2] Appointed 5 February 1971 to succeed John R. Friday.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1970

SOUTHERN RAILWAY COMPANY v. HUTTON & BOURBONNAIS COMPANY

No. 7025SC604

(Filed 16 December 1970)

1. **Automobiles § 46; Railroads § 5— speed of train — opinion testimony — opportunity for observation**

Any person of ordinary ability and intelligence who has observed the passage of railroad trains is competent to testify as to his opinion of the rate of speed a train was traveling if he had a reasonable opportunity to observe the train in motion and did observe it.

2. **Railroads § 5— speed of train— opinion testimony — absence of testimony that witness observed train**

In this action by plaintiff railroad to recover for damages sustained by its train in a collision with defendant's tractor-trailer, the trial court committed prejudicial error in the admission of opinion testimony by defendant's witness as to the speed of the train where the witness did not testify that he actually saw the train prior to the collision.

3. **Railroads § 6— duty to warn of approaching train**

Plaintiff railroad was under a duty to give timely warning of the approach of its train to a grade crossing within a municipality.

4. **Negligence § 41— instructions on insulating negligence — absence of request**

When the law on proximate cause is properly defined and applied, the subordinate phase of insulating negligence is encompassed therein, and absent a request for special instructions, it is not error to fail to elaborate thereon.

5. Railroads § 5— contributory negligence of railroad — jury question

In this action by a railroad to recover for damages sustained by its train in a collision with defendant's tractor-trailer, the question of whether the railroad's negligence was a proximate cause of the collision was for the jury.

6. Negligence § 34— contributory negligence as matter of law — failure to show right to relief

Where in a negligence action the evidence of a party with the burden of proof discloses contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom, the facts and the law are that the party has shown no right to relief.

7. Railroads § 5— crossing accident — counterclaim against railroad — directed verdict for railroad

In this action by plaintiff railroad to recover for damages sustained by its train in a collision with defendant's tractor-trailer, the trial court did not err in directing a verdict against defendant on its counterclaim for damages to its tractor-trailer, where the evidence clearly established that the driver of defendant's tractor-trailer was negligent in failing to look before driving onto the tracks and that such negligence was a proximate cause of the collision. Rule of Civil Procedure No. 50.

APPEAL by plaintiff and defendant from *Martin (Harry C.), Judge of the Superior Court,* at the May 1970 Civil Session of Superior Court held in BURKE County.

W. T. Joyner, and Riddle & McMurray by John H. McMurray for plaintiff appellant.

Keener & Cagle by Joe N. Cagle for defendant appellant.

MALLARD, Chief Judge.

Plaintiff, Southern Railway Company (Southern), instituted this action to recover damages of defendant, Hutton & Bourbonnais Company (Hutton), as a result of a collision between its Passenger Train No. 16 and a tractor-trailer unit operated by an agent of Hutton. Southern alleged that Hutton was negligent. Hutton denied negligence and alleged contributory negligence and last clear chance. Hutton also asserted a counterclaim for $14,187.00 damages which it allegedly sustained as a result of the negligence of Southern.

The parties stipulated that Southern sustained physical damages in the amount of $4,400.00 in the collision. Southern alleged and offered evidence as to damages for the loss of use of its train engine during the time required to repair it, but no stipulation was made relating to this element of damages. The parties

also stipulated that Hutton sustained $14,187.00 damages to its tractor-trailer unit in the collision.

The evidence for Southern tended to show that on 22 March 1967 its Passenger Train No. 16 pulled by a diesel engine left Asheville at 2:35 p.m. headed eastward for Hickory and points beyond. It was due in Hickory at 5:05 p.m., and at about 5:00 p.m. the train was blowing its whistle and ringing its bell as it approached the 9th Street crossing within the City of Hickory at the speed of about 35 to 40 miles per hour. There it collided with a tractor-trailer unit being operated by an employee of Hutton. It was admitted that this employee was acting in the course and scope of his employment at the time of the collision. The sun was shining and the weather was clear. The speed limit for trains operating within the City of Hickory was 45 miles per hour. Approaching the 9th Street crossing, the railroad tracks run east and west. Ninth Street crosses the tracks running north and south. Hutton's loading dock is "100 and some odd feet" to the railroad tracks and is separated from the tracks by Main Avenue, N.W., which runs parallel with and 25 to 30 feet north of the tracks. Hutton's dock is west of 9th Street. Main Avenue, 9th Street, and the railroad tracks are on the same grade and all are level. From the 9th Street intersection looking westerly, the railroad tracks are straight for a distance of 1,200 feet to two miles. At the time of the collision, there was nothing to obscure one's vision between the "block bounded by main line of Southern Railway, Main Avenue North, 9th Street and 11th Street, but a few telephone poles." From where it had been loaded at Hutton's loading dock, the tractor-trailer traveled slowly east on Main Avenue, N.W., to 9th Street and either stopped and then moved or continued to move slowly onto the tracks in front of the train. Southern's witness Colon Elliott testified that he observed the tractor-trailer from the time it turned onto 9th Street until the collision occurred and that "I did not see the driver look up or down the tracks. He was kind of looking straight ahead and that would be about where I was sitting."

Southern's witness Mark McCall testified that he was the engineer on Southern's train and that he first observed the tractor-trailer when he was at the first crossing west of the 9th Street crossing. He testified: "I watched the tractor-trailer continuously from the first time I saw it until the impact. I kept my eyes on him and that is the reason I was blowing so

much. I was afraid he would not stop and I was trying to get his attention so that he would stop. He never stopped and continued right out in front of the train." He also testified that he expected the vehicle to stop before it got to the crossing and that he applied the brakes to the train when it was about two car lengths west of the crossing.

Southern's evidence further tended to show that the left front and side of the engine was damaged as it collided with the tractor-trailer. The trailer unit remained in and blocked the 9th Street intersection with the railroad while the tractor was located about 1,200 feet east of the intersection. After the collision, oil from the tractor spilled on the rails causing the wheels of the engine to slide and lessening the effect of the brakes. As a result of the collision, Southern lost the use of the engine for a period of fifteen days.

Hutton offered evidence which, in substance, tended to show by the witness J. T. Waddell that he was an employee of Southern and was fireman on the train involved in the collision. The oil on the tracks came from the tractor that was hit by the train. He testified: "As to whether I recall making the statement that in my opinion the train was traveling 55 miles an hour through the City of Hickory prior to the impact, well, I can't tell much about speed; I guess the regular speed of 55 miles an hour. I would not say. That speed is about right. I don't control the speed of the engine. The speedometer is before the engineer. I did see the tractor and trailer unit after the crash."

This witness on cross-examination testified: "We were running about on time on this date. He was going between 30 to 35 miles an hour."

Hutton's witness Charles Emmitt testified that he was employed by Hutton as a supervisor and that at the time of the collision he was in the office which was about 150 or 200 feet from the tracks. He was standing at the window in the office and could see the railroad tracks when he looked out. He testified: "Up west you can see 47 feet. Up east you can see 500 feet. I was right about 10 feet from the loading ramp. The window is right beside the loading dock about 10 feet from it." He also testified: "It was a Ryder truck that Hutton-Bourbonnias had leased and was involved in this accident. He pulled out to 9th Street and he swung over to his left toward the build-

ing and he stopped at 9th Street." Then the following exchange occurred:

"Q. Is there a stop sign there?

A. Yes sir. He stopped and he made his right turn and then pulled out on the tracks. He turned and 'like a bullet' it was over and I told my wife to call an ambulance."

The witness Emmitt further testified that he did not hear any whistle being blown and when he went to the wreck, he saw a man lying there dead. There are no crossbars, electric bells or lights at that crossing between Main Avenue and the tracks. On cross-examination, this witness testified: "I was standing there at the window in the office. I saw the tractor pull out and I could see the railroad tracks from 9th Street in the westerly direction for about 500 feet." The distance from the intersection of Main Avenue and 9th Street that the tractor-trailer traveled after entering 9th Street was something like 25 feet.

On re-direct examination of Charles Emmitt, the following occurred:

"Q. Do you have an opinion as to the speed of the train as it traveled up towards that intersection?

MR. MCMURRAY: Objection.

COURT: Overruled.

A. Yes sir.

PLAINTIFF'S EXCEPTION NO. 3

Q. What is that opinion?

MR. MCMURRAY: Objection.

COURT: Overruled.

PLAINTIFF'S EXCEPTION NO. 4

A. In my opinion I would say it was doing 75 or 80 miles an hour."

On recross-examination of the witness, Charles Emmitt testified: "I looked out the window and saw the cars as they came by my window. I did not at any time see the train coming up the tracks. I was watching the tractor pulling out. I saw the train as it went into the tractor."

Hutton's evidence tended to show that the truck left the loading dock and pulled out slowly. It stopped before it went across the tracks and then pulled onto the tracks where it was struck by the train. There were no crossbars, flashing lights or bells, or any kind of electric light at the crossing. The engineer did not blow the whistle on the train until after it had hit the tractor-trailer.

Hutton's evidence further tended to show by the witness Edward Glenn Tucker that at the time of this collision he was working with Hutton as a receiving clerk and that he saw the train coming. He saw the tractor-trailer when it pulled out and "followed the truck and the train together and then when they hit I took off and ran across the tracks." The place where he was standing was about 50 feet from the actual point of impact of the tractor-trailer and the train. He had the opportunity to observe the train coming down from the 11th Street crossing. He formed an opinion as to the speed of the train and, in his opinion, it was about "45 miles an hour, maybe 50, somewhere between 40 and 50." He did not hear any whistle or bell from the time he saw the train until the accident.

Hutton's witness Everett B. Swanner, Jr., testified: "I did form an opinion as to the speed of the train as it passed me. I figure it was running about 50 miles an hour. At the point of impact it did not look like it had slowed any. I do not recall whether or not I saw any of the train's wheels sliding or slowing down the train. Like I said I was about 1600 feet back. I could not have seen that." On cross-examination, this witness testified that he made a statement within a week after the accident and that he could have stated that in his opinion the speed of the train was about 40 to 45 miles an hour at that time.

Hutton also introduced the ordinance of the City of Hickory which reads: "The speed of any engine or railroad train in passing through the city shall not exceed forty-five miles per hour."

At the close of all the evidence, Hutton moved for a directed verdict in favor of the defendant "on the ground that the facts in this lawsuit shows as a matter of law that the defendant is entitled to recover of the plaintiff on the counterclaim and that the defendant was not negligent in any way." No

specific ruling on this motion appears of record, and no exception was taken to the failure to rule thereon.

Southern thereupon moved that "having agreed upon the damages, that the evidence shows that the plaintiff was no way negligent and that if the plaintiff was, that it was insulated by the negligence of the defendant and that the court should allow a directed verdict for the plaintiff in the amount of the stipulated damages."

The court received an affirmative answer to its question of whether Southern was making the motion under Rule 50 for a directed verdict on the question of negligence, but the court did not rule on this motion. No exception and assignment of error appears in the record to the failure of the court to do so; therefore, the question of the failure to rule is not presented on this appeal.

Without ruling on either of the motions and no exceptions having been taken by either of the parties to the failure to rule thereon, the court asked if either of the parties had any issues that they cared to submit. Southern submitted two issues, one on the question of Hutton's negligence and the other on the question of Southern's damages. Hutton submitted five issues: a question on Hutton's negligence, a question on Southern's contributory negligence, a question on Southern's damages, a question on whether Hutton was injured by the negligence of Southern as alleged in the counterclaim, and the last relating to the amount of damages.

Thereafter, Southern made another motion for a directed verdict as to the counterclaim of Hutton in the following language: "The plaintiff at the conclusion of all of the evidence moves for a directed verdict as to the counterclaim of the defendant for the reason that the evidence, for the reason that all of the evidence and the evidence for the defendant shows that the operator of the tractor and trailer unit drove from a speed of two to seven miles an hour and drove onto the main line of Southern Railway Company directly in front of an oncoming train which was clearly visible to him and which he should have seen by the exercise of due care." Southern contended that such acts constituted contributory negligence as a matter of law. The court allowed the motion by Southern under Rule 50 for a directed verdict on the counterclaim.

The court submitted three issues to the jury, and they answered them as follows:

"1. Was Southern Railway Company's property damaged by the negligence of Hutton-Bourbonnais Company?

ANSWER: Yes.

2. Did Southern Railway Company contribute to its damages by its own negligence?

ANSWER: Yes.

3. What amount, if any, is Southern Railway entitled to recover from Hutton-Bourbonnais Company?

ANSWER: ————."

From the judgment on this verdict, both plaintiff and defendant appealed to this court.

PLAINTIFF'S APPEAL

Southern's first assignment of error discussed in its brief is assignment of error three. By this assignment of error, Southern contends that the trial judge committed prejudicial error in allowing the defendant's witness Charles Emmitt to testify as to the speed of the train without any qualifying testimony that he observed the train for a sufficient distance to form an opinion as to speed.

[1, 2] Charles Emmitt testified on direct examination that from where he was in the office of Hutton, he was watching the truck pull out, saw it stop at 9th Street, and then he saw it pull onto the tracks and watched the tractor-trailer all the way from the loading dock at Hutton's until the time of the collision with the train and that "you can see" in a westerly direction for 47 feet. On cross-examination this witness testified that while he was standing there in the office, he "could see" the railroad tracks in a westerly direction for about 500 feet. He then was permitted to testify, over Southern's objection, that in his opinion the train was "doing 75 or 80 miles per hour." On recross-examination, this witness testified that he did not see the train coming up the tracks but that he saw it as it went into the tractor. Any person of ordinary ability and intelligence who has observed the passage of railroad trains is competent to testify as to his opinion as to the rate of speed a train was traveling, providing he had a reasonable opportunity

to observe the train in motion and did observe it. 2 Jones, Evidence, § 407, p. 762 (5th Ed. 1958); 83 A.L.R. 2d 1330; 156 A.L.R. 384; *Carruthers v. R.R.*, 232 N.C. 183, 59 S.E. 2d 782 (1950). The witness Charles Emmitt did not testify that he actually saw the train prior to the collision, and under the principles of law hereinabove set out, it was error to permit him to testify, over objection, as to the speed of the train. We hold that this error was prejudicial under the circumstances of this case, entitling Southern to a new trial.

Southern's other assignments of error discussed in its brief relate to the charge of the court with respect to the issue of contributory negligence, to the speed of the train, and with respect to the principle of intervening or insulated negligence.

[3] There was some evidence that the train failed to give any warning by blowing its whistle, ringing its bell, or otherwise, as it approached the intersection, which would justify the jury in finding that Southern failed to give any warning as its train approached the 9th Street crossing. It was the duty of Southern to give timely warning as its train approached the 9th Street crossing. *Brown v. R.R. Co.* and *Phillips v. R.R. Co.*, 276 N.C. 398, 172 S.E. 2d 502 (1970). There was also *some* competent evidence that Southern's train was traveling at a speed in excess of 45 miles per hour in violation of the city ordinance providing a 45 miles per hour maximum.

[4, 5] In *Henderson v. Powell* and *Rattley v. Powell*, 221 N.C. 239, 19 S.E. 2d 876 (1942), the Supreme Court said: "No negligence is 'insulated' so long as it plays a substantial and proximate part in the injury." When the law on proximate cause is properly defined and applied, the subordinate phase of insulating negligence is encompassed therein, and absent a request for special instructions, it is not error to fail to elaborate thereon. 6 Strong, N.C. Index 2d, Negligence, § 41, p. 85. No request for special instructions appears on this record. We think that the question of whether Southern's negligence was a proximate cause of the collision was for the jury. We do not deem it necessary for decision in this case to further discuss either of Southern's other assignments of error in view of the fact that a new trial is awarded Southern for error in the admission of evidence.

DEFENDANT'S APPEAL

Hutton contends that the trial court committed error by "dismissing defendant's counterclaim at the close of all the

evidence, by failing to submit issues arising on defendant's counterclaim to the jury as proposed by defendant, by failing to direct a verdict in favor of defendant on its counterclaim, by failing to direct a verdict that the defendant was not negligent, and by signing and entering the judgment."

[6, 7] It is apparent that Hutton's employee did not see the oncoming train. Under the circumstances of this case, Hutton's driver knew, or should have known, that he was approaching the railroad crossing. He drove the tractor-trailer slowly for a distance of about 25 feet on 9th Street before reaching the railroad tracks. The conclusion is inescapable that the driver of the tractor-trailer failed to look before driving onto the tracks at a time when, by looking, he could have seen the train and avoided the collision. It was his duty to look, and by failing to look, he did not exercise due care. That Hutton's employee was negligent and that his negligence was a proximate cause of the collision and resulting damage is clearly established by all the evidence. On Hutton's counterclaim, its position was the same as if it were the plaintiff. Hutton's evidence denies it the right to any relief. Where in a negligence action the evidence of a party with the burden of proof discloses contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom, the facts and the law are that the party has shown no right to relief. *Hinnant v. R.R.*, 202 N.C. 489, 163 S.E. 555 (1932) ; 6 Strong, N.C. Index 2d, Negligence, § 34. Under such circumstances, it is proper for the court under Rule 50 of the Rules of Civil Procedure to direct a verdict against such party.

We are of the opinion and so hold that Judge Martin did not commit error in directing a verdict against Hutton on its counterclaim, in declining to submit issues on the counterclaim, in failing to direct a verdict in favor of Hutton on the counterclaim, or in failing to direct a verdict that Hutton was not negligent.

Hutton also contends that the trial court committed error in admitting evidence relating to Southern's damages and in permitting one of the witnesses for Southern to give his opinion that the engineer on the train was very careful. In view of the disposition made of the plaintiff's appeal, we do not deem it necessary to discuss these assignments of error.

On the defendant's appeal—No error.

On the plaintiff's appeal—New trial.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. THOMAS JAMES MURPHY

No. 707SC496

(Filed 16 December 1970)

1. **Habeas Corpus § 2— legality of restraint — defendant under indictment**

An indictment returned by a grand jury is sufficient ground to detain a defendant for trial, and the defendant is not entitled to his release in a *habeas corpus* proceeding.

2. **Habeas Corpus § 4— extent of appellate review**

An appeal is not allowed as a matter of right from a judgment entered in a *habeas corpus* proceeding, except in cases involving the custody of minor children.

3. **Constitutional Law § 30— right to speedy trial — reasonableness of delay**

A defendant who was arrested in March 1969 and tried in January 1970 was not denied his right to a speedy trial, where (1) part of the delay was attributable to defendant's failure to cooperate with the first two of his court-appointed counsel, (2) all of the continuances in the case except one were for defendant's benefit, and (3) defendant did not show that he was prejudiced by any delay in the trial.

4. **Criminal Law § 91— continuances — discretion of court**

Motions for continuance are ordinarily addressed to the discretion of the trial court.

5. **Habeas Corpus § 4— denial of defendant's request for transcript of habeas corpus proceeding**

Refusal by superior court judge to order that the defendant be supplied with a transcript of the *habeas corpus* proceeding heard by the judge, the judge stating that the defendant's criminal cases could be tried prior to any disposition of the *habeas corpus* proceeding in the appellate courts, was not prejudicial to defendant, especially where the transcript was subsequently made available to the defendant.

6. **Criminal Law § 66; Constitutional Law § 32— identification of defendant — right to counsel**

Where there is an in-custody identification of defendant at a line-up, or a presentation of defendant alone to a witness, the defendant has the constitutional right to have counsel present, and when counsel is not present, absent a waiver, testimony of the identification of a defendant is inadmissible and renders inadmissible any in-court identi-

fication unless it is first determined on a *voir dire* that the in-court identification is of independent origin and is untainted by the illegal lineup or other in-custody confrontation.

7. **Criminal Law § 66— in-court identification of defendant — finding that the identification was of independent origin**

In a prosecution charging defendant with armed robbery and with felonious assault, the trial court properly found that the in-court identifications of the defendant were of independent origin and were untainted by a confrontation at the police station, where (1) there was evidence that the two State's witnesses had ample opportunity to observe defendant at the time the crimes were committed, (2) the defendant fitted the descriptions that the witnesses had given the officers, and (3) the confrontation at the police station did not occur under circumstances so unnecessarily suggestive as to be a denial of due process.

8. **Criminal Law § 42— articles connected with crime — briers and brier stem**

Trial court in an armed robbery prosecution properly admitted sheriff's testimony relating to briers taken from the leather coat worn by defendant at the time of arrest, and relating to a brier stem taken from the area where a deputy sheriff found the stolen money.

APPEAL by defendant from *Peel, Superior Court Judge,* 27 January 1970 Criminal Session of Superior Court held in NASH County.

On 28 October 1970 the defendant filed a motion, which we allow, to add to the record on appeal what purports to be a "Petition for Writ of *Habeas Corpus*" addressed "To the Honorable Judge Resident and or Presiding Judge of Nash General Court of Justice Superior Court Division."

Defendant was tried upon two bills of indictment, which were consolidated for trial. In one he was charged with the felony of armed robbery and in the other he was charged with felonious assault.

The evidence for the State tended to show that the defendant was in Spring Hope on the evening of 16 March 1969 at about 6:45 p.m. He entered a self-service store owned by Mack Marlow located at the intersection of Highways # 64 and #581. This business is known as the "Minit Shop." After purchasing three cans of V-8 juice, the defendant pointed a pistol at Phillip William Edwards (Edwards), an employee of Mack Marlow, and demanded all the money in the store. The store was well lighted. The defendant had on dark glasses. Edwards put the

money, consisting of about $20 in change and about $700 to $900 in bills (which was the property of Mack Marlow) in a brown paper bag and gave it to defendant. The defendant started out the door of the store and bumped shoulders with Charles W. James (James) who was coming into the store. After entering the store, Edwards told James of the robbery and James went to the door, hollered at the defendant, and the defendant ran. James got in his car and pursued him. As James got near the defendant, they were approaching the railroad track. The defendant ran into some brier bushes. James stopped with the lights on his car shining down the road. James heard him moving around in the bushes. After a car stopped, James talked to the occupants. It proceeded on and the defendant came out in front of James' car, without dark glasses on, and with a gun in his hand. At that time James was standing by his car, the car lights were on, and the door was open. The defendant walked within three feet of the headlights of the car, and the lights of the car were shining on him when he shot the pistol. The bullet struck the windshield. James started to get back in his car; whereupon, the defendant shot again. This time the bullet struck James in the left side about two inches from his heart and came out about two or three inches on the left side of his backbone. James was treated for his wounds by a doctor but was not hospitalized. James and Edwards described the appearance of the defendant to the police officers. At about 10:15 or 10:30 that same evening, Warren Green (Green), a deputy sheriff of Nash County, arrested the defendant on Highway #64 about one hundred yards East of the "Minit Shop." The defendant did not have on dark glasses but was wearing a black leather jacket which was later discovered to have briers in it similar to the briers in the bushes where the defendant had gone as James followed him from the store.

After he was arrested, the defendant was again seen by Edwards that night at the jail about 11:30 p.m., and Edwards at that time identified the defendant as the man who robbed him. The defendant was also seen by James that night at the jail between 11:00 and 11:30, and James at that time identified the defendant as the man who had shot him. At about 12:00 that night, Officer Green went to the area which James had described as the place where defendant went into the bushes. After a search of this area that night, he found two paper bags, $318.00 in paper money, three cans of V-8 juice, and a

pair of sunglasses. The next morning Green went back to the same area and found about $17 in silver scattered over an area of three or four feet. About two months after this, Benny Lee Matthews found a .32 caliber pistol "in a yard next to the railroad property" and gave it to Green.

Defendant's evidence tended to show that he was not in Spring Hope between 6 and 8 o'clock on the evening in question. He did not rob Edwards and did not shoot James. On 16 March 1969 at about 5:15 or 5:30 p.m., he left Richmond, Virginia, on a bus on his way to Raleigh to seek employment. After arriving at Rocky Mount around 9:00 or 9:15 p.m., he learned he had missed the bus to Raleigh. He asked for directions on how to get to Raleigh "and was told to take Highway 64, West." He began hitchhiking and caught one ride to a point about one mile east of where he was arrested. After that he went "into town to the lighted area where I was arrested." There was a phone booth nearby. He called the operator and again asked for directions to Raleigh and "she told me to go West on Highway 64." He "thumbed" the car operated by Green, who arrested him. When arrested he had $193 in his pocket. One Hundred Forty Dollars of this was his money he had obtained from his mother that day. Forty Dollars of this was money paid to him on that day by his cousin.

The jury returned a verdict of guilty as charged in each of the bills of indictment.

From judgment of imprisonment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Assistant Attorney General Vanore for the State.

Biggs, Meadows & Batts by M. Alexander Biggs for defendant appellant.

MALLARD, Chief Judge.

The defendant's first assignment of error is based upon his exception to the signing and entry of an order by Judge Bundy on 26 November 1969.

[1] On 3 November 1969 the defendant had filed what he called a petition for a writ of *habeas corpus*. This appears to have been prepared by the defendant without legal aid. In it the defendant asserts that certain of his constitutional rights

were violated and that he was illegally detained. The defendant had not been tried when this was filed, and he did not assert in the petition that the legality of his restraint had not been already adjudged upon a prior writ of *habeas corpus*. By failing to do this, he did not comply with the provisions of G.S. 17-7 relating to the contents of a petition for the writ of *habeas corpus*. Nevertheless, Judge Bundy heard the defendant and upon competent evidence, found that the defendant was being held for trial on two valid bills of indictment. An indictment returned by a grand jury is sufficient grounds to detain a defendant for trial. The judge properly declined to issue the writ and to release the defendant on the hearing of the petition for the issuance of the writ.

In the record, immediately after the judgment denying the defendant's demand that he be released, there appears an entry headed "Exception and Notice of Appeal." In the body of this instrument, the defendant excepted to the signing of the order and "gives notice of application to the North Carolina Court of Appeals for writ of *certiorari*." This "notice of application" is meaningless. No petition for writ of *certiorari* was ever applied for or issued by this court to review the ruling of Judge Bundy on the *habeas corpus*.

[2] An appeal is not allowed as a matter of right from a judgment entered in a *habeas corpus* proceeding, except in cases involving the custody of minor children. *Surratt v. State*, 276 N.C. 725, 174 S.E. 2d 524 (1970).

The record on appeal from the trial was not docketed in this court within the time permitted by the rules. Subsequently, the Court of Appeals allowed defendant's petition for writ of *certiorari* to review the trial and the judgment imposed, but this does not extend to or authorize a review of the order entered prior to the trial denying the release of the defendant under *habeas corpus*.

[3, 4] Defendant argues in his brief that he was denied a speedy trial, but this is not properly raised by this first assignment of error. The evidence for the State and the record in this case tended to show that defendant was arrested in March 1969. He was not tried until January 1970. During that time he remained in the Nash County Jail or at a State hospital for examination. In May 1969, when defendant's case first came up for trial, he did not have a lawyer. The defendant had

theretofore told the court officials that he had employed a lawyer in Virginia. The Virginia lawyer was not present in May 1969. The defendant then requested a lawyer be appointed for him. One was appointed and after that, the defendant had three different court-appointed attorneys. Apparently he could not or did not cooperate with the first two of them. The first two lawyers were permitted at different sessions of court to withdraw. During the time he was in custody, the defendant's case was brought up for trial several times, but he was not ready for trial and it was continued at his instance or for his benefit. The State appears to have been ready for trial each time except the one time on 26 November 1969 when one of the State's material witnesses was absent. Also, the defendant's counsel did not appear to be ready for trial during the first week of the two-week November session. The State, during the second week of the November session, moved for a continuance, and the defendant demanded that he be tried. The trial was continued until January 1970. Motions for continuances are ordinarily addressed to the discretion of the trial court. 2 Strong, N.C. Index 2d, Criminal Law, § 91, p. 620. No abuse of discretion or prejudicial error in granting the continuances is shown on this record.

Perhaps the reason that the defendant was not ready for trial can be gleaned from the testimony of the sheriff of Nash County who testified on the question of punishment after the defendant was found guilty, as follows:

> "On the morning of the 17th Mr. Green brought him in to the jail up there and in the jailor's office Mr. Green handed me the black leather coat we had here in court. It had briers all up in the shoulder. I showed it to him and asked him about the briers and the boy was glassy-eyed, he didn't look right, he looked like he was under the influence of whiskey or dope or something. I didn't smell anything on him. I questioned him about what he had been taking and he told me he had been on heroin for about two years. He told me that he taken *(sic)* a fix after he left home and went uptown, he had a fix, he called it, and said you could get it anywhere uptown and told me of several different blocks he could get it. He said he ran up with those soldiers and had another fix on the bus later. Both of his arms showed signs of needles, both arms, and there was a needle found in his jail cell after he was taken out."

The rule is that "(a) person formally charged with crime is entitled to a speedy and impartial trial under both the federal and state constitutions, but such right is a shield to protect a defendant from arbitrary and oppressive delays, and whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case." 2 Strong, N.C. Index 2d, Criminal Law, § 91, p. 619. See also *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870 (1965), *appeal dismissed* and *cert. denied,* 382 U.S. 22, 15 L. Ed. 2d 16, 86 S.Ct. 227; and *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891 (1963), *cert. denied,* 376 U.S. 956, 11 L. Ed. 2d 974, 84 S.Ct. 977.

Under the circumstances of this case, we do not think that the defendant was denied the right to a speedy trial. All of the continuances except one were for his benefit. Moreover, he has not shown where he was prejudiced by any delay in the trial.

Defendant moved twice to dismiss the charges against him because of certain alleged violations of his constitutional rights. The question of the failure of the court to allow the motions to dismiss is not presented on this record by proper exception and assignment of error. However, we think the motions were properly overruled.

[5] Defendant's second assignment of error is to the failure of Judge Bundy on 28 November 1969 to supply him with a transcript of the *habeas corpus* proceedings and motion to dismiss heard by him on 26 November 1969. This transcript has now been made available to the defendant since it appears in this record. In a letter to the court reporter, Judge Bundy gave as his reason for failing to sign an order for payment of a transcript thereof the following:

> "It is too near the next term of court to put the State to this expense, a two-weeks criminal term being scheduled beginning January 26.
>
> The cases can be tried before these appeals, or petitions for *certiorari* can be heard and I think it is a needless and useless expense at this time.
>
> The Judge presiding at the Spring Term may do as he may be advised, after the January Term."

No prejudicial error has been made to appear by the failure of Judge Bundy to order that the defendant be supplied a copy of this transcript. This assignment of error is overruled.

Defendant's third and fourth assignments of error will be discussed together. They both deal with the question of the in-court identification of the defendant. Assignment of error three relates to the ruling of the court on the admission of the testimony of Edwards as to his identification of the defendant at the Spring Hope Jail, when the defendant did not have an attorney present, and his identification of the defendant in court as being the person who robbed him. Assignment of error four relates to the ruling of the court on the admission of the testimony of James as to his identification of the defendant in court as being the person who shot him, after he had seen the defendant in the Spring Hope Jail.

After holding a *voir dire* as to the admissibility of the identification of defendant by Edwards in the Spring Hope Jail shortly after the crime, the trial judge, upon competent evidence, found the following facts:

"(1) That at the time of the confrontation in question the defendant was not represented by counsel and had not waived any of his constitutional rights.

(2) That the alleged robbery was in the Minit Shop in the presence of the witness Phillip Edwards over a period of ten to fifteen minutes, during which time he had two conversations with him, and that at the time of the robbery the robber was three or four feet away from him, and that when he put the gun on him he got a good look at him then; that the lights throughout the Minit Shop and at the police station were good; that the witness thought it unusual that a person would wear dark glasses at 7 o'clock p.m.; that the time and conditions present gave the witness ample time to observe the robber.

(3) That the witness at the time of the robbery gave in detail an accurate description of the robber; that in the opinion of the court the description as to the defendant's age and size and race is accurate at the present time.

(4) That approximately four and one-half hours elapsed between the time the witness saw the robber in the Minit Shop and when he identified the defendant at the police station.

(5) That no suggestion was made on the part of anyone at the time of the confrontation, or prior thereto, that

would tend to suggest in any manner to the witness that the defendant was the robber.

(6) That at the time of the confrontation there was no hesitancy or hesitation on the part of the witness and no doubt in his mind that the defendant was the man who committed the robbery at the Minit Shop.

(7) That the confrontation occurred during the investigatory period and shortly after the witness had seen one person of the Negro race who had been brought to the Minit Shop as a suspect and the witness had told the officer that this was not the man.

(8) That at the time the witness saw the defendant at the police station he was wearing clothes which answered the description previously made by the witness, although he was not wearing glasses or gloves.

(9) That the defendant had been arrested approximately three and one-half hours after the robbery and the defendant was within approximately 100 yards of the Minit Shop.

(10) That the identification by the witness Edwards of the defendant today in court is based on his observation of the defendant at the time of the robbery and is not based to any extent upon seeing the defendant in the confrontation at the police station."

After holding another *voir dire* as to the admissibility of the identification of the defendant by James in the Spring Hope Jail shortly after the crime, the trial judge, upon competent evidence, found the following facts:

"(1) That at the time of the confrontation at the police station the defendant was not represented by counsel and had not waived any of his constitutional rights;

(2) That the witness James had ample time to observe the person who shot at him over a period of some two to three minutes or some appreciable period of time, and although it was dark that this person was in the bright headlights of his automobile looking at him from a distance of about eight feet, and that at the police station at the place where the witness James confronted the defendant and made his identification that it was done in a well lighted room and not in a dark cell;

(3) That although the witness had been shot at the time he saw the officer he gave a description which proved to be substantially accurate as a description of the defendant;

(4) That the confrontation between the witness and the defendant at the police station occurred approximately four to four and one-half hours after the witness was shot; and

(5) That no suggestions were made in any fashion to the witness that the defendant was the person who had shot him;

(6) That the witness identified the defendant as soon as he saw him and without any hesitation;

(7) That the defendant at the time of the identification was wearing certain clothes which corresponded to the description given by the witness;

(8) That the defendant had been arrested approximately three and one-half hours after the witness was shot, in the same general vicinity;

(9) That the witness' in-court identification was based solely on his observation of the person who shot him, at and about the time of the shooting and during the time that he observed his assailant in the headlights of the automobile, and that his in-court identification was not based in any respect on the confrontation at the police station."

[6] The rule is that where there is an in-custody identification at a lineup, or presentation of a defendant alone to a witness, the defendant has the constitutional right to have counsel present, and when counsel is not present, absent a waiver, testimony of the identification of a defendant is inadmissible and renders inadmissible any in-court identification unless it is first determined on a *voir dire* that the in-court identification is of independent origin and is untainted by the illegal lineup or other in-custody confrontation. *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S.Ct. 1951 (1967); *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S.Ct. 1967 (1967); *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969).

[7] In this case the experienced trial judge found, upon competent evidence, that both in-court identifications were of independent origin and were untainted by the confrontation at the police station. Both identifications of the defendant at the jail occurred within four and one-half hours after the commission of the crime. Each of the witnesses had ample opportunity, as well as reason, to observe the defendant at the time of the commission of the crime. The defendant fitted the descriptions the witnesses had given the officers. When the totality of the circumstances is considered, we are of the opinion that the identification of the defendant at the jail by both witnesses did not occur under circumstances "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Gatling,* 5 N.C. App. 536, 169 S.E. 2d 60 (1969); *State v. Bertha,* 4 N.C. App. 422, 167 S.E. 2d 33 (1969). We hold that the trial court did not commit error in admitting into evidence the identification of the defendant by the witnesses Edwards and James.

[8] Defendant's last assignment of error is to the admission of the testimony of the sheriff of Nash County as to some briers he found in and took from the leather coat identified as the one taken from the defendant at the time of his arrest, and a certain brier stem he took from the area where Deputy Sheriff Green found the money. The defendant contends that the State's evidence fails to show that the briers were in the coat at the time the coat was taken from the defendant by Deputy Sheriff Green that night and received by the sheriff the next morning and that the coat may have inadvertently come into contact with the briers during the time that the deputy sheriff took the coat and the time he gave it to the sheriff.

The rule is stated in Stansbury, N. C. Evidence 2d, § 85, p. 192, as follows:

> "Tangible traces of various sorts may indicate the presence of a person or the happening of an event of a certain character at a particular place, and evidence of them is therefore admissible if the inference sought to be drawn is a reasonable one."

Under the circumstances of this case, the trial judge correctly admitted the evidence concerning the briers.

The defendant has had a fair trial, free from prejudicial error.

No error.

Judges PARKER and GRAHAM concur.

DEBORAH JONES PATTERSON, BY NEXT FRIEND, BOBBY JONES v. RALPH CONNER REID AND WIFE, NANCY L. REID

No. 7026SC472

(Filed 16 December 1970)

1. **Rules of Civil Procedure § 56— motion for summary judgment — consideration of the record**

When a motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion.

2. **Animals § 2— injuries inflicted by domestic animal — prerequisites for recovery**

To recover for injuries inflicted by a domestic animal, a claimant must show (1) that the animal was in fact vicious, and (2) that the owner or keeper knew or should have known of its vicious propensities, the basis of the claim not being negligence but rather the wrongful keeping of the animal with knowledge of its viciousness.

3. **Animals § 2— "keeper" of domestic animal**

The keeper of an animal is one who, either with or without the owner's permission, undertakes to manage, control or care for the animal as owners in general are accustomed to do.

4. **Rules of Civil Procedure § 56— motion for summary judgment — supporting affidavits — unsupported allegations in pleading**

In order to show that there is a genuine issue as to facts contained in defendants' affidavits filed in support of their motion for summary judgment which, if established, would defeat plaintiff's claim, plaintiff may not rest upon the mere allegations of her pleading, but her response, by affidavits or otherwise as provided in Rule 56, "must set forth specific facts showing that there is a genuine issue for trial." *Rule of Civil Procedure No. 56(e).*

5. **Animals § 2— action for injuries received in fall from horse — defendants' supported motion for summary judgment — sufficiency of plaintiff's affidavits opposing the motion**

In this action for personal injuries received by plaintiff when she was thrown from an allegedly vicious horse kept in defendants' pasture, the trial court should have allowed defendants' motion for summary

judgment where affidavits filed by defendants in support of their motion disclosed that defendants are prepared to offer competent evidence (1) that their only connection with the horse was that they permitted its owner, their tenant, to keep the horse in their pasture, (2) that they did not at any time manage, control or care for the horse in the manner of owner, and (3) that the horse was not in fact vicious and defendants neither knew nor had any reason to know of any vicious propensity on its part, and affidavits offered by plaintiff in opposition to defendants' motion failed to show that she can offer competent evidence to prove (1) that defendants were "keepers" of the horse or (2) that defendants either knew or had reasonable cause to know of any vicious propensities the animal may have had.

6. **Rules of Civil Procedure § 56— motion for summary judgment — consideration of hearsay statements in affidavits**

Affidavit statements based on hearsay would not be admissible in evidence and should not be considered in passing on a motion for summary judgment.

7. **Animals § 2— action for injuries received in fall from horse — negligence in encouraging minor to ride horse — defendants' motion for summary judgment — sufficiency of plaintiff's affidavits opposing the motion**

Even if minor plaintiff's complaint for injuries she received when thrown from a horse is sufficient to state a valid claim for relief on the theory that defendants negligently encouraged plaintiff to ride the horse by allowing her to use saddles and other riding equipment which they owned without adult supervision and protection, affidavits offered by plaintiff are insufficient to overcome defendants' properly supported motion for summary judgment, where they fail to show that plaintiff can offer competent evidence to prove that defendants knew or should have known that the horse was vicious or that defendants actively encouraged plaintiff to ride the horse.

ON *certiorari* to review order of *Thornburg, J.*, 27 April 1970 Civil "B" Session of MECKLENBURG Superior Court.

This is a civil action to recover damages for personal injuries suffered by plaintiff, then a ten-year-old girl, on 31 March 1963 when she was thrown from a horse (named "Rowdy") owned by a Mr. Billy Ray Terry and which was being kept in defendants' pasture. In her complaint plaintiff in substance alleged: that the horse was cared for, stabled and used as a riding horse by the defendants, their children, and employees, in the same manner as livestock owned by the defendants; that the horse was dangerous and vicious and these traits were known to defendants; that defendants failed to exercise due care by allowing the horse to be wrongfully kept on their premises and by permitting and encouraging plaintiff and other children to ride the horse by allowing them to use the saddles and other

riding equipment owned by defendants without adult supervision or other protection; and that plaintiff's injuries were proximately caused by defendants' negligence.

Defendants answered and denied that they harbored the horse, denied it was dangerous, and denied knowledge of any dangerous characteristics of the horse.

On 9 March 1970 defendants moved for summary judgment dismissing the action on the grounds there was no genuine issue as to any material fact and that defendants were entitled to a judgment as a matter of law. In support of this motion, defendants filed two affidavits, one sworn to by defendants themselves and one sworn to by Mrs. Jo Anne Terry Wray. (At the time plaintiff was injured, Mrs. Wray was the wife of Billy Ray Terry, who is now deceased.)

In defendants' affidavit, they state that on 31 March 1963 they resided on property located at 523 Main Street, Pineville, N. C., at which time they also owned adjacent property which was fenced in and used as a pasture; that Mr. and Mrs. Billy Ray Terry rented a house from defendants which was located on the back of their property behind the pasture; that during the summer of 1962 Mr. Terry bought a small horse named "Rowdy" for use by his daughter; that defendants allowed Mr. and Mrs. Terry to keep the horse in their pasture without charging any additional rent, but Mr. and Mrs. Terry were responsible for the maintenance and feeding of the horse and had full and exclusive control over it; that the horse was very gentle and was ridden by the Terry girls, ages fourteen, ten and five respectively at the time complained of; that on some occasions, and always with the express permission of Mr. and Mrs. Terry, the two daughters of defendants, who were at the time both seventeen years old, also rode the horse; that the horse was not dangerous and defendants had no knowledge of anyone ever having been hurt by it before the alleged accident on 31 March 1963; that the pasture was fenced in and defendants never gave permission to anyone to go into the pasture and ride the horse, and specifically did not give such permission to plaintiff; and that defendants had no first-hand knowledge of the accident complained of in this action.

In her affidavit, Mrs. Wray confirmed the statements contained in defendants' affidavit and expressly stated that the defendant, Dr. Reid, gave the Terrys permission to keep the horse in his pasture but that the Terrys were responsible for

the maintenance and feeding of the horse and had full and exclusive control over it; that she had never known Rowdy to misbehave or cause any trouble prior to 31 March 1963; and that the accident complained of in the complaint was the only incident she knew of in which anyone was allegedly hurt anywhere around Rowdy.

Plaintiff filed four affidavits in defense of the motion for summary judgment. The first was that of Pamela Clayton Jones, who stated:

"3. I knew Sherry Terry at that time personally and we rode the same school bus to school.

"4. I remember explicitly and sometime in September, 1962 that Sherry boarded the school bus one morning and that her face was skinned and bruised. I personally heard her discussing with some friends on the bus that she had been thrown by Mr. and Mrs. Terry's horse, Rowdy.

"5. I had seen this horse, Rowdy in the pasture located beside Dr. and Mrs. Reid's home."

The second affidavit was that of Jacqueline Renea Lear, a fifteen-year-old girl, who stated:

"3. I knew that Mr. and Mrs. Terry owned a horse named Rowdy and saw Rowdy on many occasions during the years of 1962 and 1963.

"4. I have visited with the Terry children in the company of Deborah Jones Patterson who at that time was my friend Deborah Jones and have seen her and her brother, Robert, ride the horse Rowdy.

"5. I never rode the horse Rowdy although my friends encouraged me to because I was afraid of the horse and was afraid that the horse would throw me if I rode it.

"6. I remember that Deborah was hurt sometime in March of 1963 although I have no first-hand knowledge of the accident causing serious injury to her leg.

"7. Before Deborah was hurt in 1963, I had seen Rowdy buck, kick, and act wild especially when children who were strangers to Rowdy tried to ride her.

"8. Prior to the time when Deborah was injured I have seen Rowdy buck, kick and act wild when children would hit her with a stick or try to make her run.

"9. I never rode the horse because I was afraid of it, and knew it to be dangerous.

"10. The horse was kept in the pasture beside Dr. and Mrs. Ralph Reid's home and that is where I always saw it."

The third affidavit was that of plaintiff's mother, Carolyn H. Jones, who stated that she had no personal knowledge of the accident in which the plaintiff was injured. In addition, she stated:

"4. In September of 1962, late one afternoon, I was in my front yard when my daughter Deborah came running into the yard and said that Sherry Terry had been thrown by Rowdy and had hurt her face and nose. Almost at the same time, I saw the Volkswagen automobile which I knew to be the automobile of Mr. and Mrs. Billy R. Terry being driven by Mr. Billy R. Terry proceeding toward Pineville on Main Street in front of my house. I was close enough to the street to determine that Sherry Terry was sitting in the rear seat of the Volkswagen and that her face was skinned and her nose was bleeding. The Terrys' vehicle proceeded toward the center of Pineville, North Carolina, where Dr. Reid's medical offices are located.

"5. I have never seen my daughter Deborah ride the horse Rowdy. I have seen the horse Rowdy in the pasture located beside Dr. and Mrs. Reid's home. Dr. and Mrs. Reid have never told me or my husband, to my knowledge, that Deborah or Robert could not go on their property or near the horse Rowdy or near the pasture located on Dr. and Mrs. Reid's property as alleged in paragraph 11 of the affidavit filed by Dr. and Mrs. Reid herein."

The fourth affidavit filed by plaintiff in opposition to the motion for summary judgment was that of the plaintiff herself. In this, she related the circumstances of the accident as set forth in the complaint, and then went on to say:

"7. I visited the home of the Terrys often and had ridden the horse Rowdy on other occasions.

"8. Mr. and Mrs. Terry had told me not to ride the horse alone because Rowdy was dangerous.

"9. Approximately one month before March 31, 1963, Robin Terry and I were both riding Rowdy. It was about

4:30 p.m. after school. We were riding the horse bareback and when we started giggling, Rowdy bucked. Mrs. Terry called to us from her window and told us to go over to Dr. and Mrs. Reid's and get their saddle and put it on Rowdy so he wouldn't buck. We got the saddle from Dr. and Mrs. Reid's house, put it on Rowdy and Mrs. Terry then saw us riding the horse with the saddle on.

"10. I had seen Mr. Terry ride Rowdy before and had seen the horse buck and kick when he was riding the horse.

"11. An elderly lady who resides at Dr. Reid's home and known to me as Dr. Reid's mother had told me never to go in the pasture where Rowdy was kept because I might get hurt.

"12. In September, 1962, I was visiting Robin Terry at her home and saw Sherry Terry, age 14, riding Rowdy in Dr. Reid's pasture. Rowdy was running fast and jumped over a log or something and Sherry fell to the ground. Sherry came to her home and her face was skinned and her nose bleeding. Mr. and Mrs. Terry put her in the car and left the home, driving in the direction of Pineville.

"I ran home and told my mother that Sherry had gotten hurt while riding Rowdy.

"13. I know that Rowdy was spirited and would buck and kick and know that Mr. and Mrs. Terry and their children knew of these characteristics.

"14. Dr. and Mrs. Reid never told me not to come on their property. Dr. and Mrs. Reid owned a saddle which would fit Rowdy and I have ridden Rowdy while this saddle was on his back. The saddle owned by Dr. and Mrs. Reid was brown.

"15. I and Robin Terry have fed the horse Rowdy on several occasions. On these occasions, there was a donkey and another horse located in the pasture owned by Dr. Reid. We fed the horse Rowdy from hay which was located and stored in the barn where all of the livestock including Rowdy was kept. This barn was located in the pasture and was owned by Dr. Reid."

The trial judge considered all of the affidavits and ruled that the motion for summary judgment should be denied. An

order was entered accordingly on 12 May 1970. To review this order, defendants applied to this Court for a writ of *certiorari*, which was allowed on 25 June 1970.

James H. Morton for plaintiff appellee.

Helms, Mulliss & Johnston by E. Osborne Ayscue and Robert B. Cordle for defendant appellants.

PARKER, Judge.

[1] The motion for summary judgment under Rule 56 of the Rules of Civil Procedure (G.S. 1A-1, Rule 56) is a procedure new to the courts of this State. (For an excellent discussion of the history and purpose of the summary judgment procedure, see opinion by Judge Morris in *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425.) The purpose of the rule is not to resolve a disputed material issue of fact, if one exists, but to provide an expeditious method for determining whether any such issue does actually exist. The rule provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c). When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. *Crest Auto Supplies, Inc. v. Ero Manufacturing Company*, 360 F. 2d 896 (7th Cir., 1966). However, when the motion is supported as provided in the rule, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e). The affidavits contemplated by the rule, both those supporting and those opposing the motion, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e).

[2, 3] In the case before us, plaintiff alleged in her pleading a claim against defendants for injuries received by her from an animal with known vicious propensities. To recover for injuries inflicted by a domestic animal, a claimant must show (1) that

the animal was in fact vicious, and (2) that the owner or keeper knew or should have known of its vicious propensities. The basis of the claim in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness. *Swain v. Tillett*, 269 N.C. 46, 152 S.E. 2d 297. Here, plaintiff does not contend that the defendants owned the animal; she alleged it belonged to another. She does assert that defendants were the keepers of the animal. "The keeper is one who, either with or without the owner's permission, undertakes to manage, control, or care for the animal as owners in general are accustomed to do." *Swain v. Tillett, supra.*

[4, 5] Defendants' affidavits disclose they are prepared to offer competent evidence to show that their only connection with the horse in this case was that they permitted its owner, their tenant, to pasture it in their pasture, that they did not at any time "manage, control, or care for the animal as owners in general are accustomed to do," and that the horse was not in fact vicious and defendants neither knew nor had any reason to know of any vicious propensity on its part. These facts, if established, would defeat plaintiff's claim. Defendants' affidavits are, therefore, sufficient to require summary judgment in their favor unless plaintiff is prepared to show that there is a genuine issue as to these facts. To do so, she may not rest upon the mere allegations in her pleading, but her response, by affidavits or otherwise as provided in Rule 56, "must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e).

[5, 6] Turning to plaintiff's affidavits, we find that some of the statements therein are based on hearsay. These would not be admissible in evidence and should not be considered in passing on the motion for summary judgment. Rule 56(e). Considering such of the facts stated in plaintiff's affidavits as would be admissible in evidence, and construing these in the light most favorable to plaintiff, we find plaintiff has failed to show that she can offer any competent evidence to prove that the defendants were the "keepers" of the animal here involved, within the definition of that word as contained in *Swain v. Tillett, supra.* Furthermore, even if a liberal construction of plaintiff's affidavits show that she can produce some competent evidence from which a jury might permissibly find that the horse here involved was a vicious animal, they completely fail to disclose that she has any competent evidence to show that defendants either knew or had any reasonable cause to know of any such

vicious propensities. Her affidavits, therefore, fail to "set forth specific facts showing that there is a genuine issue for trial."

[7] We note that a liberal construction of the allegations in plaintiff's complaint might support the contention that she has stated a valid claim for relief on the theory that defendants, even though being neither owners nor keepers of the horse, were nevertheless liable for her injuries in that they negligently encouraged plaintiff to ride the horse by allowing her to use saddles and other riding equipment owned by defendants without adult supervision or protection. However, here again, in order to recover on such a theory, it would be necessary for plaintiff to prove that defendants knew or should have known that the animal was in fact vicious. In addition, plaintiff would have to produce evidence that defendants actively encouraged plaintiff to ride. Her affidavits fail to show that she can produce any competent evidence to prove these facts.

Plaintiff having failed to show that there is a genuine issue for trial, defendants' motion for summary judgment in their favor should have been allowed. The judgment denying defendants' motion is

Reversed.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. VIRGIL W. STROUD

— AND —

STATE OF NORTH CAROLINA v. DONALD MASON

— AND —

STATE OF NORTH CAROLINA v. LEWIS PIERSON WILLIS

No. 703SC491

(Filed 16 December 1970)

1. Burglary and Unlawful Breakings §§ 5, 10; Larceny § 7— breaking and entering — possession of burglary tools — larceny — sufficiency of evidence

In a prosecution charging three defendants with breaking and entering, larceny, and possession of burglary tools, the State's evidence was sufficient to carry the case to the jury against each of the three defendants on each of the three separate offenses, where the evidence was to the effect (1) that three unidentified men in a 1963 green Chevrolet were observed at the scene of the break-in only minutes before the three defendants were found in a 1963 green Chevrolet that contained the stolen safe, as well as punches, crowbars, chisels, and other

tools; (2) that the car was only a short distance from the store from which the safe had been removed; and (3) that the lock on the back door of the store had been pried completely off by the use of implements such as those found in the Chevrolet.

2. **Criminal Law § 118— instructions on the contentions of the parties — prejudicial error**

Trial court's remarks in stating the contentions of the parties constituted an expression of opinion in violation of G.S. 1-180 and warranted a new trial, notwithstanding the stated contentions might have been properly argued to the jury by the solicitor, where (1) the warmth and vigor of the court's remarks were capable of impressing the jury with the strength of the State's case and the weakness of the alibi testimony of one defendant, and (2) several of the court's expressions included assumptions of evidence entirely unsupported by the record.

Chief Judge MALLARD concurring.

APPEAL by defendants from *Parker, Superior Court Judge,* 3 April 1970 Session, CARTERET County Superior Court.

Defendants were tried upon bills of indictment charging them with breaking and entering, larceny, possession of burglary tools and safecracking.

The State presented evidence tending to show that a furniture store owned by R & N Furniture Company in Morehead City was broken into in the early morning hours of 27 January 1970. A safe containing valuables and weighing approximately 500 pounds was removed. Mrs. Shirley Toler, who lives in an apartment near the store, saw a car near the back of the store between 10:00 and 11:00 p.m. on the night of 26 January. At about 1:30 the morning of 27 January, she was awakened by a loud noise. Upon looking out her bedroom window she again saw a car near the building and at this time observed three men there. One of the men was white. All she recalled about the car was that it had four taillights. Fred Tillery, who lived next door and immediately across the alley from the store testified that he had heard a car coming through the alley between 10:00 and 10:30 on 26 January. It sounded as if it had a "busted muffler." He looked out and saw a green 1963 Chevrolet parked behind the store. A person with red hair had his head against the window. The car remained there for about 45 minutes and left. Between 2:00 and 2:30 a.m. on the 27th, Mr. Tillery again heard a car come through the alley. He looked and saw it being backed toward the rear of the store. In his opinion it was the same car as he had seen earlier.

Both Mrs. Toler and Mr. Tillery immediately called the police.

Two officers of the Morehead City Police Department responded to the calls and found a 1963 green Chevrolet parked on the left-hand side of a street approximately four blocks from the R & N store. The defendant Willis' head was lying out the right front window. The trunk lid of the car was slightly lifted and the officers could see the bottom of the safe in the trunk. Before they approached the car, the two doors on the left-hand side opened and two men ran. One of the officers identified them as defendants Stroud and Mason. The car was owned by Stroud. Willis was removed from the car and arrested. A loaded revolver and leather gloves were found near his left leg. Punches, crowbars, chisels and other tools were found with the safe in the trunk of the car and were offered into evidence as exhibits. One of the officers testified that it was exactly six minutes from the time Mr. Tillery's call was received until Willis was under arrest. Twenty or twenty-five minutes later, Mason was arrested while walking along the street about ten blocks away.

Two police officers arrested Stroud at his home approximately 5:00 to 5:30 a.m. the morning of 27 January. Both Stroud and his wife insisted that he had been at home all night. When Stroud got to the door where he could see the place where his car was usually parked he stated that it had been stolen.

Willis and Mason offered no evidence.

Stroud testified that on the evening of 26 January 1970 he had taken Willis to the grocery store because Willis had lost his driver's license and was unable to drive. They also went to Atlantic Beach where they picked up Stephen Emory. Thereupon they returned to the Willis home where they were joined by defendant Mason. The four men then rode around drinking and talking until around 9:00 p.m. at which time Stroud dropped Willis and Mason off at the Willis house and dropped Emory off at a taxi stand. Stroud then went home, arriving there about 9:30 p.m. He remained there until awakened at 5:20 the following morning by the police officers. As he was leaving the house with the officers, Stroud noticed that his car was gone.

Stroud's wife testified that her husband arrived home on 26 January shortly after 9:00 p.m. and did not leave the house again until the officers woke them the following morning.

At the conclusion of all the evidence the charge of safe-cracking was dismissed upon motion of defendants. The jury returned verdicts of guilty as to the other charges and judgments were entered imposing consecutive sentences as to each defendant of from eight to ten years on each count. All defendants appealed.

Attorney General Morgan by Trial Attorney Jacobs for the State.

Wheatly & Mason by C. R. Wheatly, Jr. for defendant appellants Virgil W. Stroud and Lewis Pierson Willis.

Sherman T. Rock for defendant appellant Donald Mason.

GRAHAM, Judge.

[1] Defendants assign as error the court's denial of their motions to dismiss for a lack of sufficient evidence.

The State's evidence placed three unidentified men in a 1963 green Chevrolet at the scene of the break-in only minutes before the three defendants were found in a 1963 green Chevrolet which contained the stolen safe and the various described implements. The car was only a short distance from the store from which the safe, weighing approximately 500 pounds, had been removed. The lock on the back door of the store had been pried completely off and there was other evidence that implements, such as those found in the trunk of the car, had been used for the purpose of the break-in. In our opinion this evidence was sufficient to carry the case to the jury against each of the three defendants on each of the three separate counts. See *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753; *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335; *State v. Godwin,* 269 N.C. 263, 152 S.E. 2d 152; *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21.

[2] The court's charge to the jury covers 66 pages in the record and is the subject of 60 exceptions. Most of these exceptions are grouped under a single assignment of error wherein it is contended that the trial court, through the manner in which the jury was instructed, expressed an opinion on the evidence. Among those portions of the charge which defendants say were prejudicial are the following:

> "The State says and contends they were identified between ten and eleven o'clock by Mrs. Toler and Mr. Tillery both

as having been there. The State says and contends that Mr. Tillery identified them at the time of this loud BOOM, which the State says and contends was the time that the safe was put in the car and that there were three.

* * *

The State says and contends that the defendant Stroud had been associating with the defendant Willis and that they had talked together and that the only reasonable inference that fair minded people could arrive at, the only reasonable conclusion they could arrive at that they were closely related, they were excellent friends, they had worked this out; that Stroud had been to see him and carried to, him to the grocery store some two or three blocks away, another one within a half block from one to three times a week, and the State says from the testimony of the defendant Stroud himself, he says quite frequently they would go for groceries and either have a bottle with him or pick up one on the way and ride around and drink liquor for several hours before the defendant Stroud would bring the defendant Willis back to his home with the groceries. Now, the State says that is quite significant and you should so find when you come to consider this evidence; that here's a man who has associated with a person who was actually found in the car with the stolen safe, for four to five months drinking whiskey with him from one to three times a week for four to five months, rode around with him quite frequently one or more times a week during those periods of four to five months, for four or five months.

* * *

The State further says and contends that there's another significant point: that Mr. Stroud has taken the stand and testified he was not there; that Mrs. Stroud has taken the stand and testified he was not there because he was home asleep. Well, the State says and contends that that is evidence that you can weigh and consider from your own standpoint. You have the right to consider whether or not the average wife would stand by her husband. You have the right to consider, and as the State says and contends you should conclusively find that nine hundred and ninety-nine wives out of a thousand would stand by their husbands when he's in trouble and serious trouble even though it

might mean shading the truth sometimes as the State says and contends even to the point of committing perjury, and the State says and contends that you have a right to consider all of these factors, factual situations when you come to make up your verdict.

. . . the State says and contends that evidence in regard to what became of the keys in the car is absent, but that you ladies and gentlemen have a right to consider what might be the reasonable act of the average and reasonable person.

The State says and contends you have the right to consider whether you would living in the City of Morehead, a fair size town we might say in North Carolina, having lived here ten or 15 years and lived here during the Summer when you have somewhat of a population explosion with numerous people around, would the average person leave the keys to his car in his car in the City of Morehead at night time from nine or nine-thirty until the following morning, sometimes inadvertently but most of the time they do not. If those keys were not left in the car as the State says and contends, who put them in there? Who were they taken from, as the State says and contends if they were not left in the car and the car was actually parked there as the defendant Stroud contends then the only way the keys could have gotten back into the car would have been through and by the knowledge and consent of the owner Mr. Stroud, and the State says that is a situation that deserved your consideration, and that you should draw such inference from this situation as the minds of reasonable men might draw under the same or similar circumstances.

* * *

He [Stroud] further says and contends that when he returned home he left his car on the street; he went in about 9:30; his wife met him and that his wife has testified that immediately she closed the door and turned and looked at the clock, and she says and contends that, and he says and contends that although the State might ask you to consider it rather strange that a wife who is accustomed to her husband coming in late, who is accustomed to taking his friend Willis to the grocery store one to three times a week and who is accustomed to him riding around with his friend Willis, and others while taking a few nips from

a bottle of liquor and talking and fraternizing, and although the State might ask you to look at it as being somewhat strange that she being accustomed to these activities on the part of her husband, that on this particular night, just on this one night so far as the evidence tends or might tend to show, out of four to five months one to three times a week she just happened to close the door and just happened to turn and just happened to look at the clock and the clock happened to be a little after nine o'clock, . . . "

These expressions by the trial judge, in their warmth and vigor, though stated in the form of contentions, were capable of impressing the jury with the strength of the State's case and the weakness of the alibi of defendant Stroud. Such expressions, though unintended by the trial judge to prejudice anyone, are in violation of G.S. 1-180 and constitute prejudicial error. *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412. *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263. It may well be that the contentions stated by the court were actually argued to the jury by the solicitor. However, an argument that would be permissible when made by the solicitor may, when repeated by the court as a contention, give emphasis that would weigh too heavily upon defendant. *State v. Maready,* 269 N.C. 750, 153 S.E. 2d 483.

Several of the court's expressions are particularly harmful because they include assumptions of evidence entirely unsupported by the record. For instance, the court charged that the State contended that Mrs. Toler and Mr. Tillery had identified defendants between ten and eleven o'clock and also at the time the safe was being put in the car. The evidence was to the contrary. Mrs. Toler recalled only that one of the three men she saw at the scene was white. Mr. Tillery stated one had red hair. It was obvious from their testimony that they could not specifically describe or identify the men. We further observe that there was no evidence that Stroud associated with Willis "drinking whiskey with him for from one to three times a week for four to five months." Likewise, the record is silent as to where Stroud's car keys were at the time the car was allegedly stolen. Hence, the vigorous charge with respect to the State's contention that people in Morehead City do not normally leave their car keys in their cars was inappropriate, particularly when considered along with other portions of His Honor's instructions. "While ordinarily error in stating conten-

tions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, nothwithstanding the absence of timely objection. *In Re Will of Atkinson,* 225 N.C. 526, 35 S.E. 2d 638; *State v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473; 7 Strong, N. C. Index 2d, Trial § 34, p. 338." *State v. Bradshaw,* 7 N.C. App. 97, 99, 171 S.E. 2d 204, 206.

The defendants Stroud and Willis contend that allegations in the bills of indictment were insufficient to properly charge breaking or entering or larceny; also, that there was a fatal variance between the indictments and the proof. These contentions are without merit. Other assignments of error are also asserted by Stroud and Willis. We do not discuss these as a new trial is necessary and they may not recur.

New trial as to all defendants.

Chief Judge MALLARD and Judge PARKER concur.

Chief Judge MALLARD concurring.

I concur in the judgment of the court and in the opinion but add the following which has not been alluded to therein. Under G.S. 1-180 prior to its amendment effective 1 January 1970, it was required, among other things, that "the judge shall give equal stress to the *contentions* of the plaintiff and defendant in a civil action, and to the State and defendant in a criminal action." (Emphasis Added.) Under this statute as it then existed, the Supreme Court held on many different occasions that a trial judge instructing the jury was not required to state the contentions of the State or the defendant; however, if the judge undertook to state the contentions of one, he must also give the equally pertinent contensions of the other. *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966); *State v. King,* 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513 (1958); *State v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768 (1956); *State v. Colson,* 222 N.C. 28, 21 S.E. 2d 808 (1942).

G.S. 1-180, after the amendment effective 1 January 1970, reads as follows:

"*Judge to explain law, but give no opinion on facts.*—No judge, in giving a charge to the petit jury in a 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. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the State and defendant in a criminal action."

It is noted that this statute does not contain the word "contention." It is, therefore, clear that in charging the jury in a criminal case, the trial judge is not required by statute or case law to state the contentions of the parties.

However, in civil cases the rule may be otherwise. Under Rule 51(a) of the Rules of Civil Procedure, relating to instructions to the jury by the judge in civil cases, there is a proviso which reads: "(P)rovided, the judge shall give equal stress to the *contentions* of the various parties." (Emphasis added.)

It is in the giving of contentions in criminal cases that error frequently occurs.

In charging the jury in a criminal case, the trial judge would be well advised to refrain from giving any contentions of the State or the defendant. However, if the judge feels that it is absolutely necessary that he give some contentions, it would appear that language to the effect that the State contends the defendant ought to be found guilty and the defendant contends that he ought not to be found guilty would be a sufficient statement of the contentions. At least, this would be giving equal stress to the State and the defendant.

MARSHVILLE RENDERING CORPORATION v. GAS HEAT ENGINEERING CORPORATION, RAY BURNER COMPANY, AND BOYD KEZIAH

No. 7026SC218

(Filed 16 December 1970)

1. **Sales § 2; Process § 14— cause of action arising in another state — nonresident corporate defendant — substituted service of process on Secretary of State — G.S. 55-145(a)**

Plaintiff's alleged cause of action against a nonresident manufacturer of a boiler feed unit for either breach of implied warranty or negligence arose in Pennsylvania when sale of the feed unit to an independent North Carolina dealer was completed in that state by its delivery to a common carrier for shipment to the dealer f.o.b. Lancaster, Pennsylvania, not when the unit exploded in plaintiff's plant in this State; consequently, where defendant manufacturer was neither domesticated nor represented by a designated process agent in North Carolina, it could not be brought into court in plaintiff's action by substituted service of process on the Secretary of State under G.S. 55-145(a).

2. **Courts § 2; Limitation of Actions § 4— when cause of action arises — statute of limitations — jurisdiction of court**

The rules for determining when a cause of action arises for purposes of the statute of limitations also apply in determining when a cause of action arises for the purpose of determining jurisdiction.

APPEAL by defendant Ray Burner Company from *Copeland, Special Judge,* 1 December 1969 Schedule "D" Civil Session, MECKLENBURG Superior Court.

Plaintiff, a North Carolina corporation, instituted suit against Gas Heat Engineering Corporation (Gas Heat), a North Carolina corporation; Boyd Keziah, a resident of North Carolina; and Ray Burner Company (Ray Burner), a Nevada corporation with an office in California which is not authorized to do business in North Carolina and has never designated a process agent in this State. Plaintiff seeks to recover property damages sustained when a boiler feed unit exploded in its plant. The boiler feed unit was installed by Gas Heat and Boyd Keziah. The tank which constituted the main container of the boiler feed unit was manufactured by the Roy E. Roth Company of Rock Island, Illinois, not a party to the suit. It was purchased by Ray Burner and incorporated into the boiler and boiler feed unit by Ray Burner. The boiler feed unit was then sold by Ray Burner to Gas Heat. The entire boiler feed unit, with all its accessory pipes and pumps and valves and controls, was then installed and put into operation in plaintiff's plant by Gas

Heat and Boyd Keziah. After the boiler feed unit had been in operation for several months, the tank exploded under steam pressure, wrecking the tank and plaintiff's processing plant.

For its first cause of action, plaintiff alleged breach of warranty "in delivering and assembling and installing the boiler feed unit, including the tank" in eleven particulars and for its second cause of action, plaintiff alleged negligence of defendants proximately causing its injury in eleven particulars.

Defendant Ray Burner appeared specially and moved to dismiss, on the grounds that service of summons for it on the Secretary of State was not sufficient to subject it to the jurisdiction of the court. The court heard the motion upon the affidavits submitted by plaintiff and defendant Ray Burner. From an order entered denying the motion to dismiss, defendant Ray Burner appealed.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr., for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman, by W. T. Covington, Jr., for defendant Ray Burner Company appellant.

MORRIS, Judge.

The appellant excepts to certain of the findings of fact and conclusions of law made by the court and assigns them as error. It also assigns as error the failure of the court to adopt findings of fact and conclusions of law tendered by it.

The court found as facts that "the sales by Ray Burner to North Carolina dealers are accepted outside of the State and payment is received by Ray outside of State," and that "the particular shipment involved in this suit was shipped by Ray Boiler *(sic)* Company from Lancaster, Pennsylvania, to Marshville, North Carolina, where the plaintiff is located, for delivery there to Gas Heat Engineering Corporation, the dealer." The evidence reveals that Gas Heat is an independent dealer with no authority to act for Ray in North Carolina. All orders for merchandise sold by Ray Burner to Gas Heat were accepted outside of North Carolina and shipments of merchandise were made to Gas Heat by means of common carriers, f.o.b., outside North Carolina. The boiler feed unit involved in this litigation was ordered by Gas Heat from Ray Burner by written order of Gas Heat dated 22 October 1965; received by Ray Burner in

San Francisco, California, 25 October 1965. The order was accepted in California and the contract of sale made in California. Ray Burner then ordered the unit from Roy E. Roth Company for shipment from the Roth plant in Illinois to the Ray Burner plant in Lancaster, Pennsylvania. Thereafter, Ray Burner, without opening the crate, delivered the crate containing the boiler feed unit to Moss Trucking Company of Charlotte, North Carolina, for delivery to Gas Heat, freight collect, at Marshville, North Carolina. There is no allegation that Ray Burner participated in any fashion in the installation of the unit.

Among the findings and conclusions of the court denominated as findings of fact are the following:

"7. The alleged wrong to the plaintiff took place in North Carolina where the explosion, the natural consequence of improper construction, assembly, shipment, and installation of the unit occurred." and

"8. The service of process upon the defendant Ray Burner was proper under sections 55-145 and 55-146 of the North Carolina General Statutes and its application to this defendant is proper under sections 55-145(a)(2), (3) and (4) of the North Carolina General Statutes, the Constitution of the United States and the Constitution of North Carolina."

G.S. 55-145 provides:

"(a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

(1) Out of any contract made in this State or to be performed in this State; or

(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or

(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable

expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or

(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance."

Fundamental to a determination of the question presented here is a determination of whether G.S. 55-145 can be applied to the facts of this case to bring defendant Ray Burner under the jurisdiction of the court.

In *R.R. v. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E. 2d 644 (1963), Justice Sharp, speaking for a unanimous Court, said:

"The jurisdiction created by G.S. 55-145 pertains only to *local actions*. It has no application to any cause of action arising outside the State. The draftsmen have expressed the purpose of this section as follows:

'Foreign corporations are by Section 145 made subject to local suits by residents of North Carolina in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so "transacting business" as to be required to obtain a certificate of authority.' Latty, Powers & Breckenridge, *op. cit. supra* at 54."

In *Hunt*, plaintiff, a corporation doing business in North Carolina, sued Hunt, a domestic corporation; Driscoll, a North Carolina resident and salesman for Hunt; and Insto-Gas Corporation, a Michigan corporation, not authorized to do business in North Carolina and with no process agent in North Carolina. Plaintiff sought indemnity from defendants for the amount it paid the estate of a deceased employee, Parrish, for his wrongful death in settlement of a claim under the Federal Employers' Liability Act. Parrish received fatal injuries at plaintiff's yard near Portsmouth, Virginia, when a gas heater, manufactured by Insto-Gas and furnished plaintiff by Hunt through its agent, Driscoll, exploded.

Justice Sharp cited *Babb v. Cordell Industries,* 242 N.C. 286, 87 S.E. 2d 513 (1955), as controlling. There a resident of Georgia brought suit in North Carolina against a New York corporation on a cause of action arising outside North Carolina. There Justice Higgins, for the Court, said that although there can be no doubt but that a nonresident has access to the courts of this State and can sue a foreign corporation, nevertheless "to bring the foreign corporation into court the service of process must be made upon an officer or agent as defined in G.S. 1-97, and in the following cases only: (1) Where it has property in this State; or (2) where the cause of action arose in this State; or (3) where the service can be made personally upon some officer designated in G.S. 1-97." In *Hunt,* Justice Sharp noted that "G.S. 55-145 (then G.S. 55-38.1) became effective on May 20, 1955. The opinion in *Babb* was filed on May 25, 1955 and it is entirely consistent with G.S. 55-144 and G.S. 55-145(a)."

We are aware that there is some authority in this State for the proposition that any one of the subdivisions of G.S. 55-145(a) is valid as the sole basis for granting jurisdiction. In *Byham v. House Corp.,* 265 N.C. 50, 143 S.E. 2d 225 (1965), an action for rescission of a contract was brought against a foreign corporation. The contract was executed by plaintiff in North Carolina, accepted by defendant in Tennessee, and was to be performed in North Carolina. There the Court said that subsection (1) was satisfied and found that the assumption of jurisdiction did not offend the due process clause of the Constitution of the United States. In *Shepard v. Mfg. Co.,* 249 N.C. 454, 106 S.E. 2d 704 (1959), defendant was a foreign corporation which manufactured gas hot water heaters. It had agents residing in and working in North Carolina and shipped large quantities of its appliances into North Carolina with the reasonable expectation that they would be used in the homes of the people of this State. Its sales contracts were accepted outside North Carolina. Plaintiff was injured when one of the heaters exploded. The Court said: "Manifestly, therefore, upon the undisputed facts, the cause of action arises out of activities described in G.S. 55-145(a)(3)." The Court went on to hold that the minimum contracts requirement was satisfied so that the due process clause was not offended. In *Painter v. Finance Co.,* 245 N.C. 576, 96 S.E. 2d 731 (1957), suit was brought against a foreign corporation for damages resulting from the wrongful taking of her automobile without legal process. The

act occurred in North Carolina. Defendant moved to quash service for lack of jurisdiction. The Court said: "The allegations of the complaint and the crucial findings of fact made by the court below disclose that the plaintiff's cause of action arose out of defendant's tortious conduct committed in this State. This suffices under G.S. 55-38.1 to render the defendant amenable to the jurisdiction of the Superior Court of Buncombe County." The Court further said that in this view of the case it was unnecessary for the court to determine whether defendant was "doing business in the State of North Carolina."

The *Byham* and *Shepard* opinions, both decided after *Babb* and prior to *Hunt,* do not cite nor discuss *Babb.* Neither *Byham* nor *Shepard* is cited or discussed in *Hunt.* In *Painter,* the cause of action arose in North Carolina.

[1] In line with *R.R. v. Hunt & Sons, Inc., supra,* apparently the most recent pronouncement of our Supreme Court on the particular question involved here, it becomes necessary to determine whether the plaintiff's alleged cause of action arose in North Carolina.

Gas Heat's order for the tank was received and accepted by Ray Burner in California. The sale was completed and title passed from Ray Burner to Gas Heat when the unit was delivered to a common carrier for shipment to Gas Heat, f.o.b. Lancaster, Pennsylvania. The general rule is that under a contract of sale providing for a sale f.o.b. the point of shipment, the carrier is the agent of the purchaser, and title passes upon delivery to the carrier. *Peed v. Burleson's, Inc.,* 244 N.C. 437, 94 S.E. 2d 351 (1956); *Hunter v. Randolph,* 128 N.C. 92, 38 S.E. 288 (1901); 6 Strong, N. C. Index 2d, Sales, § 2, p. 693.

We conclude that the alleged cause of action against Ray Burner for either breach of warranty or negligent manufacture occurred when the sale was made—not when the damage was sustained. The sale was completed in Pennsylvania and any cause of action against it arose there at the time the unit was delivered to the common carrier. See *Motor Lines v. General Motors Corp.,* 258 N.C. 323, 128 S.E. 2d 413 (1962), and *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1 (1965). The cause of action having arisen outside of North Carolina, jurisdiction of Ray Burner cannot be obtained under G.S. 55-145(a) under authority of *R.R. v. Hunt & Sons, Inc., supra,* which is controlling.

[2] Plaintiff contends, however, that the rules for determining when a cause of action arises for purposes of the statute of limitations should not apply to questions of jurisdiction. Plaintiff cites no authority for this position, nor can we subscribe thereto. A cause of action arises only once. It would, in our opinion, be an anomalous position to say that a cause of action could arise at one time and place for purposes of the statute of limitations and at another time and place for the purpose of determining jurisdiction.

Neither are we inadvertent to *Farmer v. Ferris,* 260 N.C. 619, 133 S.E. 2d 492 (1963), relied upon by plaintiff. There plaintiff sought to recover for personal injuries sustained when a mechanical swing or ride known as "Merry Mixer" collapsed, due to a defective weld, and plaintiff was thrown from her seat to the ground. Defendant King Amusement Company was a foreign corporation, not domesticated in North Carolina, not authorized to do business in this State, and without a process agent in this State. The individual defendants purchased the ride from King as the result of an advertisement read by them at Carolina Beach. The ride was delivered at Carolina Beach by an employee of King in a truck owned by King. The individual defendants executed a conditional sales contract which was recorded in New Hanover County. The language relied on by defendant is: "The alleged wrong in the instant case did not originate in the conduct of a servant or agent of appellant present in North Carolina, but arose instead from acts performed where appellant did the aforesaid welding. Only the consequences to plaintiff occurred in North Carolina. It is apparently well established, however, that in law the place of a wrong is in the State where the last event takes place which is necessary to render the actor liable for an alleged tort. Restatement, Conflict of Laws, sec. 377; *Gray v. American Radiator and Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E. 2d 761." The Court held the defendant King amenable to process under G.S. 55-145(a). The Court did not cite nor discuss *Thurston* and *Jewell.* Neither was *Farmer v. Ferris* cited nor discussed in *R.R. v. Hunt & Sons, Inc.,* handed down eight days later. However, we do not perceive any inconsistencies. The sale of the equipment was completed in North Carolina. Under *Thurston* and *Jewell* the last event necessary to render the actor liable occurred in North Carolina—the completed sale of the equipment. The cause of action was a cause of action arising

in this State and the statute was applicable under *R.R. v. Hunt & Sons, Inc., supra.*

In our view of the case, the conclusions of law of the trial court that the alleged wrong to plaintiff took place in North Carolina where the consequences of the tort occurred and that the service of process upon Ray Burner was proper are erroneous. The motion to quash should have been allowed and the action dismissed as to Ray Burner.

We, therefore, do not discuss the question of whether Ray Burner had sufficient contacts with North Carolina so that the due process clause would not preclude the application of the statute. Suffice it to say that we are of the opinion that, were the statute applicable, the assumption of *in personam* jurisdiction of Ray Burner by the North Carolina court, pursuant to G.S. 55-145(a), would not offend the due process clause of the Constitution of the United States.

Reversed.

Chief Judge MALLARD and Judge VAUGHN concur.

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF ELUID (ELLIOTT) LOUIS ALSTON, DECEASED

— AND —

CHARLIE D. CLARK, JR., ATTORNEY AT LAW, ROANOKE RAPIDS, N. C.

No. 706SC648

(Filed 16 December 1970)

1. **Appeal and Error § 7; Attorney and Client § 3— dismissal of meritless appeal by attorney — attorney acting in self interest**

   The Court of Appeals dismisses as meritless an attorney's appeal from a proceeding wherein the clerk of superior court proposed to qualify a personal representative for the estate of a minor decedent, where the record on appeal disclosed (1) that the attorney had not been retained either by the estate or by the parents of the decedent and (2) that the attorney was acting solely in his own pecuniary interest in intruding into the affairs of the estate.

2. **Executors and Administrators § 9— management of the estate — right to hire attorney**

   Until a personal representative is appointed for the estate, there is no right to retain an attorney to represent the estate. G.S. 28-172.

In re Alston

THIS is a purported appeal by the above-entitled Estate and the Next of Kin and James R. Walker, Jr., as an attorney and Individually from an order entered by *Joseph W. Parker, Judge Presiding,* at a hearing held in the HALIFAX County courthouse on 7 July 1970.

The record in this case is unique.

The following facts are gleaned from the record:

1. Eluid (Elliott) Louis Alston (hereinafter referred to as deceased son) came to his death on 5 December 1969 while riding as a passenger in an automobile driven by his brother, who was also killed in the same automobile wreck. The automobile was covered by a liability insurance policy, and the estate of the deceased son apparently had a cause of action for wrongful death.

2. The deceased son was 19 years old, unmarried, and was survived by his parents, Emmett Alston (Father) and Oliva Alston (Mother).

3. In the latter part of the month of December 1969 Father and Mother went to the home of James R. Walker, Jr. (Walker) where Walker maintains a law office. They took with them the automobile liability insurance policy and sought legal advice from Walker. They apparently had previously been in communication with the insurance adjuster for the automobile liability insurance company, and they wanted the advice of Walker pertaining thereto. They did not leave the policy or any other information with Walker with regard to the name of the insurance adjuster they had been dealing with.

4. Father and Mother informed Walker that the insurance adjuster was coming to see them on Wednesday, 4 March 1970, and that they would bring the adjuster to the office of Walker. The adjuster did arrive at the home of Father and Mother on Wednesday, 4 March 1970, but instead of returning to the office of Walker, Father went with the adjuster to Roanoke Rapids where Charlie D. Clark, Jr., an attorney, maintained an office; and they saw Clark in his office.

5. Walker apparently learned of this and also learned the name of the insurance adjuster, because on 6 March 1970, Walker wrote the insurance adjuster to the effect that he represented the estate of deceased son and offered to settle the case for $10,000. In this letter Walker stated that Father "has

a serious psychiatric problem." In this same letter Walker made it appear that Lawrence G. Cooper was the Administrator of the Estate. Walker also claimed that he was the attorney for the estate and it would be improper for a settlement to be made with anyone else. On the next day, 7 March, 1970, Walker wrote Father informing him that Father had broken his promise about bringing the insurance adjuster to see him and stated in this letter:

> "Also, I inform you that I will not release this case to any other lawyer in the State of North Carolina and you might as well stop trying to find a lawyer to take the case away from me. I am informed that that is what you have been trying to do.
>
> If the reports are true, you will be five or six years trying to settle this case because I will not let you do what you have in mind without filing attorney's liens, breach of contract actions, and proceedings under G.S. 35 Article 2, and before the Insurance Commissioner."

6. On 17 March 1970 Walker filed an application for a citation to show cause. This was filed with the Clerk of Superior Court of Halifax County. In this application Walker sets out that he is an interested party in the estate for that he had been employed by the next of kin under a contingency fee agreement to file such actions and make such settlements as may be in the best interest of the estate; that he had negotiated a settlement in the amount of $9,000; that the next of kin have the right to administer the estate but have refused and failed to apply for letters and likewise had refused to execute a renunciation of their rights to qualify and nominate Lawrence G. Cooper as they had previously agreed to do; and he requested a citation to the next of kin to show cause why they should not be deemed to have renounced their rights to administer the estate.

7. Pursuant to the above application, the Clerk of Superior Court on 17 March 1970, issued a citation to Father and Mother to show cause within 20 days why they should not be deemed to have renounced their right to administer the estate and in default thereof letters of administration would be issued to some other person.

8. Immediately upon receipt of the citation, Father and Mother, on 18 March 1970, went to the office of the Clerk of

Superior Court in response thereto. The Clerk advised them that they would be notified of the time of hearing. On 19 March 1970, the Clerk of Superior Court notified Father, Mother and Walker that the hearing would be held on 25 March, 1970 at 10:00 o'clock a.m. At 9:30 a.m. Walker telephoned the Clerk of Superior Court and advised him that he would not appear at the hearing because he had gone to the home of Father and Mother the preceding evening and on that occasion Father "had lost his rational and emotional balance" and that it would be unsafe to hold the hearing. Father and Mother did appear for the hearing with their attorney, Clark. Both Father and Mother denied that they had ever employed Walker or had ever agreed to renounce their right to qualify to administer the estate. Thereafter, the Clerk of Superior Court notified Walker that the hearing had been held and that he proposed to qualify Mother as personal representative of the estate on Thursday, 2 April, 1970.

9. On 1 April 1970 Walker filed a notice and exceptions to the hearing held before the Clerk. Subsequently, Walker gave notice of a purported appeal from the findings of the Clerk and the proposed action of the Clerk to appoint a personal representative for the estate.

On 8 June 1970 Judge Copeland was holding a session of Superior Court in Halifax County. Walker appeared and made a motion and a request for findings of fact and tendered a judgment. Judge Copeland refused to sign the tendered judgment and Walker gave notice of appeal to the Court of Appeals. In the record as presented to this Court, it is made to appear that Judge Copeland signed the tendered judgment and the appeal entries are omitted.

Thereafter, Father and Mother, through their attorney, Clark, arranged with Judge Parker, the Resident Judge of Halifax County, to have a hearing on a motion to dismiss the purported appeal filed by Walker. Judge Parker held a hearing in Halifax County on 7 July 1970 after proper notice to Walker. Walker again failed to appear. Judge Parker made full and adequate findings of fact and based thereon ordered that this action be dismissed and that the Clerk of Superior Court of Halifax County proceed to qualify a personal representative for the estate. It is from this order that the present appeal was taken.

James R. Walker, Jr., for appellants.

Charlie D. Clark, Jr., for appellee.

CAMPBELL, Judge.

[1] It is obvious from the record filed in this case that this appeal has no merit. Whatever matter was pending in the Superior Court was based upon the application filed by Walker on 17 March 1970 for a citation to show cause. Walker had no standing to file such an application under the provisions of General Statutes 28-15. Walker was never the attorney for the estate as no personal representative was appointed until 7 July 1970, when Oliva Alston, Mother, was duly appointed and qualified.

[2] Until a personal representative was appointed for the estate, no one had the right to retain an attorney to represent the estate. G.S. 28-172; *McIntyre v. Josey,* 239 N.C. 109, 79 S.E. 2d 202 (1953); *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253 (1963). Not having been retained by the personal representative of the estate, Walker had no authority to conduct negotiations with the insurance company or to arrive at any settlement on behalf of the estate.

The record discloses that Walker nowhere contends that he has been retained by the personal representative of the estate. At most, Walker contends that he had some kind of an agreement with Father and Mother. There is, however, no evidence in the record before us to substantiate even this claim. The record discloses that both Father and Mother denied ever having employed or retained Walker. The record discloses that both Father and Mother did talk at one time with Walker and sought his legal advice and offered to pay him for same at the time. They did not go back to see him as they apparently were not satisfied with his services. Conceding that Father and Mother did consult with and seek legal advice from Walker, the subsequent conduct and actions of Walker, as revealed from this record, justified both Father and Mother discontinuing any further relations with Walker. The record reveals every effort being made by Walker to intrude into a situation where an attorney's fee might be obtained. This record indicates a complete lack of knowledge of law and legal precepts on the part of Walker, or if not ignorant, then the conduct of Walker in this instance reveals a complete disregard of the duties owed a client by an attorney. In either event, Father and Mother were

well advised when they discontinued any further association with Walker.

The record in this case was distorted, incomplete, inadequate and was never served on opposing counsel.

It would appear that the actions of Walker in this case have not been in the best interests of his purported clients, but to the contrary have been taken only to further the personal interest of Walker. The record reveals that Walker has been given every opportunity to appear in hearings held before the Clerk of Superior Court of Halifax County and before Judge Parker and that every effort was made to afford him an opportunity to present his views and contentions. Despite all of this, Walker failed to appear.

This appeal deserves to be, and is

Dismissed.

Judges BRITT and HEDRICK concur.

ELSIE B. CASSELS v. FORD MOTOR COMPANY, MARVIN F. BEAN, INC., FORD DEALER, AND BILLY RAY STARNES

— AND —

THEODORE J. CASSELS v. FORD MOTOR COMPANY, MARVIN F. BEAN, INC. FORD DEALER, AND BILLY RAY STARNES

No. 7025DC617

(Filed 16 December 1970)

1. **Rules of Civil Procedure § 8— sufficiency of complaint to withstand motion to dismiss**

A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial.

2. **Automobiles § 6; Sales § 22— negligent manufacture of truck — failure of dealer to inspect — sale of defective truck — sufficiency of complaints**

In these actions against an automobile manufacturer and its dealer seeking recovery for injuries sustained in an automobile-truck collision, no insurmountable bar to recovery appears on the face of plaintiffs' complaints, and the allegations therein give defendants notice that they are being sued for injuries allegedly caused by the negligence of defendant manufacturer in manufacturing and delivering to its dealer

a truck with improperly manufactured or installed drive shaft, universal joints and pinion shafts, and the negligence of defendant dealer in failing to inspect the truck and in selling it in the defective and unsafe condition; consequently the complaints are sufficient to withstand defendants' motions to dismiss.

3. **Automobiles § 6; Sales § 22— duty of truck manufacturer to public**

The manufacturer of a truck owes a duty to the public, irrespective of contract, to use reasonable care in its manufacture and to make reasonable inspection of the construction in the plant where the truck was manufactured.

4. **Sales § 22— potentially dangerous article — liability of seller to purchaser**

The seller of an article is subject to the same liability to the purchaser as the manufacturer if the article is potentially dangerous by reason of a defect in construction or the absence of safety devices.

APPEAL by plaintiffs from *Beach, District Judge,* 6 April 1970 Session of BURKE County District Court.

Separate actions were instituted by plaintiffs on 20 February 1970 seeking recovery for injuries sustained in an automobile-truck collision near Valdese on 21 February 1967. The complaints are identical except for the names of the complaining parties, the damages alleged, and the prayer for relief. The essential allegations are as follows: (Summarized except where quoted).

On or about 10 December 1966, defendant Starnes purchased from defendant Marvin Bean, Inc. (Bean), a Ford dealer, a 1967 Ford pickup truck which had been manufactured by defendant Ford Motor Company (Ford). The truck was new when purchased and was warranted, either by express or implied warranty, to be in good condition, including the drive shaft, universal joint and pinion shafts. On 21 February 1967 Starnes was operating the truck north on Highway 350 near Valdese at an excessive rate of speed and was meeting the automobile in which plaintiffs were riding. The truck suddenly veered left across the path of the automobile and into its path causing a collision and resulting in injuries to plaintiffs.

"THAT THE DEFENDANTS, MARVIN F. BEAN, INC. AND THE FORD MOTOR COMPANY, WERE JOINTLY AND CONCURRENTLY NEGLIGENT IN THE FOLLOWING PARTICULARS:

I. That the defendant, The Ford Motor Company, failed to properly manufacture or install the drive shaft, universal

joints and pinion shafts in the 1967 Ford pickup truck, and knew or should have known that a defective drive shaft could cause loss of control and an accident. That despite said Motor Company's failure to properly manufacture or install the drive shaft in the truck, they delivered the truck to their dealer, Marvin F. Bean, Inc.

II. That the defendant, Marvin F. Bean, Inc., failed to properly inspect the truck after delivery and before sale to Billy Ray Starnes, despite their express and implied warranty that the truck was in proper running condition and suitable and safe for use on the highways of North Carolina; that Marvin F. Bean, Inc. sold and delivered the truck, a dangerous instrumentality in itself, to Billy Ray Starnes, in a condition which was unsafe and unfit for use; that the said defendant knew or should have known that a defective drive shaft could cause loss of control of the truck, and that the truck veered into the path of the plaintiff as a result of the failure of the defective shaft in the new truck along with the failure of the defective universal joint and pinion shafts in the new truck which had very low mileage and thus caused the accident and damages herein complained of by the plaintiff.

III. That the drive shaft in the truck fell to the pavement, thereby digging the end of the drive shaft into the pavement and causing the truck to veer into the path of the plaintiff."

Defendants Ford and Bean moved to dismiss plaintiffs' actions pursuant to G.S. 1A-1, Rule 12(b)(6). The trial court granted defendants' motions after concluding that the complaints failed to state a claim upon which relief could be granted against defendants. Other grounds asserted by defendants in support of their motions do not appear to have been passed upon by the trial court. Plaintiffs appealed and the cases were ordered consolidated for hearing on appeal.

Mitchell & Teele by H. Dockery Teele, Jr. for plaintiff appellants.

Byrd, Byrd & Ervin by Robert B. Byrd and Thomas R. Blanton III, for defendant appellee Ford Motor Company.

GRAHAM, Judge.

The determinative question on this appeal is whether plaintiffs' complaints are sufficient under Rule 8(a) of the

North Carolina Rules of Civil Procedure (G.S. 1A-1) to withstand defendants' motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Rule 8(a) provides:

"*Claims for relief.*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

In the case of *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161, Justice Sharp discusses at length the requirements of Rule 8(a) with respect to the specificity now required in pleadings by the provisions of Rule 8(a). The following language is particularly pertinent:

"Under the 'notice theory' of pleading contemplated by Rule 8(a)(1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

* * *

When Rule 7(c) abolished demurrers and decreed that pleas 'for insufficiency shall not be used' it also abolished the concept of 'a defective statement of a good cause of action.' Thus, generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a 'defective statement of a good cause of action.' For such complaint, as we have already noted, other provisions of Rule 12,

the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. *See* the paper delivered by Dean Dickson Phillips, *The Sufficiency of a Pleading as Tested by the Motion to Dismiss for Failure to State a Claim upon Which Relief Can be Granted,* reported in the proceedings at the North Carolina Bar Association's Institute on the New Rules of Civil Procedure, October 1968, VI 16-19. *See also* Comment upon Rule 12, Vol. 1A, N.C. Gen. Stats., § 1A-1, p. 610."

[1] The above opinion gives rise to the following general principle: A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiffs' claim to enable him to answer and prepare for trial.

[2-4] No insurmountable bar to recovery appears on the face of the complaints now before us. Furthermore, allegations therein give defendants notice that they are being sued for injuries which plaintiffs allege were proximately caused by the negligence of Ford in manufacturing and delivering to its dealer a truck with an improperly manufactured or installed drive shaft, universal joints and pinion shafts, and the negligence of Bean in failing to inspect the truck and in selling and delivering it in the defective and unsafe condition. " 'The overwhelming weight of authority is to the effect that the manufacturer of a truck . . . owes a duty to the public, irrespective of contract, to use reasonable care in its manufacture and to make reasonable inspection of the construction in the plant where the truck was manufactured.' *General Motors Corporation v. Johnson,* C.C.A. (4th), 137 F. 2d 320; *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696, Ann. Cas. 1916C 440; 5 Am. Jur., Automobiles § 350; 60 C.J.S., Motor Vehicles § 165; Annotations: 156 A.L.R. 479; 164 A.L.R. 569, 584." *Gwyn v. Motors, Inc.,* 252 N.C. 123, 113 S.E. 2d 302. "[T]he seller is subject to the same liability to the purchaser as the manufacturer if the article is potentially dangerous by reason of a defect in construction or the absence of safety devices." 6 Strong, N.C. Index 2d, Sales, § 22, p. 718.

In our opinion the defendants' motion to dismiss was improperly granted. If they desire to ascertain more precisely

the details of the claims asserted against them adequate discovery procedures are now available to them for this purpose. *Sutton v. Duke, supra.*

Defendants' motions to dismiss allege that the plaintiffs' actions are barred by the statute of limitations. However, the judgments dismissing the actions were not based upon this ground. We therefore do not discuss the merits of these alleged defenses, or whether they can be properly raised by a motion to dismiss made pursuant to Rule 12.

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. BRUCE BYRD

No. 708SC515

(Filed 16 December 1970)

1. **Criminal Law § 156— appellate review — granting of certiorari**

The Court of Appeals allows defendant's petition for *certiorari* and considers his case on its merits, where defendant failed to docket his record on appeal within the time provided by the rules of the Court.

2. **Criminal Law § 99— remarks of trial court during trial — expression of opinion on defendant's testimony**

Trial judge improperly expressed an opinion on the credibility and probative value of defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." G.S. 1-180.

3. **Criminal Law § 99— remarks of trial court during trial — prejudicial effect**

Remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant, and the question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made.

4. **Criminal Law § 99— remarks of trial court during trial — expression of opinion on evidence**

Trial court's instruction to the jury that the investigating officer testified "substantially the same as the prosecuting witness testified to here on the witness stand," *held* erroneous in expressing an opinion on the evidence, since the question of whether the officer's testimony did corroborate that of the prosecuting witness was a question of fact for the jury.

State v. Byrd

APPEAL by defendant from *Superior Court Judge Bundy,* 23 March 1970 Session of Superior Court held in LENOIR County.

Defendant was tried upon a bill of indictment, proper in form, charging him with a felonious assault upon Arthur T. Brafman with a deadly weapon, to wit: a .38 caliber pistol, with intent to kill, inflicting serious injuries not resulting in death.

When the case was called for trial, the defendant, in writing, waived the assignment of counsel and expressed the desire to represent himself. This was done in open court after he had been informed of the charges against him and of his right to have counsel assigned by the court.

The defendant pleaded not guilty. The jury found the defendant guilty of an "assault with a deadly weapon *per se,* inflicting serious injury."

From judgment of imprisonment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Trial Attorney Jacobs for the State.

Braswell, Strickland, Merritt & Rouse by Roland C. Braswell for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant's record on appeal was docketed on 13 July 1970. Under the rules of practice in this court, it should have been docketed within ninety days after 24 March 1970. On 13 November 1970 defendant filed a petition for *certiorari* as a substitute for an appeal. This petition is allowed, and the case is considered on its merits.

The evidence for the State tended to show that on 21 November 1969 the prosecuting witness, Brafman, and three other Marines were on their way back to Camp Lejeune after having attended a dance in Kinston. They stopped at defendant's place of business to buy some beer. The three companions of the prosecuting witness went into the place of business. The prosecuting witness remained in the car. The defendant refused to sell them any beer and struck one of them in the face with his fist and then hit him with a fan belt. He left the store and told the prosecuting witness what had occurred. The prosecut-

ing witness thereupon went into the defendant's place of business to investigate the matter. The defendant, without provocation, thereupon shot the prosecuting witness with a .38 caliber pistol.

The bullet went through his arm, penetrated his body, and at the time of the trial was located in his spinal canal. As a result of the bullet wound, he remained in the hospital for approximately six weeks and at the time of the trial in March 1970 was still experiencing pain from the wound.

[2] The defendant testified in his own behalf but offered no other witnesses. The evidence for the defendant tended to show that the prosecuting witness came in his place of business on Saturday morning, the 22nd, and "wanted to know what in hell was going on" and began arguing and contending that somebody "had about murdered his buddy." Defendant testified that he told the prosecuting witness, " * * * No, I asked him to leave and he wouldn't and I just persuaded him, and I said it is about time for you to go now and I fired one time in the ceiling, that's all I done." On cross-examination the defendant stated that there were four other people there besides himself when the "boy" came in there and asked for some beer and that a Mr. Rufus Allen was there all the time on this occasion. Mr. Allen was working for the defendant at the time of the trial. He also testified:

> "I ain't shot nobody. I just shot to show I meant business. I didn't shoot intending to hit him. I shot up in the ceiling. I don't know where the bullet came from that entered his body, if there's one in him."

During the cross-eaxamination of the defendant, the following colloquy took place:

> "[BY THE COURT: Let me ask you one thing. You say there were two men there that lived in Jones County.
>
> A: Yes, sir.
>
> Q: A Mr. Allen?
>
> A: No, Mr. Allen lives in Lenoir County.
>
> Q: I know that. Two live in Jones County and where are the others?
>
> A: One of them, someone said he had moved to Washington, D. C. I don't know where the boy lives.

Q: Those in Jones County, why don't you have them subpoenaed?

A: (First few words of the witness were not audible to the reporter.) He said he hadn't indicted nobody.

Q: He said what?

A: He hadn't indicted nobody.

BY THE REPORTER: I did not understand what he said.

BY THE COURT: Q: Why didn't you have them subpoenaed as your witnesses to testify for you?

A: Well, I had some subpoenaed when those darkies tried to hold me up and you know how many showed up? One man.

Q: When you have a man subpoenaed, he has got to come or the court can send the sheriff after him.

A: Well, he didn't bring them.]

EXCEPTION NO. 3.

[Q: If you don't want to have them here, that's up to you, but if I had some witnesses who saw what you say they saw, I would have them here.]

EXCEPTION NO. 4.

* * *

Q: Do you really want Mr. Allen here?

A: I could get him if I wanted to. Yes, sir.

[BY THE COURT: That's not what he asked you. He said, do you want him here?

A: Well, I could get him right now if I could get to a telephone.

BY THE COURT: He didn't ask you that. He asked you if you wanted him here?

A: No, not now, I don't.]"

The defendant contends that the trial judge, in thus questioning the defendant, expressed an opinion and violated the provisions of G.S. 1-180.

In 7 Strong, N. C. Index 2d, Trial, § 10, it is said:

"GS 1-180 applies not only to the charge of the court, but also prohibits the court at a jury trial from expressing an opinion on the evidence or the veracity of the witnesses at any time during the trial in any manner, or in any form, by word of mouth or by action, and prohibits the 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.

It is proper for the court to ask a witness questions for the purpose of clarifying the witness' testimony, but in so doing the court should be careful not to express an opinion on the facts or impeach or discredit the witness."

[3] The judge may not make a statement or ask a defendant or a witness questions tending to impeach him or to cast doubt on his credibility or which intimate that a fact has or has not been established. However, remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant, and the question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made. 2 Strong, N. C. Index 2d, Criminal Law, § 99. *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568 (1951).

In *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954), it is stated: "Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge. * * *" See also *State v. Williamson,* 250 N.C. 204, 108 S.E. 2d 443 (1959).

[2] We think that the judge expressed an opinion as to the credibility and probative value of the defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." It apparently was done by the experienced trial judge in an effort to help the defendant who was without counsel; however, we think it could have and probably did lead the jury to believe that the trial judge thought the defendant's testimony was of little probative value and needed supporting evidence or that the witnesses, if present, would not support the defendant's testimony. We think, under

the circumstances revealed by this record, that this was prejudicial error, entitling the defendant to a new trial. This effect was again emphasized after the defendant was asked by the solicitor if he wanted Mr. Allen as a witness. The defendant finally replied, "Yes, sir." The judge apparently overlooked his answer and, in substance, repeated the question twice. The defendant, evidently confused, replied in the negative. We think that the questions and statement of the judge influenced the jury is indicated by the fact that after the jury had been charged and was considering the case, the jury returned to the courtroom and the following occurred:

> "(BY JUROR: Would there be reason to think that at a second trial more evidence could be presented:
>
> BY THE COURT: I don't know, I could not tell you, I have no means of knowing. It has been some time and everybody has had opportunity to get what evidence here they wanted. I just don't know.)"

[4] Defendant contends that the judge also committed error by expressing an opinion in the following portion of the charge:

> "(Lieutenant Shannon testified that Brafman told him at the hospital what you have just heard him testify, substantially the same as Brafman testified to here on the witness stand, and that so did the other man, Johnny Stefanyszym.)"

The vice in this instruction is that when the judge told the jury that the witness Shannon testified "substantially the same as Brafman testified to here on the witness stand," he inadvertently told the jury that the testimony of the prosecuting witness, Brafman, was corroborated by the witness Shannon. The question of whether the testimony of Shannon did corroborate that of Brafman was a question of fact for the jury. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830, 5 L. Ed. 2d 707, 81 S. Ct. 717 (1961).

Defendant has other assignments of error which we do not discuss since he is entitled to a new trial.

New trial.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIE BEST

No. 708SC520

(Filed 16 December 1970)

1. **Criminal Law § 145.1— revocation of probation — service of warrant upon defendant**

Upon findings that the defendant had wilfully violated the conditions of his probation in certain respects, including a finding that the defendant had changed his residence without the knowledge or consent of his probation officer, the superior court judge had authority to order defendant's probation revoked and his prison sentence put into effect, notwithstanding no probation violation warrant was served on defendant during the period of probation.

2. **Criminal Law § 145.1— revocation of probation — service of warrant on defendant**

A probation violation warrant may be issued at any time during the period of a defendant's probation, but it is not required that the defendant be apprehended and brought into court for hearing within that time. G.S. 15-200.

APPEAL by defendant from *Bundy, J.*, May 1970 Session of WAYNE Superior Court.

On 10 November 1966 defendant pleaded guilty in Wayne Superior Court to a charge of forgery and was sentenced to prison for a term of not less than two nor more than three years. The prison sentence was suspended and defendant placed on probation for a period of three years. Usual conditions of probation were imposed, including that defendant report to the probation officer as directed. A special condition of probation was that defendant not move his place of residence without the written consent of the probation officer.

On 5 November 1969 Judge Howard H. Hubbard, Judge presiding at the November 1969 Session of Wayne Superior Court, acting on a report from the probation officer that defendant had willfully violated conditions of the probation judgment in several specifically designated respects, including that he had failed to report and had moved his place of residence without the consent of the probation officer, ordered a probation violation warrant to be issued for defendant's arrest. Pursuant to this order and on the same date, a capias was issued and delivered to the sheriff for service. On 6 November 1969 the capias was returned unserved with the notation thereon by the sheriff: "Though diligently sought, defendant could not be found in this county. He is believed to be Unknown."

On 6 May 1970 the probation officer again filed a report with the court alleging that defendant, during the three-year probationary period, had violated the terms and conditions of the probation judgment in several specifically designated respects, again including the allegation that defendant had failed to report and had moved his place of residence without consent of the probation officer. On the same day this report was filed, the probation officer, pursuant to G.S. 15-200.1, gave defendant, who was in jail on a different matter, a copy of the probation violation report and notified defendant in writing of his intention to pray the court to revoke defendant's probation and to put the suspended prison sentence into effect.

The matter was heard on 7 May 1970 by Judge William J. Bundy, Judge presiding at the May 1970 Session of Wayne Superior Court, the defendant being present in person and being represented by counsel. At the hearing the probation officer testified that on or about 30 July 1967 the defendant had left his place of residence in Goldsboro, that defendant did not at any time have the probation officer's permission to move, and that defendant's place of residence still remained unknown to the probation officer. On cross-examination, the probation officer testified that the first time anything was served on defendant because of alleged probation violation was in April 1970, when defendant was in jail on an entirely different matter, and that the April 1970 notice, to which a copy of Judge Hubbard's arrest warrant was attached, and the amended notice served in May 1970, while defendant was still in jail, were the only papers he had served on defendant since defendant was placed on probation.

After hearing, Judge Bundy entered an order finding that defendant had willfully violated conditions of the probation judgment in certain specified respects, including a finding that on or about 30 July 1967 he had changed his place of residence to a place unknown to the probation officer without securing the written consent of the probation officer. On these findings the court in its discretion ordered defendant's probation revoked and his prison sentence put into effect. From this order, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Ernest L. Evans for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

PARKER, Judge.

[1] Defendant does not contest the court's findings that he had willfully violated various conditions of his probation during his probationary period. His sole contention is that, no probation violation warrant having been served upon him during the period of his probation, the court thereafter lacked power to order his probation revoked and his prison sentence put into effect. He argues that the language of G.S. 15-200 required this result. We do not agree.

The statute referred to contains the following:

> "§ 15-200. *Termination of probation, arrest, subsequent disposition.*
>
> ". . . . At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant. . . . Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence. If at any time during the period of probation or suspension of sentence a warrant is issued and the defendant is arrested for a violation of any of the conditions of probation or suspension of sentence, or in the event any person is arrested at the instance of a probation officer, the defendant shall be allowed to give bond pending a hearing before the judge of the court. . . ."

[2] Defendant argues that the quoted language of the statute must be interpreted to require that the warrant not only be issued but that it also be actually served on the defendant and he be taken into custody during the probationary period, else the court lacks power to hear the matter. Such a construction, which obviously rewards the defaulting probationer for his skill in eluding the officers, is, in our opinion, required neither by reason nor authority. Applied in the present case, such a construction would result in the anomaly that, by the simple expedient of violating the conditions of his probation which required him to report to his probation officer and not to move

his place of residence without the officer's consent, defendant could obtain immunity for his violations in all other respects. We do not believe the Legislature intended so strange a result. In our opinion, G.S. 15-200 authorizes issuance of a probation violation warrant at any time during the period of probation; it does not require that the defendant be apprehended and brought into court for hearing within that time. This construction is consistent with that which our Supreme Court has placed on G.S. 15-1, which provides a two-year limitation period on misdemeanor cases. The Court in *State v. Williams,* 151 N.C. 660, 65 S.E. 908, held that an indictment or presentment marks the beginning of the prosecution so as to toll the statute of limitations, even though defendant be apprehended and tried more than two years after the offense was committed.

Our construction of G.S. 15-200 is also supported by the decision in *State v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850. In that case judgment was entered on 18 February 1935 sentencing defendant to prison. The prison sentence was suspended and defendant placed on probation for a period of five years on certain conditions. On 19 October 1939 a capias was issued and returned marked, "[d]ue search made and defendant not to be found in Buncombe County or the State of North Carolina." Efforts to locate defendant continued. He was arrested on 10 February 1940 by police authorities in Washington, D. C., upon an *alias* capias issued by the North Carolina Court. He fought extradition and was not brought before the North Carolina Superior Court on the matter of revocation of his probation until January 1942, which was almost two years after expiration of his probationary period. The Superior Court, after hearing evidence, found defendant had violated conditions of his probation and ordered the probation revoked and the prison sentence put into effect. On appeal, our Supreme Court affirmed, and in an opinion by Denny, J., said (p. 498):

> "The failure to enter judgment within the five-year period, prescribed in the original judgment, was not due to the lack of diligence on the part of the court, but was chargeable solely to the conduct of defendant. Therefore, we hold that the court had not lost jurisdiction of the defendant by reason of the lapse of time and that the court had power to enter judgment at January Term, 1942, of the Superior Court of Buncombe County."

State v. Pelley, supra, is clear authority that if a probation violation warrant and order of arrest is issued during the probationary period, a valid probation revocation hearing may be held and order entered after the period of probation has expired, at least in situations where the delay is not due to any lack of diligence on the part of the probation authorities or the court. It is true that in *Pelley* the defendant was arrested out of the State a few days before the probation period expired, while in the present case the defendant was not found and served until after his probation period had expired. However, *Pelley* does not hold that the arrest would have been invalid if made after expiration of the probationary period. Nor is the holding in *Pelley* limited, as appellant here contends, only to cases in which the violating probationer flees the State in order to avoid arrest. We see no valid reason why the holding should not also apply to cases in which the violating probationer keeps himself concealed within the State, particularly where, as here, it is a condition of his probation not only that he keep his probation officer informed as to his whereabouts but that he not move at all without the officer's consent.

The order appealed from is

Affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

KERMIT B. NICHOLS, D/B/A MARSH KITCHENS OF CHARLOTTE v. C. J. MOSS REAL ESTATE, INC. AND CONCORD-KANNAPOLIS SAVINGS AND LOAN ASSOCIATION

No. 7026DC602

(Filed 16 December 1970)

1. Sales § 10— seller's action to recover purchase price — sale of kitchen cabinets — variance between pleading and proof

In a cabinetmaker's action to recover the balance of the purchase price for kitchen cabinets sold and delivered, a judgment for directed verdict in favor of the defendant, a real estate firm, is proper, where the cabinetmaker alleged an express contract with the real estate firm under which the cabinetmaker was to sell and deliver the cabinets to the firm, but all of the cabinetmaker's evidence established that it had refused to sell to the real estate firm and instead had sold the cabinets to a third party that had agreed to assume responsibility for payment.

2. **Sales § 10; Quasi Contracts § 2— seller's action to recover purchase price — recovery on implied contract**

In a cabinetmaker's action to recover the balance of the purchase price for kitchen cabinets sold and delivered, the cabinetmaker was not entitled to recover on a theory of implied contract against a real estate firm that had accepted the cabinets and installed them in its apartment building, where the cabinetmaker's own evidence established an express contract with a third party that had agreed to pay for the cabinets delivered to the real estate firm.

3. **Rules of Civil Procedure § 50— motion for directed verdict — review and disposition on appeal**

Upon deciding that the trial court should have granted appellant's motion for a directed verdict made at the close of all the evidence, the Court of Appeals may appropriately direct entry of judgment in accordance with the appellant's motion, but only when the appellant also in apt time moved for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50(b)(1) and Rule 50(b)(2).

APPEAL by defendant, C. J. Moss Real Estate, Inc., from *Abernathy, District Judge,* 6 April 1970 Session of MECKLENBURG District Court.

Civil action to recover $658.40 balance of purchase price for goods sold and delivered. In substance, plaintiff alleged: Under an express contract with defendant, C. J. Moss Real Estate, Inc. (Moss), plaintiff sold and delivered to Moss six sets of kitchen cabinets for the price of $1,869.09; the cabinets were installed in Moss' apartment project in Kannapolis, N. C.; Moss paid plaintiff $1,210.69 on account of such sale, leaving a balance due of $658.40; after demand, Moss has refused to pay the balance due. (Plaintiff's complaint also asserted a claim against Concord-Kannapolis Savings and Loan Association for alleged loss of lien rights; however, as a result of the jury's verdict, judgment was entered dismissing the action against that defendant and that claim is not involved on this appeal.)

Moss answered and denied it had ever contracted with plaintiff or had ever made any payment to plaintiff for the kitchen cabinets.

At the close of the evidence upon trial before a jury, Moss moved for a directed verdict on the grounds that plaintiff had alleged an express contract but no evidence was offered concerning the express contract between plaintiff and Moss. The motion was denied. The jury returned verdict, answering issues finding that plaintiff and Moss had entered into a contract as alleged in the complaint and that plaintiff was entitled to re-

cover of Moss the sum of $658.40. Judgment was entered on the verdict, and Moss moved to have the verdict and judgment entered thereon set aside and to have judgment entered in accordance with its previous motion for a directed verdict. This motion was overruled. Moss then moved for a new trial as a matter of law for errors assigned and to be assigned, and this motion was also overruled. Moss appealed.

Bradley, DeLaney & Millette by S. M. Millette for plaintiff appellee.

Hartsell, Hartsell & Mills by William L. Mills, Jr., and W. Erwin Spainhour, for defendant appellant, C. J. Moss Real Estate, Inc.

PARKER, Judge.

[1] Plaintiff alleged an express contract with Moss under which he sold and delivered the cabinets to Moss. All of the evidence, however, shows that plaintiff had refused to sell to Moss and instead had sold the cabinets to H. and H. Supply Company, a sole proprietorship owned by one Gene Holbrooks. Plaintiff testified: "I told him (C. J. Moss, president of defendant) I didn't know him and I didn't have any way of selling him on approved credit. Mr. Holbrooks had agreed that it could be billed through him and he would be responsible to me for collection. I told Mr. Moss it would be billed through H. and H. Supply Company in Kannapolis." All of the evidence is to the effect that when the cabinets were manufactured and shipped, all shipping documents and invoices issued by plaintiff or at his direction showed a sale to H. and H. Supply Company, not to Moss. Holbrooks, presented as plaintiff's witness, testified as follows: "These invoices were charged to my company, and I agreed for them to be charged to my company. I promised to pay for these cabinets and these cabinets here were billed to me by Marsh Furniture Company in the same way and manner that cabinets were billed to me on numerous occasions in the past. They were billed exactly as the others." All of the evidence is to the effect that plaintiff never rendered any bill for the cabinets to Moss, but billed only H. and H. Supply Company, and that Moss never made any payment to plaintiff, but did make a payment of $1,210.69 for the cabinets to a company owned by Holbrooks.

Plaintiff alleged an express contract with Moss. All of the evidence, however, established that the only express contract

which he made with reference to sale of the cabinets was with Holbrooks, not with Moss, and that this contract expressly provided for a sale of the cabinets to Holbrooks, not to Moss. Under the express contract established by all of the evidence in this case, plaintiff has shown no valid claim for relief against Moss. What claims, if any, plaintiff may have against Holbrooks, who is not a party to this litigation, are not presently before us.

[2] Nor does the evidence here give rise to any implied contract between plaintiff and Moss. It is true that a contract for sale of personal property, as other contracts not required to be in writing, need not necessarily be express but may be implied from facts and circumstances which create an obligation on the part of one to pay for goods received from another. It is also true that "ordinarily, when one person receives goods or merchandise from another, the law implies a contract on his part to pay therefor, which will support an action of assumpsit for goods sold and delivered. One cannot ordinarily accept goods from another and use them and then refuse to pay for them on the ground that he never ordered them. A promise, however, to pay for goods delivered will not be implied in direct contradiction of the agreement or intention of the parties. . . ." 46 Am. Jur., Sales, § 37, pp. 229, 230. Thus, if in the present case plaintiff's evidence had shown merely a delivery of the cabinets by plaintiff to Moss, and acceptance and installation by Moss of the cabinets into its apartment building, nothing else appearing such evidence would give rise to an implied promise on the part of Moss to pay plaintiff for the cabinets. But here plaintiff's own evidence and all of the evidence goes further and establishes an express contract under which plaintiff sold to a third party, who agreed both to pay plaintiff for the cabinets and that the cabinets be delivered to Moss. Here, the express contract established by all of the evidence negates implication of any promise by Moss to pay plaintiff. As above noted, what rights or liabilities, if any, Holbrooks may have with respect to the cabinets are not presented for adjudication in this litigation.

[3] For the reasons noted above, it is our opinion that the trial judge should have granted appellant's motion for a directed verdict made at the close of all the evidence. Since appellant also in apt time moved for judgment notwithstanding the verdict, as provided in Rule 50(b)(1) of the Rules of Civil Procedure, it is appropriate that we direct entry of judgment in accordance with appellant's motion. See Rule 50(b)(2). The cause is remanded to the trial court with the direction that judgment be

entered in accordance with appellant's motion for a directed verdict in its favor.

Reversed and remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

TOWN OF HILLSBOROUGH, A MUNICIPAL CORPORATION v. CLARENCE DUPREE SMITH AND WIFE, MAE L. SMITH

No. 7015SC452

(Filed 16 December 1970)

1. **Municipal Corporations § 12; State § 4— governmental immunity**

Except where waived under authority of statute, the common law rule of governmental immunity is still the law in this State.

2. **Municipal Corporations § 30— enactment and enforcement of zoning regulations — police power**

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State.

3. **Municipal Corporations § 12— waiver of governmental immunity**

A municipal corporation may not waive or contract its governmental immunity in the absence of legislative authority for such action.

4. **Municipal Corporations §§ 12, 30— action to restrain violation of zoning ordinance — waiver of governmental immunity**

While G.S. 160-179 authorizes a municipality to institute an action to restrain a violation of its zoning ordinances, the statute does not authorize or require the municipality to waive its governmental immunity by so doing.

5. **Municipal Corporations §§ 12, 41— waiver of governmental immunity — institution of civil action**

A municipality does not waive its governmental immunity by the mere act of instituting a civil action.

6. **Injunctions § 16; Municipal Corporations §§ 13, 30; Principal and Surety § 11— bond given by town for wrongful injunction — governmental immunity — liability of town — liability of surety**

Execution of a bond by a municipality to obtain under [former] G.S. 1-496 the issuance of a temporary injunction preventing an alleged violation of its zoning ordinance by defendants was an *ultra vires* attempt by the municipality to waive its governmental immunity, and the municipality is not liable on the bond for damages suffered by defendants as a result of being wrongfully enjoined; however, the surety on the bond is not protected by governmental immunity and is liable on the bond for such damages.

Town of Hillsborough v. Smith

APPEAL by defendant from *Braswell, Judge of the Superior Court,* 30 March 1970 Session, ORANGE Superior Court.

Plaintiff obtained a temporary restraining order on 11 July 1968, which was continued in force to the time of a trial on the merits; the order restrained defendants from using their property as planned by defendants because their planned use allegedly violated plaintiff's zoning ordinance. Upon trial on the merits it was determined that the restraining order should be vacated but under the authority of G.S. 1-500 it was continued in effect pending appeal to the appellate division. The Supreme Court of North Carolina affirmed the judgment of the trial court, holding that the plaintiff was not entitled to restrain defendants. *Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904. The background facts of the case are fully set forth therein.

Thereafter defendants, on 13 March 1970, filed a motion in the cause seeking an assessment of damages against plaintiff and its surety on the bond which had been posted to obtain issuance of the restraining order. The motion was heard by Judge Braswell, who made findings of fact and conclusions of law as follows:

> "That the plaintiff is a municipal corporation; that the original action was commenced to restrain the defendants from performing acts which the plaintiff alleged were in violation of a municipal ordinance, and it further appearing that pursuant to N. C. General Statutes Chapter 1, Article 37, the plaintiff obtained a temporary restraining order, which upon hearing was continued until the final hearing on the merits and subsequently was continued until the final disposition of the case on appeal. That the Town of Hillsborough executed written undertakings with Fidelity & Deposit Company of Maryland as sureties in the sum of $20,000 conditioned upon the Town of Hillsborough paying to the defendants such damages as they might sustain by reason of said injunction if the Court should finally declare that the plaintiff was not entitled thereto. That the North Carolina Supreme Court declared that the plaintiff was not entitled to said injunction and ordered the same dissolved.
>
> "Upon the foregoing findings of fact the Court concludes as a matter of law that the plaintiff, Town of Hillsborough, being a municipal corporation, has governmental

immunity; that the acts of the Town of Hillsborough in obtaining said injunction were in the exercise of the Town's governmental functions; that the execution of any and all surety bonds by the Town of Hillsborough in connection with obtaining any temporary restraining order or injunction did not operate as a waiver of such governmental immunity and did not operate to contract away said governmental immunity; that the execution of said bonds by the Town of Hillsborough was an ULTRA VIRES act; that there is no statutory authority which would authorize the Town to waive or contract away its governmental immunity and in the absence of such authority the municipality could not expressly contract away or waive its governmental immunity; that if the municipality is without authority to expressly waive or contract away its governmental immunity it may not do so by implication and has not done so; that the Town of Hillsborough is not liable on said bonds; that Fidelity & Deposit Company of Maryland is not liable on said bonds since its only liability would be derived from liability of the principal on said bond."

Judge Braswell thereafter denied and dismissed defendants' motion. Defendants appealed assigning as error the signing and entry of Judge Braswell's Order.

Graham & Cheshire, by Lucius M. Cheshire, for plaintiff-appellee.

Alonzo Brown Coleman, Jr., for defendants-appellants.

Smith, Moore, Smith, Schell & Hunter, by Larry B. Sitton, for Fidelity & Deposit Company of Maryland, surety on plaintiff's bond.

BROCK, Judge.

[1] "Prior to the legislative enactment on 14 April 1951 of Chapter 1015 of the Session Laws of 1951, now codified as G.S. 160-191.1 to 160-191.5, the common law rule of governmental immunity prevailed in North Carolina. *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42. Under this common law rule a municipality is not liable for the torts of its employees or agents committed while performing a governmental function." *Galligan v. Town of Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427. Except where waived under authority of statute the common law rule of governmental immunity is still the law in North Carolina.

Galligan v. Town of Chapel Hill, supra; Stephenson v. Raleigh, 232 N.C. 42, 59 S.E. 2d 195.

[2] "In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State." *Taylor v. Bowen,* 272 N.C. 726, 158 S.E. 2d 837. See also 5 Strong, N. C. Index 2nd, Municipal Corporations, § 12, p. 633.

G.S. 1-496 and G.S. 1-497 were repealed effective 1 January 1970, at which time G.S. 1A-1, Rule 65 became effective. Therefore at the time plaintiff instituted this action and at the time the opinion of the Supreme Court of North Carolina was filed in this action on 10 December 1969, G.S. 1-496 and G.S. 1-497 were in effect.

Defendants strenuously argue that because the legislature did not exempt municipalities from the necessity of posting bond in accordance with G.S. 1-496, it follows that posting bond as required by statute constitutes an authorized waiver of governmental immunity. Defendants contend that their argument is strengthened by the provisions of the new G.S. 1A-1, Rule 65; it is their contention that under Rule 65 the State or one of its political subdivisions will waive its governmental immunity by seeking an injunction. It is unnecessary for us to interpret G.S. 1A-1, Rule 65 at this time; suffice to say, we find therein no expression of *past* legislative intent.

[3-5] A municipal corporation may not waive or contract away its governmental immunity in the absence of legislative authority for such action. *Galligan v. Town of Chapel Hill, supra.* G.S. 160-179 authorizes a municipality to institute an action to restrain a violation of its zoning ordinances, *Gastonia v. Parrish,* 271 N.C. 527, 157 S.E. 2d 154; but this statute does not authorize or require the municipality to waive its governmental immunity. And a municipality does not waive that immunity by the mere act of instituting a civil action. *Graded School v. McDowell,* 157 N.C. 316, 72 S.E. 1083; *Battle v. Thompson,* 65 N.C. 406. We think the language used in *Hollifield v. Keller,* 238 S.C. 584, 121 S.E. 2d 213, is appropriate here:

> "As we understand the rule relating to the immunities attaching to sovereignty, such attributes are never to be considered as waived or surrendered by any inference or implication. The surrender of an attribute of sovereignty being so much at variance with the commonly accepted

tenets of government, so much at variance with sound public policy and public welfare, the Courts will never say that it has been abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect."

"Our legislative history amply shows that the General Assembly has been fully cognizant of this sound principle of law. It has in several instances by express enactment prescribed the cases in which actions are allowed against counties, cities, towns and the State Highway Department. And in those enabling statutes the Legislature has invariably set forth with care and precision the terms and conditions upon which suit may be brought."

[6] Thus, the act of the Town of Hillsborough in posting the bond was an unauthorized attempt to waive its governmental immunity, and, as such, was *ultra vires*. Because the act was *ultra vires* it follows that immunity was not waived, and the Town of Hillsborough has no liability to defendant.

It does not follow, however, that the surety on the bond is also protected by governmental immunity. A surety for an idiot or an infant, or a surety for a corporation or governmental entity acting *ultra vires*, may be liable, although the principal is liable neither to the obligee nor to the surety. *Davis v. Commissioners*, 72 N.C. 441; *Poindexter v. Davis*, 67 N.C. 112.

We discern no basis in law, nor in public policy, for relieving the surety of its obligation, voluntarily undertaken for a premium, by extending to it vicarious protection of sovereign immunity.

We affirm so much of the judgment of the trial court as holds the Town of Hillsborough not liable to defendant by reason of governmental immunity. However, we reverse so much of the judgment of the trial court as holds the surety (Fidelity and Deposit Company of Maryland) not liable to defendant on the bond. As to the surety (Fidelity and Deposit Company of Maryland) this cause is remanded to the Superior Court of Orange County for an appropriate hearing upon the question of damages. Originally this hearing would have been conducted in accordance with G.S. 1-497; but, since the Rules of Civil Procedure became effective 1 January 1970, the hearing will be conducted in accordance with G.S. 1A-1, Rule 65(e).

Affirmed, as to the Town of Hillsborough.

Reversed and remanded, as to the Fidelity and Deposit Company of Maryland.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. ALBERT R. SHORE AND BOBBY RAY KENNEDY

Nos. 7021SC531
7021SC533

(Filed 16 December 1970)

1. **Burglary and Unlawful Breakings § 9— unlawful possession of implements of housebreaking — burden of proof**

In a prosecution for unlawful possession of implements of housebreaking, the burden is on the State to show (1) that the person charged was found having in his possession an implement of housebreaking and (2) that such possession was without lawful excuse. G.S. 14-55.

2. **Burglary and Unlawful Breakings § 10— bolt-cutter as "implement of housebreaking" — sufficiency of State's evidence**

The State's evidence was sufficient to permit the jury to find that a bolt-cutter was possessed by defendants as an "implement of housebreaking," where it tended to show that a short time before being found in defendants' possession one defendant had used the bolt-cutter to break into a cigarette machine while the other defendant waited for him in a car.

3. **Burglary and Unlawful Breakings § 10— bolt-cutter as burglary tool — possession "without lawful excuse" — sufficiency of State's evidence**

The State's evidence was sufficient to permit the jury to find that defendants' possession of a bolt-cutter at 4:30 a.m. was "without lawful excuse," where it tended to show that a short time before being found in defendants' possession the bolt-cutter had been used by one defendant to break into a cigarette machine while the other defendant waited for him in a car, notwithstanding one of the defendants presented evidence that he possessed the tools found at the scene of arrest for use in his work as a carpenter's helper.

APPEAL by defendants from *Armstrong, J.*, 24 April 1970 Criminal Session, FORSYTH Superior Court.

Defendants Kennedy and Shore were each indicted for unlawfully, wilfully and feloniously having in his possession, without lawful excuse, implements of housebreaking, to wit, one

screwdriver, one heavy duty HKP bolt cable cutter, one left-hand glove, and one pair of pliers, in violation of G.S. 14-55. They pleaded not guilty.

Pertinent testimony presented by the State is summarized as follows: On 10 March 1970 at approximately 4:30 a.m. police officers on patrol in the City of Winston-Salem observed a green 1954 Buick drive slowly along South Main Street in a southerly direction, turn around, come back up Main, and then stop next to a Duke Power Company tower located on the east side of Main Street. Officer Bolt stated that the lights of the vehicle remained on for 4 or 5 minutes after stopping and thereafter it backed into a driveway (the FCX parking lot) beside the tower and its lights went out. Bolt notified other police vehicles in the area of the suspicious vehicle. In response to the notification, Officer Kapps proceeded to the vicinity of the suspicious auto and parked his patrol car. Kapps testified that some 15 or 20 minutes before he had checked the Gant Service Station that was located on South Main Street and that a cigarette and drink machine in front of the station were in order. Kapps positioned himself so that he could observe the area with field glasses, and after several minutes he noticed a man crossing from the east side of Main Street near where Bolt testified that the Buick had been parked. Kapps was not able to identify the man as either of the defendants because it was still dark. The man headed in the general direction of several gas stations, including a Spur and a Gant Station. Several minutes later Kapps observed a man running back from the direction in which the first man had gone. Kapps testified that he saw a long object in the man's hand as he ran, and that the runner headed toward the FCX parking lot. The lights of a vehicle parked there were then turned on, and the car started down Main Street in a southerly direction; thereupon Officer Kapps began to follow the vehicle which he then identified as a green 1954 Buick. He drove up close behind the Buick and with his lights shining into the vehicle was able to see two men in the front seat; the man on the right was holding a bolt-cutter and was taking a glove off his left hand. Kapps attempted to stop the vehicle, and the man on the right side of the car jumped from it and ran as it slowed to a stop. The driver of the vehicle, Kennedy, was arrested by Kapps while Officer Tuttle apprehended Shore, the man who had fled on foot. Kapps found a pair of pliers on Kennedy's person and a long screwdriver on the front seat of the Buick; he also found a left-hand glove and six packs of cigarettes in the car. Before Officer

Tuttle caught defendant Shore, he saw Shore throw the bolt-cutter down; Shore had the right-hand glove when apprehended. Tuttle found $22.95 in quarters, dimes, and nickels on Shore's person at the scene, and later at the County Jail $4.00 in change was found in Shore's sock. Officer Kapps stated that after the defendants were taken into custody he returned to the Gant Station and observed that the metal bar which went across the front of the cigarette machine had been clipped and that the lock on the machine had been pried.

At the trial Kennedy's wife testified that her husband did work as a carpenter's helper, and that he owned tools which he used in his work. She testified that among his tools were a screwdriver, pliers, ruler, and a hammer, but that she had never seen the gloves, long screwdriver or bolt-cutter which were exhibits for the State.

Motions for judgment of nonsuit were timely made and denied by the court. From a verdict of guilty and judgment entered thereon defendants appealed.

Attorney General Robert Morgan and Assistant Attorneys General Charles M. Hensey and Claude W. Harris for the State.

John M. Harrington for defendant appellant Albert Ray Shore and J. Clifton Harper for defendant appellant Bobby Ray Kennedy.

BRITT, Judge.

The statute under which defendants were prosecuted is G.S. 14-55 which provides:

> If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the Court.

[1] This statute defines three separate offenses, *State v. Morgan,* 268 N.C. 214, 219, 150 S.E. 2d 377 (1966), and the one we are concerned with here is the second defined offense which has

to do with the possession of an implement of housebreaking without lawful excuse. *State v. Boyd,* 223 N.C. 79, 83, 25 S.E. 2d 456 (1943). The burden is on the State to show (1) that the person charged was found having in his possession an implement or implements of housebreaking and (2) that such possession was without lawful excuse. *State v. Styles,* 3 N.C. App. 204, 164 S.E. 2d 412 (1968).

The State's evidence, viewed in the light most favorable to it, tends to show that defendants parked their vehicle on South Main Street in Winston-Salem at 4:30 a.m.; that defendant Shore left the vehicle and proceeded to the Gant Service Station and there with the aid of a bolt-cutter broke into a cigarette machine and stole an amount of change after which he returned to the vehicle; and shortly thereafter the two defendants were apprehended with the bolt-cutter and other implements set forth in the indictment, together with some $26.95 in change, in their possession.

[2] Defendants contend the State's evidence was insufficient to permit a jury to find that one or more of the tools in their possession were "implements of housebreaking." It is conceded that the items possessed are not specifically named in G.S. 14-55, so if their possession without lawful excuse is proscribed at all it is under the general language of the statute. *State v. Morgan, supra.* The State's evidence tending to show that at 4:30 a.m. the bolt-cutter was in the possession of defendants while they were in close proximity to the machine that was broken into; that the metal band around the cigarette machine had been cut by some implement; and that shortly before an officer had observed that the band was intact, was sufficient to show that the bolt-cutter, although a tool that is normally lawful to possess, was capable of and was being used as an "implement of housebreaking" within the meaning of the statute. We do not hold here that a cigarette machine is a "structure designed to secure property" so as to fall within the meaning of G.S. 14-54, but we believe that the possession of the implement with intent to burglarize and not the character of the object (be it a house or vending machine) of the burglary brings the act within the condemnation of the statute. It is reasonable to perceive that a burglar with a bolt-cutter, on the prowl to steal that which belongs to others, would clip a padlock and enter and steal from a service station building as readily as he would clip a metal band

securing a vending machine and steal its contents. We hold that the State's evidence was sufficient to allow the jury to find that the bolt-cutter was possessed under the circumstances shown in this case, as an "implement of housebreaking."

[3] The second element of the State's case has to do with proving that the tools in question were possessed "without lawful excuse." Defendant Kennedy introduced evidence that indicated he had a colorably lawful reason to possess the tools that were found at the scene of the arrest; however, the State introduced strong evidence indicating that the possession was unlawful. The State's evidence tended to show that defendants were on South Main Street at 4:30 in the morning and had the intention of stealing; that the bolt-cutter was being held by one of the defendants immediately before and during the course of his arrest and no explanation was given as to what it had been used for that night. A more proper place for the bolt-cutter if possessed for lawful purposes, or at least one that was less suspicious, would have been in the trunk of the car. The evidence as to whether the possession was lawful, being in conflict, was for the jury to decide and a nonsuit would have been improper, 2 N. C. Index 2d, Criminal Law, Sec. 104. The conduct of the defendants and the circumstances under which they were in possession of the bolt-cutter raised the inference that its possession was for an unlawful purpose.

We hold that the defendants had a fair trial free from prejudicial error and the sentences imposed were within the limits prescribed by statute.

No error.

Judges CAMPBELL and HEDRICK concur.

W. A. McELDUFF v. E. C. McCORD, JR., THE CITY OF GASTONIA, AND CITIZENS NATIONAL BANK IN GASTONIA

No. 7027DC479

(Filed 16 December 1970)

1. **Aviation § 2— liability in operation of airport — damage to taxiing plane — temporary deviation from runway**

A plaintiff who taxied his airplane off the concrete runway of an airport in order to avoid an automobile that was blocking the way to the airplane parking area failed to show that the operator of the airport was negligent when the plane struck a concrete slab, which was located on the grassy area just off the runway, and turned over, where (1) there was no evidence to suggest that the airport operator should have reasonably foreseen that plaintiff would abandon the runway in favor of a route not intended or maintained for airplane traffic and (2) the plaintiff's turning off the runway was for his own convenience and did not arise from any danger presented by the automobile.

2. **Aviation §§ 2, 5; Negligence § 52— pilot landing at airport — status of invitee**

A plaintiff who landed his airplane at a municipal airport with the intention of parking his airplane and paying a fee to the airport operator for this privilege was an invitee of the operator.

3. **Aviation § 2— liability of airport operator to invitees — standard of care**

An aircraft landing field operator owes a duty to persons landing thereon by invitation to maintain the premises in reasonably safe condition for contemplated use, and he must use reasonable care to keep premises in reasonably safe condition so that a person landing his aircraft there will not be unreasonably exposed to any danger.

APPEAL from *Mason, District Judge,* 6 April 1970 Session of GASTON County District Court.

Plaintiff instituted this action on 31 December 1968 seeking to recover for damage to his aircraft alleged to have occurred at the Gastonia Municipal Airport on 14 November 1967. (The evidence established the date as 14 October 1967.) At that time the airport was under lease to named defendant, E. C. McCord, Jr. Mr. McCord died while this action was pending and Citizens National Bank of Gastonia, as administrator of his estate, was duly substituted as defendant.

At the conclusion of plaintiff's evidence judgment was entered allowing the motion of the City of Gastonia for a directed verdict. No appeal has been taken from that judgment.

Motion for a directed verdict was made by the defendant administrator on the grounds that plaintiff's evidence had failed to show any negligence on the part of defendant's intestate, and further, that it established as a matter of law plaintiff's negligence as a proximate cause of his damage. Judgment was entered allowing this motion on both grounds and plaintiff excepted and appealed.

Joseph B. Roberts III, for plaintiff appellant.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant appellee.

GRAHAM, Judge.

[1] Plaintiff's principal contention is that the court erred in allowing the appellee's motion for a directed verdict.

Plaintiff's evidence tended to show that on 14 October 1967 he landed his 1953 Cessna aircraft at the Gastonia airport, which was under lease to appellee's intestate and being operated by him. Under the terms of the lease, appellee's intestate was responsible for the installation and maintenance of landing areas, parking areas and taxiing areas for aircraft. Plaintiff had landed at the airport approximately fifty times previously. A paved taxiway was provided to the one area used by aircraft for parking. Plaintiff planned to park his aircraft and to pay a fee to defendant's intestate for this privilege. As plaintiff proceeded along the paved taxiway and toward the parking area he observed an automobile parked between him and the parking area. In plaintiff's opinion there was insufficient room to operate his aircraft around the parked automobile and still remain on the paved taxiway, so he turned off the taxiway and on to a level grass strip in an effort to proceed to the parking area. After traveling about three feet off the taxiway the left wheel of his aircraft struck a concrete slab, causing the aircraft to turn over and sustain damage. The slab was approximately three feet long, two feet wide, and six to eight inches above the ground. It was one of many concrete slabs that were placed along the runway and taxiway two years after the airport was constructed in 1945. The purpose of the slabs was to indicate where a high voltage cable ran underneath the ground conducting power for the runway lights. Plaintiff testified that the slab was "almost covered over with grass" and that he had not seen it on any occasion before his aircraft collided with it.

We turn first to the question of the sufficiency of plaintiff's evidence as to the negligence of appellee's intestate.

[2, 3] Plaintiff's evidence was sufficient to show that he entered the premises as an invitee, within the meaning of that term. An aircraft landing field operator owes a duty to persons landing thereon by invitation to maintain the premises in reasonably safe condition for contemplated use, and he must use reasonable care to keep premises in reasonably safe condition so that a person landing his aircraft there will not be unreasonably exposed to any danger. 65 C.J.S., Negligence, § 63 (133), p. 913; *Plewes v. Lancaster,* 171 Pa. Super. 312, 90 A. 2d 279. The rule is identical to the general rule governing the duty owed by the owner or operator of any place of business to an invitee entering the premises. "The owner or proprietor of premises is not an insurer of the safety of his invitees. But he is under a duty to exercise ordinary care to keep that portion of his premises designed for their use in a reasonably safe condition so as not to expose them unnecessarily to danger, (but not that portion reserved for himself and his employees), and to give warning of hidden dangers or unsafe conditions of which he has knowledge, express or implied." 6 Strong, N.C. Index 2d, Negligence, § 53, pp. 108-109, and cases therein cited.

[1] Plaintiff contends that appellee's intestate was negligent in not placing a flag or other warning device in the vicinity of the concrete slab. The fallacy of this argument is that the concrete slab was not located in a place designed for use by plaintiff and other airport customers. There is nothing in the record to suggest that appellee's intestate should have reasonably foreseen that plaintiff would abandon the concrete taxiway provided for his use in favor of a route not intended or maintained for aircraft traffic. "What constitutes a reasonably safe condition of premises depends, of course, upon the uses which the proprietor invites his business guests to make of them and those which he should anticipate they will make. 65 C.J.S., Negligence, § 45(b)." *Hedrick v. Tigniere,* 267 N.C. 62, 147 S.E. 2d 550. " 'The owner or occupant of premises is liable for injuries sustained by persons who have entered lawfully thereon only when the injury results from the use and occupation of that part of the premises which has been designed, adapted, and prepared for the accommodation of such persons.' 20 R.C.L., 67." *Ellington v. Ricks,* 179 N.C. 686, 102 S.E. 510; *Cupita v. Country Club,* 252 N.C. 346, 113 S.E. 2d 712.

The record is silent as to who parked the car which plaintiff stated blocked the taxiway and caused him to deviate from it. There is no showing that appellee's intestate or any of his employees knew of the car's presence on the taxiway, or that it had been there for a sufficient length of time to give them notice that it was an obstacle to aircraft using the taxiway. In fact, plaintiff makes no contention that the presence of the car in his path resulted from any negligence on the part of appellee's intestate. The record indicates that plaintiff, upon seeing the car, immediately turned from the paved taxiway. This immediate movement was for the purpose of plaintiff's convenience and not because any danger arose from the fact the taxiway was blocked by a parked car. A slight delay on plaintiff's part could have resulted in the car being moved. Under these circumstances, we do not regard plaintiff's departure from the concrete taxiway onto the grass area to be such a slight departure " ' "in the ordinary aberrations or casualties of travel" ' " as to extend to him the same protection he was entitled to while lawfully upon the portion of the premises embraced within the object of his visit. *Cupita v. Country Club, supra; Coston v. Hotel,* 231 N.C. 546, 57 S.E. 2d 793; *Dunn v. Bomberger,* 213 N.C. 172, 195 S.E. 364; *Money v. Hotel Co.,* 174 N.C. 508, 93 S.E. 964; *Quantz v. R.R.,* 137 N.C. 136, 49 S.E. 79. Nor do we regard this as a case where the obstacle was so close to the portion of the premises held out for plaintiff's use as to render travel thereon otherwise unsafe. *Hood v. Coach Co.,* 249 N.C. 534, 107 S.E. 2d 154; 38 Am. Jur., Negligence, § 130, p. 790.

For the reasons herein stated it is our opinion that the court correctly granted defendant's motion for a directed verdict on the grounds that plaintiff's evidence was insufficient to show actionable negligence on the part of appellee's intestate. It is, therefore, unnecessary that we discuss the question of plaintiff's contributory negligence.

Plaintiff has assigned various errors in connection with the court's refusal to admit certain testimony. We have considered the testimony which plaintiff says should have been admitted and are of the opinion that it would not change the result we have reached. The assignments of error are consequently overruled.

No error.

Judges BROCK and MORRIS concur.

MARVIN A. OWENS, EMPLOYEE v. STANDARD MINERAL COMPANY, EMPLOYER, CONTINENTAL CASUALTY COMPANY, INSURER

No 7020IC400

(Filed 16 December 1970)

1. **Master and Servant § 93— workmen's compensation — disability by silicosis — application for rehearing improperly denied by Industrial Commission**

An employee's application for a rehearing on the ground that he has additional evidence to establish his claim of disability by silicosis, *held* improperly dismissed by the Industrial Commission, where (1) the employee's application was timely made and (2) the Commission acted under a misapprehension of the law in denying the application. G.S. 97-47.

2. **Master and Servant § 93— discretion of the Industrial Commission — introduction of additional evidence**

The principle that a motion for further hearing on the ground of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission is not applicable when the Commission declines to consider such a motion under a misapprehension of applicable principles of law.

APPEAL by plaintiff from Full Industrial Commission Opinion and Award of 19 February 1970.

This proceeding was originally heard before Deputy Commissioner Robert F. Thomas on 15 November 1968. Plaintiff was represented by counsel other than his present counsel. He presented no medical evidence. Defendant introduced a report of the Advisory Medical Committee to the Industrial Commission dated 11 October 1968 which contained a conclusion that the plaintiff was not disabled because of silicosis at that time. At the request of plaintiff's counsel, the hearing was recessed for thirty days to give counsel an opportunity to seek additional medical evaluation of plaintiff's condition. The case was subsequently continued several more times for the same reason. Finally on 25 March 1969 plaintiff's counsel was advised that the case would be held in abeyance until 25 May 1969. No communication was received from plaintiff's attorney. On 29 May 1969 Deputy Commissioner Thomas entered an award finding, in accordance with the report of the Advisory Medical Committee, which was the only medical evidence before him, that the plaintiff was not then disabled by reason of silicosis. An award was entered ordering the defendant to pay certain medical expenses and denying plaintiff's claim for compensation. The plaintiff did

not apply to the Full Commission for review within the seven-day period prescribed by G.S. 97-85.

Thereafter plaintiff secured the services of his present counsel of record, and on 15 August 1969 "requested that the above case be reopened and set for hearing the next time a Commissioner is in Moore County on the basis of a change of condition under G.S. 97-47 and/or to receive further evidence that Marvin A. Owens does have silicosis." Defendant filed a motion to dismiss for the reason, among others, that the cause had been concluded by the failure of plaintiff to appeal within the time allowed by law. Thereafter plaintiff filed a motion and affidavit, in part as follows:

> MARVIN A. OWENS, through counsel JOHN RANDOLPH INGRAM, respectfully moves the Court that he be permitted to file an Appeal in the above reference case and to present new and further evidence to the effect that he has silicosis. In support of this Motion, he respectfully shows to the Court the following:
>
> 1. Upon information and belief, a decision was rendered in this case by Deputy Commissioner Thomas and filed on 29 May 1969. A copy of this was received by Mr. Owens on 3 June 1969 and he was admitted to the North Carolina Sanatorium [*sic*] on 6 June 1969 where he remained until 23 June 1969. Sometime prior to his admission to the hospital, Mr. Seawell, his lawyer at that time, told him that he had not had a hearing yet in his case and that he had a year to have a hearing. Mr. Seawell, his lawyer, wrote him a letter dated 7 June 1969 forwarding him all or most of his file. Marvin Owens was not physically able to do anything about his case nor does he possess the mental ability to do anything about his case without assistance of legal counsel. He cannot even sign his name, as illustrated by the Contract of Employment which is a matter of record in this case. There is also a letter dated 9 June 1969 in the file which indicates there is still something pending in this case. Mr. Seawell himself was sick and disabled during much or all of the time involved in the hearing and appeal time of this case.
>
> 2. Upon information and belief Dr. Vanore will testify that Marvin Owens has silicosis or pneumonoconiosis, [*sic*] which is the same thing, that he is totally disabled and accordingly is entitled to workmen's compensation disability

benefits, as a result of his employment with Standard Mineral Company. Another doctor, Dr. Hiatt, will testify that Marvin Owens has pneumonconiosis, [*sic*] and attached hereto is a medical report from McCain Sanatorium which says that Marvin Owens has pneumoconiosis."

On 2 December 1969 the cause came on for hearing before Deputy Commissioner Delbridge who entered an order which stated that medical evidence taken at the hearing tended to show that plaintiff had silicosis and allowed defendant's motion to dismiss for failure of plaintiff to appeal from the award entered on 29 May 1969. Plaintiff appealed to the Full Commission which on 19 February 1970, entered an order providing in part, as follows:

"It is the opinion of the Full Commission that this case was not properly set for hearing before Deputy Commissioner Delbridge nor was his order of dismissal proper under the circumstances. No one Commissioner or Deputy Commissioner of the Industrial Commission has the power to review or rule upon a decision or order issued by another Commissioner or Deputy Commissioner. This is a function of the Full Commission.

"THEREFORE, the Full Commission strikes out and sets aside the Order of Deputy Commissioner Delbridge filed 2 December 1969. The Opinion and Award of Deputy Commissioner Thomas filed in this case on 29 May 1969 has not been appealed and constitutes a final adjudication of the case."

From this Order of the Full Commission the plaintiff appealed to this Court.

John Randolph Ingram for plaintiff appellant.

Young, Moore and Henderson by B. T. Henderson for defendant appellees.

VAUGHN, Judge.

[1] The order appealed from holds that the order Deputy Commissioner Thomas filed on 29 May 1969, from which no timely appeal was taken constitutes a final adjudication of the claim and, in effect, thus proscribes any relief for plaintiff. We conclude that the Commission was of the opinion that, in the light

of the order of 29 May 1969, it could not consider plaintiff's motion for a rehearing on the basis of a change of condition and to hear new evidence. At any rate, it did not do so. This constitutes error.

Plaintiff's application for review on the grounds of a change of condition under the provisions of G.S. 97-47 was made well within one year of the date of the award requiring payment of his medical bills and was thus timely. G.S. 97-47.

[2] Moreover, under the circumstances of this case, the Commission is not limited to a consideration of plaintiff's evidence as to changes in his condition since the order of 29 May 1969. It seems to be well established that the Industrial Commission "has the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award on the ground of newly discovered evidence." *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799. Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission. *Mason v. Highway Commission,* 273 N.C. 36, 159 S.E. 2d 574. This principle is not applicable where, as here, the Commission declines to consider such a motion under a misapprehension of applicable principles of law. From *Hall v. Chevrolet Co.,* 263 N.C. 569, 139 S.E. 2d 857, the following is thought to be appropriate.

> "It is a fundamental rule that the Workmen's Compensation Act 'should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation.' *Johnson v. Hosiery Co.,* 199 N.C. 38, 40, 153 S.E. 591, 593; *accord, Guest v. Iron & Metal Co.,* 241 N.C. 448, 85 S.E. 2d 596. According to some authorities,
>
> > '(T)he facts that evidence claimed as a basis of a motion to open a compensation award is not newly discovered and might have been offered at the original hearing in the exercise of due diligence and that counsel, through inadvertence, has failed to present a ground upon which compensation might be allowed, do not in themselves prevent the compensation commissioner from granting such a motion.' 58 Am. Jur., *Workmen's Compensation* § 541 (1948), citing *Olivieri*

v. City of Bridgeport, 126 Conn. 265, 10 A. 2d 770, 127 A.L.R. 1471."

Although we do not deem it necessary to quote further from the opinion in *Hall,* the principles declared and the quotations from other authorities set out in that opinion are pertinent here.

Reversed and Remanded.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. FURNIE THIGPEN

No. 704SC467

(Filed 16 December 1970)

1. **Criminal Law § 159— statement of the evidence on appeal**

An appeal that sets forth the evidence in question and answer form is subject to dismissal by the Court of Appeals in its discretion. Court of Appeals Rule of Practice 19(d).

2. **Automobiles § 130— drunken driving — punishment**

A sentence of six months' imprisonment which was imposed upon defendant's conviction of drunken driving is within the maximum permitted by statute.

3. **Criminal Law § 161— assignment of error — necessity for exceptions**

An assignment of error which is not supported by an exception previously noted in the case on appeal presents no question of law for the appellate court to decide.

4. **Criminal Law § 161— grouping and numbering of exceptions**

All exceptions must be grouped and numbered immediately before the signature to the record on appeal, and those exceptions not done in this manner will be deemed abandoned. Court of Appeals Rule of Practice 19(c).

5. **Criminal Law § 161— statement of exceptions**

Appellant's exceptions to the proceedings, rulings, or judgment of the court, briefly and clearly stated and numbered, must be set out in his statement of record on appeal. Court of Appeals Rule of Practice 21.

6. **Criminal Law § 147.5— appellate rules are mandatory**

The Rules of Practice in the Court of Appeals are mandatory and not directory.

7. **Criminal Law § 160— motion to correct the record on appeal**

The Court of Appeals denies a motion by the Attorney General to remand the case to the superior court for clarification or correction of the record.

8. Criminal Law § 154— case on appeal — duty of solicitor

The solicitor has the duty to examine the case on appeal.

APPEAL by defendant from *Fountain, Superior Court Judge,* January 1970 Session of Superior Court held in DUPLIN County.

Attorney General Morgan and Assistant Attorney General Icenhour for the State.

Mercer & Thigpen by Ella Rose Thigpen for defendant appellant.

MALLARD, Chief Judge.

Furnie Thigpen, the defendant, was tried upon a warrant charging him with driving an automobile on 22 November 1969 while under the influence of intoxicating liquor and driving while his license was revoked.

In the Uniform Traffic Ticket, used as a warrant, there was an apparent attempt to charge the defendant with resisting arrest. This was not a proper allegation and did not charge the defendant with that offense.

The plea, verdict and judgment appealed from in district court are not set out in the record on appeal. In the record on appeal under the "Statement of Case on Appeal," it is stated that the defendant appealed to the superior court from the district court. There has also been filed in the office of the Clerk of the Court of Appeals an instrument which reveals that the defendant was convicted and sentenced in the district court of "driving under the influence of intoxicating liquor, resist arrest, driving while license were revoked."

[1] In superior court the defendant pleaded not guilty and was found guilty as charged. The evidence was purportedly narrated in the record on appeal. In addition, the transcript of the evidence was filed in question and answer form, contrary to Rule 19(d) of the Rules of Practice in the Court of Appeals, as amended. The narrative in the record on appeal does not set forth all the circumstantial evidence of the State as contained in the transcript. The transcript also contains a copy of the charge of the court to the jury. When Rule 19(d), as amended, is not complied with and the evidence is set forth in question and answer form, it is provided that " * * * 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."

[2] From the transcript and charge of the court, it is clear that in the superior court the defendant was tried and convicted of driving an automobile while under the influence of intoxicating liquor, this being the second offense. He was also tried and convicted of driving a motor vehicle upon a public highway while his operator's license was revoked. Concurrent sentences of six-months imprisonment were imposed on each count. There is sufficient competent evidence in the transcript to require submission of the case to the jury on each of these charges, and the sentences are not in excess of that permitted by statute.

The record on appeal in this case consists of nineteen pages and contains on page five the following: "Denial of motion at close of State's evidence EXCEPTION TRANSCRIPT PAGE 45." The word "exception" also appears on pages ten and fifteen of the record on appeal. All three of these "exceptions" appear to relate to a motion to dismiss. There are no other exceptions in the record on appeal.

On page four of the record begins a series of sections, the first being styled "ASSIGNMENT OF ERROR NO. I." They run consecutively to "VI." We quote here from one of them entitled "ASSIGNMENT OF ERROR NO. II ALIBI EVIDENCE" to indicate our bewilderment:

> "Failure of the Court to allow the defendant to put before the jury his alibi evidence by means of cross-examination of the arresting officer who was the sole witness for the State. Here officer was not allowed by the Court to repeat any of his conversation with the defendant upon his arrest nor any of defendant's responses for the BENEFIT OF THE JURY."

The Supreme Court stated in *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970):

> "While the circumstances of each case must largely dictate the form of an assignment of error, the assignment should clearly present and specifically point out the alleged error relied upon without the necessity of going beyond the assignment itself to ascertain the question to be debated. *Gilbert v. Moore*, 268 N.C. 679, 151 S.E. 2d 577; *Long v. Honeycutt*, 268 N.C. 33, 149 S.E. 2d 579. 'The assignment must be so specific that the Court is given some real aid

and a voyage of discovery through an often voluminous record not rendered necessary.' (citations omitted)"

[3] In this case, even if we were to take a voyage through the rest of the record on appeal, there would be no exceptions to support the assignments of error. In *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970), it is said: "An assignment of error which is not supported by an exception previously noted in the case on appeal presents no question of law for this Court to decide."

The evidence in the record on appeal is paraphrased in the words of the appellant. It is not in narrative form, there are no objections or exceptions except the three heretofore mentioned, and these do not properly present the question of nonsuit attempted to be presented. We think that this appeal merits the same treatment afforded the one in *State v. Rorie,* 258 N.C. 162, 128 S.E. 2d 229 (1962), where Justice Rodman said:

"It is the duty of the appellant who asserts prejudicial error to point out the asserted error by exception. He must classify his exceptions, putting in a separate group all exceptions which relate to each particular question. The failure to except leaves nothing to review, and the failure to group requires a dismissal of the appeal."

[4] Rule 19(c) of the Rules of Practice in the Court of Appeals requires that all exceptions be grouped and numbered *immediately* before the signature to the record on appeal, and those not done in this manner will be deemed abandoned. In this case, appellant's exceptions appear on pages five, ten and fifteen of a nineteen-page record, and they are not grouped and numbered immediately before the signature to the record on appeal.

[5] Rule 21 of the Rules of Practice in the Court of Appeals requires that the appellant set out in his statement of record on appeal his exceptions to the proceedings, rulings, or judgment of the court, briefly and clearly stated and numbered. Those not set out in this manner will not be considered by the court.

[6] The Rules of Practice in the Court of Appeals are mandatory and not directory. *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388 (1968). It is manifest that appellant has not complied with the cited rules.

"It is the duty of appellant to see that the record is properly made up and transmitted to the Court." *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262 (1965). The solicitor agreed to "the case on appeal." In *State v. Fox, supra,* it is said, relative to the duties of the solicitors:

> "At the same time we remind the solicitors that their obligation to a case does not end when the judge pronounces sentence. Their duty includes policing the case on appeal. This, of course, necessitates the expenditure of the time and effort required to make a careful and painstaking examination of it and to file exceptions or counter case if either is necessary to provide a correct record and a case on appeal which truly and intelligibly sets out the proceedings as they occurred. Only upon such a record can the Attorney General and the Appellate Division do justice to the State and to the defendant."

[7, 8] The record on appeal, when compared with the transcript referred to therein, is distorted, incomplete, confusing and argumentative. Because of the condition of the record on appeal, the Attorney General moved to remand the case to the superior court "for clarification or correction of the record in this case." This motion is denied. However, if the solicitor had properly examined the case on appeal, as it was his duty to do, he should have detected the condition of the record on appeal. It would then have been unnecessary for us to search through the entire transcript as well as the record on appeal in order to determine what occurred at the trial.

The appeal ought to be dismissed. However, upon an examination of the record on appeal and the transcript referred to therein, no prejudicial error is made to appear.

No error.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. LAWRENCE BUTCHER

No. 706SC477

(Filed 16 December 1970)

1. **Criminal Law §§ 99, 143— nonapplicability of G.S. 1-180 to probation revocation hearing**

The provisions of G.S. 1-180 prohibiting a court from giving an opinion on the evidence in the presence of the jury are not applicable in a probation revocation proceeding where no jury is present.

2. **Criminal Law § 143— probation revocation hearing — questions asked by trial court**

Questions propounded by the court to witnesses during a probation revocation hearing constituted a legitimate inquiry into the facts alleged in the report of defendant's probation officer.

3. **Criminal Law § 143— revocation of probation — breach of condition "without lawful excuse" — necessity for finding of willfulness**

It was not necessary for the court to find that defendant's breach of a condition of his probation was "willful" in order to activate defendant's suspended sentence where the court found that such breach was "without lawful excuse."

4. **Criminal Law § 143— revocation of probation — failure to make payments into clerk's office — defendant's earnings — breach of condition "without lawful excuse"**

In this proceeding to revoke defendant's probation for his failure to comply with a condition of his probation that he make specified periodic payments into the office of the clerk of court to be applied to the court cost and to the medical expenses incurred by the victim of defendant's assault, the evidence supported the court's findings that defendant had earnings in excess of certain voluntary expenditures defendant testified he had made which could have been paid into the clerk's office as ordered, and such findings support the court's conclusion that failure to make the payments was "without lawful excuse."

5. **Criminal Law § 143— revocation of probation — failure to make payments into clerk's office — lawful excuse — voluntary payment of other expenses**

It was not incumbent upon the court in a probation revocation proceeding to find that defendant's voluntary payment of certain expenses was a "lawful excuse" for his failure to make periodic payments into the office of the clerk of court as required by a condition of his probation.

6. **Criminal Law § 143— revocation of probation — failure to make payments into clerk's office — voluntary payment of defendant's hospital bill and expenses of illegitimate child**

It was within the discretion of the trial court in this probation revocation proceeding to decide whether, under the circumstances, defendant was justified in paying his own hospital bill and expenses

in connection with an illegitimate child born eleven months after the probation judgment was entered while ignoring payments ordered by the court, which included a hospital bill incurred by the victim of defendant's assault.

APPEAL by defendant from *Cohoon, Superior Court Judge,* April 1970 Session of HALIFAX County Superior Court.

On 9 August 1968 judgment was entered sentencing defendant to two years imprisonment upon his plea of guilty to the offense of assault with a deadly weapon. The prison sentence was suspended and defendant was placed on probation for a period of five years. A special condition of probation was that defendant pay into the office of the clerk of Superior Court of Northampton County the sum of $654.40 at the rate of $50 every two weeks. The money was to be applied by the clerk to the payment of the court cost and certain doctor's and hospital bills incurred by the prosecuting witness.

Defendant failed to make the payments as ordered and on 31 October 1968, Judge Hubbard entered an order finding this a willful violation of the terms and conditions of probation. However, he directed that defendant be continued on probation and that the payments required as a condition of probation be reduced to $20 weekly.

On 5 August 1969 a hearing was held before Judge Parker upon the request of the defendant's probation officer who alleged in his report that defendant had failed to make the payments as required under the order of Judge Hubbard. Judge Parker found that defendant was in arrears and that his failure to make payments as ordered constituted a willful violation of the terms and conditions of his probation. The prison sentence was thereupon ordered into effect. Subsequently, this hearing was set aside on the grounds that defendant was not represented by counsel at the time and had not waived his right thereto. (See G.S. 7A-451(a)(4), effective 1 July 1969). A new hearing was ordered and the matter was transferred to Halifax County for that purpose.

The new hearing was held before Judge Cohoon on 27 April 1970 at which time defendant was represented by court appointed counsel. After hearing evidence presented by the State and the defendant, Judge Cohoon entered an order concluding that defendant had failed to comply with the terms of his probation by failing to make the periodic payments into the

office of the clerk of court as theretofore ordered, and that such failure was without lawful excuse. The sentence was thereupon ordered into effect with credit allowed for that portion already served. Defendant appealed.

Attorney General Morgan by Staff Attorney Sauls for the State.

Bruce C. Johnson for defendant appellant.

GRAHAM, Judge.

[1] Defendant's first assignment of error encompasses numerous exceptions taken to questions propounded by the court to witnesses during the hearing. In support of this contention, he has cited numerous cases holding that a judge may not express an opinion on the evidence through the propounding of questions to witnesses. However, all of the cases relied upon by defendant involve comments made by the court in the presence of a jury and in violation of the provisions of G.S. 1-180. The provisions of G.S. 1-180 prohibiting a court from giving an opinion on the evidence in the presence of the jury are obviously not applicable in a hearing where no jury is present. The question of whether a condition of probation has been violated is always for the court and not for a jury. G.S. 15-200; *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476; *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376.

In *State v. Hewett, supra,* at p. 353, we find the following:

"A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary. The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. *S. v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53, and cases cited. Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. *S. v. Robinson, supra; S. v. Morton,* 252 N.C. 482, 114 S.E. 2d 115; *S. v. Brown,* 253 N.C. 195, 116 S.E.

2d 349; Supplement to 1 Strong's N.C. Index, Criminal Law, § 136."

[2] The questions asked by the court constitute, in our opinion, a legitimate inquiry into the facts alleged in the report of the probation officer. Defendant's assignment of error with respect thereto is overruled.

[3] Defendant next attacks various findings made by the court and contends that the evidence failed to show and the court failed to find that defendant's breach of his probationary condition was willful. The court found and concluded that the breach of the probationary condition by defendant was without lawful excuse. This is sufficient to support the activation of the suspended sentence. "All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation *or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.*" (Emphasis added). *State v. Hewett, supra.*

[4] Evidence that defendant failed to make the payments ordered as a condition of his probation was not controverted. However, defendant sought to excuse this breach on the grounds that he had been unable to work regularly due to an injury and inability to find work; that he had paid some of his personal hospital bills; that he had voluntarily paid support money to the mother of his five-year-old illegitimate child; and that he had paid expenses in connection with a second illegitimate child born almost eleven months after the probation judgment was entered. The court, in its findings, gave defendant the benefit of all of the voluntary expenditures which he testified that he had made. However, the court also found that defendant had earnings available over and above these expenses which he could have paid into the clerk's office as ordered. The evidence supports these findings which in turn support the conclusion that the violation was without lawful excuse.

[5, 6] Moreover, it was not encumbent upon the trial court to regard as a "lawful excuse" for failure to comply, defendant's voluntary payments of other expenses in lieu of those which he was under court order to pay. Whether, under the circumstances, defendant was justified in paying his own hospital bill while ignoring the payments ordered by the court, which included a

hospital bill presumably incurred by the victim of defendant's assault, was a matter for the trial court to decide in its discretion. The same is true with respect to defendant's other payments, particularly those arising out of the birth of an illegitimate child obviously conceived after the probationary judgment was entered.

We have carefully reviewed all of defendant's exceptions and assignments of error and conclude that no prejudicial error has been made to appear.

No error.

Chief Judge MALLARD and Judge PARKER concur.

AMANDA J. EDWARDS, SHELBY LOU CLARK BURGESS, OTHA A. CLARK AND PAUL R. WATERS, AS EXECUTOR OF THE WILL OF LUCINDA JONES, DECEASED v. GLADYS J. GURKIN

No. 702SC557

(Filed 16 December 1970)

Fraud § 12— inducing mother to put money in joint account with defendant daughter — withdrawal of money by daughter — insufficiency of evidence of fraud

In this action to recover money withdrawn by defendant from the savings account of her mother, now deceased, on the ground that defendant, by fraudulent misrepresentations, induced her mother to withdraw $5,000 from a savings account in a bank and deposit it in a savings and loan association account in the name of her mother and herself with a survivorship provision, plaintiff's evidence was insufficient for submission of the issue of fraud to the jury, where it showed that defendant's mother was an intelligent woman of sound mind who possessed good common sense at the time of the transfer of the account and for some seven years thereafter, during which time deposits were made to and withdrawals were made from the account, and there was no evidence that defendant's mother did not acquiesce in the way the account was set up or that she did not know how it was set up.

APPEAL by plaintiffs from *James, Judge,* June 1970 Session, BEAUFORT County Superior Court.

This action was instituted by a daughter and two grandchildren of Lucinda Jones and the executor of her estate against another daughter of Lucinda Jones. The complaint alleged that defendant, through fradulent representations, had obtained funds

of Lucinda Jones and that Lucinda Jones was actually deceived by the representations. A copy of the will of Lucinda Jones is attached to the complaint and made a part thereof. By the will, Lucinda Jones bequeathed the sum of $800 to each of the grandchildren who are plaintiffs. After devises of real estate, the remainder of her estate is to be divided equally between the plaintiff Amanda J. Edwards and the defendant Gladys J. Gurkin. There is neither allegation nor evidence that the personal estate is insufficient to pay the specific bequests to the two grandchildren. The complaint includes a prayer for the recovery of $6085.01 representing funds wrongfully withdrawn by defendant from funds of Lucinda Jones in Beaufort County Savings & Loan Association and for an accounting of funds received by defendant for Lucinda Jones from 1963 to 1969 and recovery of such amounts as the accounting may show the estate of Lucinda Jones is entitled to receive from defendant.

At the close of plaintiffs' evidence, on motion of defendant, the action was dismissed.

Carter and Ross, by L. H. Ross, for plaintiff appellants.

Wilkinson and Vosburgh, by John A. Wilkinson for defendant appellee.

MORRIS, Judge.

Plaintiffs' evidence is substantially the following: Amanda J. Edwards, one of the plaintiffs and sister of the defendant, testified that her mother died in 1969 and was 81 years of age at the time of her death. She could not read anything but her name. Up until January 1962 her mother had had a savings account in the Wachovia Bank and Trust Company. She had $5000 on deposit at that time and defendant Gladys J. Gurkin had the right to make withdrawals therefrom. In 1962 that fund was withdrawn and placed in the Beaufort County Savings and Loan Association. Both the witness and her mother were present when the account was opened at the Savings and Loan. When asked what statement defendant made to her mother concerning the account, the witness, over objection, testified: "My sister told my mother that she could put it in the Beaufort County Savings & Loan—this building where we were in. That she could get more interest on the money and she could have it put in there, the same as it was in the bank. . . . That is the only statement she made. That it could be put in there,

the same as it was in the bank, so she could get it out in case she needed it, she was sick, or anything, she needed the money, then she could get it out, the same as the bank." The defendant and her husband lived with her mother until the defendant built a home for herself and then her mother moved in defendant's home. All those years the mother had an income of her own. She had a small tobacco allotment, soil bank payment and a social security check. Her health was pretty good. She took care of the house and most of the laundry and did all of the cooking except breakfast, but in 1968 and 1969 she didn't do much of anything.

On cross-examination, the witness testified that her mother's mental condition was good up until 1967. She was an intelligent woman. She had good common sense. Up until the last two years of her life she was pretty much alert and took an active interest in what went on around her. The mother went to live with defendant in 1956 and lived there until her death. During that time she paid the defendant $20 per month and filled the oil drum twice a year and paid the light bill twice a year. Before the mother began to lose her mental competency the last two years of her life she had some problems with her general health. When the bank account was changed her mother was of sound mind. "I didn't walk up to the counter where they made the transaction, but we stepped inside the door. She walked up to the counter, made the transaction, stepped back and told us she could put it in there and draw more interest and put it in the same way it was in the bank. That is what my sister told my mother and I. No, there was not any attempt to hide this transaction from me or any other member of the family, because mother asked me to go." She never inquired of her sister, the bank, or anyone else whether her own name could be added to the account. The mother had considerable medical expenses the last years of her life but she had an insurance policy and after she became 70 that was dropped and medicare took over. During the last "couple of years" of her mother's life she required special care and observation.

The managing officer of the Savings and Loan Association testified that the account was opened 25 January 1962 in the name of Lucinda C. Jones or Gladys J. Gurkin and that the account had a survivorship provision. On 7 October 1968, $5074.38 was withdrawn, and a penciled notation "To Account No. 2676" was made. Account No. 2676 is in the name of Mrs.

Gladys J. Gurkin or Louis M. Gurkin and on 7 October 1968, $5000 was deposited to that account. On 11 April 1969, $1010.62 was withdrawn and on 25 April 1969, $1010.63 was withdrawn, closing the account. The records do not indicate that those withdrawals were deposited in another account. The Savings and Loan Association had a signature card signed by Mrs. Lucinda Jones during the existence of the account.

The savings account passbook was introduced in evidence and it shows that no withdrawals were made for two years after the initial deposit of $5000. Two hundred dollars was deposited in 1962, $500 in 1963, and $800 in 1965. From 1964 to the date of the $5000 withdrawal in 1968, 14 withdrawals were made, 12 of which were in the identical amount of interest earned to that time. The record is silent as to by whom these deposits and withdrawals were made.

The defendant by her answer admitted withdrawing the $5000 on 7 October 1968, but averred that it was done to reimburse her for expenses she had paid and as a result of her mother's insistence over the years. She also admitted withdrawing $1010.63 but averred it was not for her own use but had been used to pay her mother's funeral expenses and the balance would be used, as far as it would go, to erect a suitable marker at her mother's grave.

The essential elements of fraud are clearly stated in *Johnson v. Owens,* 263 N.C. 754, 756, 140 S.E. 2d 311 (1965), as:

> "the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss."

Taking the plaintiffs' evidence as true and in the light most favorable to them, it seems abundantly clear that it falls far short of being sufficient to submit the issue of fraud to the jury.

Plaintiffs' own evidence is that Lucinda Jones was an intelligent woman, of sound mind, and possessed of good common sense at the time of the transfer of the account and for some seven years thereafter, during which time deposits were made to and withdrawals from the account. There is no evidence that

Lucinda Jones did not acquiesce in the way the account was set up, nor is there any evidence that she did not know how it was set up. There is evidence that she signed a signature card. The record is silent as to when this was done. There is no evidence that the whole transaction was not fully explained to her.

We are in accord with the trial judge that the action should have been dismissed.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JIMMY LEE WINGARD

No. 7026SC451

(Filed 16 December 1970)

1. **Mayhem § 2; Criminal Law § 42— malicious throwing of acid — admission of evidence — cup connected with the crime**

In a prosecution charging the defendant with maliciously throwing a corrosive acid or alkali in the face and eyes of the prosecuting witness with the intent to murder, maim, or disfigure the witness and inflicting serious injury not resulting in death, the admission of evidence relating to the plastic cup in which the acid was contained and to the chemical analysis of the contents of the cup, *held* proper, where (1) defendant offered no objection to the evidence when it was admitted and (2) the State sufficiently connected the liquid analyzed by the chemist with the liquid thrown by defendant. G.S. 14-30.1.

2. **Criminal Law § 162— waiver of objection to evidence**

Failure to object in apt time to evidence constitutes a waiver of objection unless the evidence is forbidden by statute or results from questions asked by the trial judge or a juror.

3. **Mayhem § 1— malicious throwing of acid — intent as ascertained from defendant's acts**

One who, without provocation, deliberately throws corrosive acid or alkali into the face and eyes of another, thereby causing serious injuries, is in no position to complain if a jury finds that he intended his act to produce the very result which it did produce.

4. **Criminal Law § 2—jury finding of intent — nature of evidence**

Juries must frequently ascertain intent from evidence as to a person's actions.

5. **Mayhem § 1— malicious throwing of acid — element of intent**

In a prosecution for maliciously throwing a corrosive acid or alkali, it is not necessary for the jury to find that the intent to mur-

der, maim, or disfigure was the sole or even the dominant motivation for defendant's actions.

6. **Mayhem § 2— malicious throwing of acid — sufficiency of evidence**

In a prosecution charging the defendant with maliciously throwing a corrosive acid or alkali in the face and eyes of the prosecuting witness with the intent to murder, maim, or disfigure the witness, and inflicting serious injury not resulting in death, the State's evidence was sufficient to support a finding of guilt on every essential element of the crime, including intent, where there was testimony that (1) the defendant entered the store in which the prosecuting witness was working; (2) the defendant was carrying a glass or cup filled with some liquid; (3) the defendant brought several items to the counter and told the prosecuting witness to add them up; (4) the defendant said, "Here, do you want this?" and threw the liquid in the witness' face; (5) the prosecuting witness received injuries to his face, neck, and arms, and lost the vision of his right eye; and (6) the liquid remaining in the cup was analyzed as ammonia hydroxide, an alkali.

7. **Criminal Law § 115; Mayhem § 2— malicious throwing of acid — instruction on lesser included offense**

In a prosecution for the malicious throwing of corrosive acid or alkali, any error by the trial court in charging on the lesser included offense of assault could not have been prejudicial to the defendant. G.S. 14-30.1

APPEAL by defendant from *Anglin, J.*, 6 April 1970 Session of MECKLENBURG Superior Court.

Defendant was indicted for maliciously throwing a corrosive acid or alkali in the face and eyes of one James Rayford Wolfe with intent to murder, maim, or disfigure the said Wolfe, inflicting serious injury not resulting in death, a violation of G.S. 14-30.1. He pleaded not guilty.

The State's evidence showed the following events: On the morning of 17 January 1970 defendant and a girl companion came into the Little General Store where Wolfe was employed. Defendant, who had previously been a customer and was known to Wolfe, was carrying in his hand a glass of liquid which Wolfe thought to be a soft drink. Defendant and the girl said that they might want a money order and wandered around the store looking at different items. They then left, saying they would be back. They returned at approximately 2:15 in the afternoon. Defendant was still carrying the glass or cup filled with some liquid. He placed this on the counter. The girl asked Wolfe for a $35.00 money order. While Wolfe was making out the money order, defendant walked around the store and picked up several

items of merchandise. When most of the people had gone out of the store, defendant brought the items of merchandise he had picked up to the counter and asked Wolfe to add them up. Wolfe did so and turned to tell defendant the total. Defendant said, "Here, do you want this?" and threw the liquid in Wolfe's face. Wolfe testified: "The liquid felt like fire thrown in my face. It was all over my face and eyes and I could not see." Wolfe struggled with defendant because, so Wolfe testified, "I figured he was trying to come to the register." Defendant hit Wolfe on the head four or five times with a garbage can lid. Then defendant and the girl fled. Wolfe received injuries to his face, neck, and arms, and lost the vision of his right eye. He received medical and surgical treatment for these injuries and was in the hospital for eight days.

The investigating police officer testified that he found a plastic glass or cup on the counter, which contained three or four ounces of a yellowish or cloudy-looking liquid. He poured this liquid into a baby food jar, which he sealed and took to the police crime laboratory. There he delivered it to a graduate chemist and microbiologist. The chemist testified he analyzed the contents of the baby food container given him at the police department and determined that the substance was ammonia hydroxide. The chemist testified that ammonia hydroxide is an alkali which, when placed on the human body, in effect, breaks down at the bonds between the chemical components of the tissue and dissolves or liquifies it.

Defendant did not testify and offered no evidence. The jury found defendant guilty as charged and the court entered judgment sentencing defendant to prison for a term of ten years. Defendant appealed.

Attorney General Robert Morgan by Trial Attorney James E. Magner, Jr., for the State.

Hasty & Kratt by John H. Hasty for defendant appellant.

PARKER, Judge.

[1, 2] Appellant's first four assignments of error are directed to the admission of evidence relative to the plastic glass or cup and the chemical analysis of its contents. The record reveals and appellant admits that no objection was made at the time this evidence was introduced. It did not result from questions

asked by the trial judge or a juror, nor was it forbidden by statute. Therefore, even if it had been incompetent, failure to object to this evidence in apt time waived any objection so that its admission will not be reviewed on appeal. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534. In our view, however, the evidence was entirely competent and admissible. The State did sufficiently connect the liquid analyzed by the chemist with the liquid which defendant threw in Wolfe's face to permit the jury to find they were the same substance.

[3-6] Appellant next assigns as error the denial of his motions for nonsuit, contending that the State's evidence failed to show the specific intent to "murder, maim or disfigure," an essential element of the crime described in G.S. 14-30.1. We find no merit in this contention. One who, without provocation, deliberately throws corrosive acid or alkali into the face and eyes of another, thereby causing serious injuries, is in no position to complain if a jury finds that he intended his act to produce the very result which it did produce. Juries must frequently ascertain intent from evidence as to a person's actions. Nor was it necessary for the jury to find that the intent to murder, maim, or disfigure was the sole or even the dominant motivation for defendant's actions. The possibility he may have also harbored an intent to rob would not preclude a jury finding he intended to maim his victim in the process. Intent and motivation are often complex; as an element of crime they need not be neatly compartmentalized. There was in this case substantial evidence from which the jury could legitimately find defendant guilty of every essential element of the crime with which he was charged, and there was no error in overruling his motions for nonsuit.

[7] Appellant's assignments of error directed to the court's charge to the jury are also without merit. Indeed, the charge given in this case could well serve as a model of what a clear, brief, and yet complete and accurate instruction to the jury should be. The court accurately stated the evidence to the extent necessary to explain the application of the law thereto and properly declared and explained the law arising on the evidence given in the case. The jury was instructed in clear and understandable language as to what facts they were required to find in order to return their verdict. Under the evidence in this case the court did not commit error in charging on the lesser included offense of assault, and even if this had been error, it would have been prejudicial to the State, not to the defendant,

who has no cause to complain. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525.

In the trial and judgment we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. FOREST ELMO FIELDS

No. 7025SC657

(Filed 16 December 1970)

1. **Criminal Law § 99— questions asked by trial court — expression of opinion**

In this prosecution for felonious breaking and entering and felonious larceny, questions put to witnesses by the trial judge during the course of the trial did not constitute an expression of opinion by the judge but served only to clarify and promote a proper understanding of the testimony of the witnesses.

2. **Criminal Law §§ 89, 169— admission of testimony to corroborate two persons — one person not called as witness — prejudice to defendant**

Defendant was not prejudiced by the admission for corroborative purposes of testimony by a State's witness as to what a police officer and another person had told him occurred at the time of defendant's arrest after the solicitor informed the court that the officer and the other person would later be called as witnesses, notwithstanding the officer was never called as a witness before the jury, where the court instructed the jury to disregard all testimony of the witness as it related to what the officer may have told him, and the witness' testimony did corroborate subsequent testimony given by the other person before the jury.

3. **Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering — automobile larceny — sufficiency of evidence for jury — possession of recently stolen property**

In this prosecution for felonious breaking and entering and felonious larceny, the State's evidence was sufficient for submission of both cases to the jury under the doctrine of possession of recently stolen property, where it tended to show that an automobile was stolen from a building which had been broken and entered, that a short time later the automobile was found in a town 30 miles away, with its motor still warm, parked about 100 feet from the residence in which defendant was arrested, and that the key to the stolen automobile was found in defendant's pocket.

4. Burglary and Unlawful Breakings § 5; Larceny § 7— possession of property recently stolen by breaking and entering — sufficiency of evidence for jury

Where there is sufficient evidence that a building has been unlawfully broken into and entered and property has been stolen therefrom, the possession of such stolen property shortly after the larceny raises presumptions of fact that the possessor is guilty both of the larceny and of the breaking and entering.

ON Writ of *Certiorari* to review judgment of *Copeland, J.*, 15 January 1969 Session of CALDWELL Superior Court.

Defendant was charged in a two-count bill of indictment with (1) felonious breaking and entering and (2) felonious larceny of an automobile valued at approximately $1,000.00. He pleaded not guilty, was found guilty by the jury on both counts, and the two cases were consolidated for judgment. From judgment imposing prison sentence of not less than eight nor more than ten years, defendant filed notice of appeal but failed to perfect his appeal in apt time. Subsequently, the Court of Appeals allowed his petition for writ of *certiorari* to review his trial and the judgment imposed.

Attorney General Robert Morgan by Trial Attorney Lester V. Chalmers, Jr., for the State.

Neil D. Beach for defendant appellant.

PARKER, Judge.

[1] Defendant assigns as error certain questions put to witnesses by the trial judge during the course of the trial. We have carefully examined each of these, and in our opinion no prejudice to defendant resulted from them. The questions asked by the court served only to clarify and promote a proper understanding of the testimony of the witnesses, and in our opinion the asking of these questions did not amount to an expression of opinion by the judge. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376.

[2] During presentation of the State's evidence, the court permitted the State's witness, Fowler, to testify as to what a Mr. Witherspoon and an Officer Stewart had told him had occurred at the time of defendant's arrest. This was permitted only after the court had ascertained from the solicitor that both Witherspoon and Stewart were present and would be called as witnesses. The court instructed the jury that the evidence

by Fowler as to what Stewart and Witherspoon told him was being offered for the sole purpose of corroborating these witnesses when they should testify, if, in fact, the jury should find that it did corroborate them. Thereafter the State called Witherspoon as a witness, and he was examined extensively before the jury on both direct and cross-examination. Officer Stewart was also called as a witness, but only during the course of a *voir dire* examination, and he did not testify before the jury. The trial judge, in going over his notes while charging the jury, discovered that the State had not called Stewart as a witness before the jury as the solicitor had indicated would be done. The judge then instructed the jury as follows: "[A]nything that Captain Fowler told you on the witness stand as it may relate to what Officer Stewart may have told him, you will disregard it completely because I find that Officer Stewart did not take the stand. You will consider that testimony only as to what Captain Fowler said that Mr. Witherspoon told him. And in that regard, you will consider it only as it may corroborate the witness Witherspoon, if you find that it does corroborate him, and you will consider it for no other purpose."

After careful review of the record, it is our opinion defendant suffered no prejudice when the State's witness Fowler was permitted to testify as to what Stewart and Witherspoon had told him. This testimony served only to corroborate the subsequent testimony given by Witherspoon before the jury, during the course of which Witherspoon described in detail the events which occurred at the time of defendant's arrest. The fact that the solicitor inadvertently failed to present Stewart as a witness before the jury to testify further concerning the same events, did not, under the circumstances of this case, render Fowler's previously given testimony prejudicial to defendant. The court correctly instructed the jury to disregard all testimony of Fowler as it related to what Officer Stewart may have told him, and we see no reason why the jury could not correctly apply the court's instruction. "Where evidence is improperly admitted, but the court later withdraws the evidence and categorically instructs the jury not to consider it, it will be presumed that the jury followed the instruction of the court, and the admission of the evidence will not ordinarily be held prejudicial." 7 Strong, N.C. Index 2d, Trial, § 16, p. 281.

[3, 4] Finally, defendant contends his motions for nonsuit should have been granted. We do not agree. The evidence,

considered in the light most favorable to the State, tended to show that at sometime between 3:00 p.m. on Sunday afternoon, 11 August 1968, and 12:30 a.m. on the following Monday morning, an automobile repair shop located on Blowing Rock Road in Caldwell County was broken into and a 1964 Ford automobile valued about $1,100.00 was removed therefrom without permission of the proprietor. At approximately 2:00 a.m. on Monday morning, 12 August 1968, defendant was arrested by police officers and sheriff's deputies in a residence in Conover, approximately 30 miles distant from the place the car had been taken. At the time of defendant's arrest, the stolen car was found with its motor still warm, parked about 100 feet from the residence in which defendant was arrested, and the key to the stolen automobile was found in defendant's pocket. The possession by defendant of the ignition key and the close proximity of the automobile to him while its motor was still warm, gives rise to a permissible inference that defendant had but recently been in possession and control of the automobile. This, coupled with the evidence that the automobile had been stolen from a building located 30 miles distant, which had been broken and entered only a short time before, required submission to the jury of both cases against defendant. It is a well recognized legal principle in this State that where there is sufficient evidence that a building has been unlawfully broken into and entered and property has been stolen therefrom, the possession of such stolen property shortly after the larceny raises presumptions of fact that the possessor is guilty both of the larceny and of the breaking and entering. *State v. Allison*, 265 N.C. 512, 144 S.E. 2d 578. Defendant's motions for nonsuit were properly overruled.

We have carefully examined the entire record, and in the trial and judgment imposed find no prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

L. ISHMAEL WHALEY v. H. SPICER RHODES

No. 708SC672

(Filed 16 December 1970)

1. **Rules of Civil Procedure § 55— entry of default**

An entry of default, as distinguished from a judgment by default, is only an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter; a court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. G.S. 1A-1, Rule 55.

2. **Rules of Civil Procedure § 55— vacating an entry of default — sufficiency of showing of good cause**

Entry of default in an automobile accident case was properly vacated by the trial court upon a showing by the defendant that he had good cause for his failure to file an answer, where defendant offered evidence (1) that he had turned over the complaint to his insurance agent, who assured him that the insurance company would take care of the matter; (2) that after three weeks he checked again with his agent and was assured that the case was being taken care of; (3) that he was next advised that an entry of default had been made against him; and (4) that he had a meritorious defense to the plaintiff's action. G.S. 1A-1, Rule 55.

3. **Rules of Civil Procedure § 55— vacating entry of default**

There is no necessity for a finding of excusable neglect in granting a motion to set aside and vacate the entry of default.

APPEAL by plaintiff from *Peel, Judge,* 24 August 1970 Civil Session of WAYNE County Superior Court.

Plaintiff filed a complaint seeking a judgment against the defendant for injuries allegedly received as a result of negligence on the part of the defendant. The complaint was filed on 24 March 1970 and service was made on the defendant on 25 March 1970. The defendant did not file an answer or otherwise plead. On 27 April 1970, the plaintiff filed an affidavit and motion for default, and on the same day, the clerk entered a default against the defendant.

On 27 July 1970, the defendant filed an affidavit and motion to set aside the entry of default against the defendant, asserting that he had turned over the complaint to his insurance agent who assured him that a copy of the complaint would be sent to the insurance company who would take care of the matter; that after three weeks he checked again with his insurance

agent and was assured that everything was being taken care of; that he was next advised that an entry of default had been made against him; and that he does have a meritorious defense.

After holding a hearing on the motion on 24 August 1970, at which both parties presented evidence, Judge Peel filed an order on 3 September 1970 setting aside and vacating the entry of default under the provisions of Rule 55(d) of the North Carolina Rules of Civil Procedure. He made findings of fact in substantial conformity with those set forth in the affidavit of the defendant, and then made conclusions of law to the effect that defendant's failure to answer the complaint was due to excusable neglect; that defendant has a meritorious defense to the cause of action alleged in the complaint; that there have been no intervening equities that would prejudice plaintiff by allowing defendant to file an answer; and that defendant, under the provisions of Rule 55(d), has shown good cause in support of his motion to set aside the entry of default.

From the order setting aside and vacating the entry of default, the plaintiff appeals to this Court.

Henson P. Barnes and R. Gene Braswell by R. Gene Braswell for plaintiff appellant.

Taylor, Allen, Warren & Kerr by John H. Kerr III, for defendant appellee.

CAMPBELL, Judge.

Plaintiff assigns as error (1) the conclusion of law of the trial judge to the effect that the defendant's failure to file an answer was the result of excusable neglect; and (2) the action of the trial judge in granting the motion to set aside and vacate the entry of default against the defendant.

When an entry of default has been made by the Clerk of the Superior Court, a motion to vacate that entry is governed by the provisions of Rule 55(d) of the North Carolina Rules of Civil Procedure, which became effective 1 January 1970. Rule 55(d) provides as follows:

> "(d) *Setting aside default.*—For *good cause* shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." (Emphasis added).

[1] An entry of default is to be distinguished from a judgment by default. An entry is only an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter; 6 J. Moore, Federal Practice, par. 55.10[1], p. 1827 (2d Ed. 1966); and a court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. Moore, *supra,* par. 55.10[2], p. 1831.

The "entry of default" has been characterized as a "ministerial duty." 2 McIntosh, N. C. Practice 2d, § 1668 (Supp. 1970).

The federal courts, in their application of Rule 55(d), have favored trials on the merits. In *Alopari v. O'Leary,* 154 F. Supp. 78 (E.D. Pa. 1957), the court stated:

> " . . . A motion to set aside a default is addressed to the discretion of the court. Any doubt should be resolved in favor of setting aside defaults so that the cases may be decided on their merits. In view of the lack of any substantial prejudice to plaintiff, the claim of a meritorious defense, and the absence of any gross neglect on the part of defendant, the default will be set aside."

See also *Mitchell v. Eaves,* 24 F.R.D. 434 (E.D. Tenn. 1959).

In *Teal v. King Farms Co.,* 18 F.R.D. 447 (E.D. Pa. 1955), Chief Judge Kirkpatrick set forth some of the distinctions between setting aside an entry of default and setting aside a default judgment.

> "A default, but no judgment having been entered, the defendant's motion is governed by the first clause of Fed. Rules Civ. Proc. rule 55(c), 28 U.S.C. which is 'For good cause shown the court may set aside an entry of default * * . ' The rules evidently make a distinction between what is required to make a good case for setting aside a default and what is required to set aside a judgment. The latter specifies 'mistake, inadvertence, surprise, or excusable neglect.' This has been construed to mean that the mistake, inadvertence, or surprise, as well as neglect, must be excusable in order to give the Court the power to set aside the judgment.
>
> To set aside a default all that need be shown is good cause. There would be no reason for the distinction unless

> Rule 55(c) intended to commit the matter entirely to the discretion of the Court, to be exercised, of course, within the usual discretionary limits. Thus, I think that inadvertence, even if not strictly 'excusable,' may constitute good cause, particularly in a case like the present where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant."

It is clear, under the federal cases, that a determination of whether or not good cause exists rests in the sound discretion of the trial judge, and that the facts and circumstances of the particular case govern. *Elias v. Pitucci,* 13 F.R.D. 13 (E.D. Pa. 1952). See also *Mitchell v. Eaves, supra; Kulakowich v. A/S Borgestad,* 36 F.R.D. 185 (E.D. Pa. 1964). An action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. *Welch v. Kearns,* 261 N.C. 171, 134 S.E. 2d 155 (1964).

[2] In the present case the facts are sufficient to warrant a conclusion by the trial judge that the defendant has shown good cause for his failure to file an answer. Accordingly, the action of the trial judge in vacating the entry of default must be upheld.

[3] It should be pointed out that there is no necessity for a finding of excusable neglect in granting a motion to set aside and vacate the entry of default, hence plaintiff's assignment of error directed at the trial judge's conclusion that excusable neglect existed is to no avail, and such finding was surplusage and though erroneous is not prejudicial.

For the reasons stated, the action of the trial court in setting aside and vacating the entry of default is,

Affirmed.

Judges BRITT and HEDRICK concur.

EDWARD FOREST JOHNSON, BY HIS NEXT FRIEND, EDWARD DANIEL JOHNSON, NOW BY HIS GUARDIAN AD LITEM, DORIS BLACKBURN JOHNSON v. HAROLD JUNIOR SIMMONS, TOLSON AND COLEMAN AND DIXIE BEDDING COMPANY

EDWARD DANIEL JOHNSON, SUCCESSOR IN INTEREST, DORIS BLACKBURN JOHNSON v. HAROLD JUNIOR SIMMONS, TOLSON AND COLEMAN AND DIXIE BEDDING COMPANY

No. 705SC670

(Filed 16 December 1970)

1. **Automobiles § 72— accident case — doctrine of sudden emergency — sufficiency of evidence**

In a minor plaintiff's action for injuries received when his motorcycle collided into the defendant's truck that was turning across the plaintiff's lane of travel, plaintiff's evidence did not warrant an instruction on the doctrine of sudden emergency, where the plaintiff testified (1) that when he first observed the truck a block and a half away the truck was off the edge of the pavement and appeared to be completely stopped, (2) that he saw the truck beginning to pull out onto the pavement when he was less than one hundred feet away, and (3) that the truck entered his lane of travel when he was approximately forty-five feet away.

2. **Trial § 33— instructions to the jury — application of law to the evidence**

The court is required to declare the law and apply the evidence thereto in regard to each substantial and essential feature of the case without any request for special instructions.

3. **Automobiles § 21— doctrine of sudden emergency**

The doctrine of sudden emergency is not available to one who by his own negligence has brought about or contributed to the emergency.

4. **Appeal and Error § 53— error cured by verdict**

When the issue of defendant's negligence was answered in favor of the plaintiffs, plaintiffs were not prejudiced by the admission of challenged testimony that related to the negligence of defendant.

5. **Negligence §§ 38, 42— contributory negligence — instructions on defendant's burden of proof**

Trial court's instructions that, before the jury could answer the question of contributory negligence against the plaintiff, the defendants must satisfy them by the greater weight of the evidence that the plaintiff was guilty of negligence and that such negligence in one or more respects concurred with the negligence of defendants as a proximate cause of plaintiff's injuries, *held* sufficient to establish defendant's burden of proof on the issue of contributory negligence.

APPEAL by plaintiffs from *Cowper, Superior Court Judge,* June 1970 Session of NEW HANOVER Superior Court.

These are civil actions instituted by the minor plaintiff, Edward Forest Johnson, and his father, Edward Daniel Johnson, to recover compensation for personal injuries, loss of services, and medical expenses allegedly resulting from the negligence of the defendants in the operation of a leased tractor-trailer rig on 16 May 1968.

On the afternoon in question the plaintiff, Edward Forest Johnson, eighteen years old, and his cousin rented two Honda motorcycles in Carolina Beach, North Carolina. The minor plaintiff had never driven a motorcycle before that day but was given operating and riding instructions by the rental agent. Approximately one hour later the plaintiff and his cousin were riding the motorcycles in a northerly direction on U. S. Highway 421 in the town of Kure Beach, North Carolina. The defendant, Harold Junior Simmons, was operating a tractor-trailer rig leased by defendant Dixie Bedding Company. Simmons had pulled the truck off the pavement of the southern bound lane of U. S. Highway 421 at the intersection of "I" Street in preparation for making a U-turn. The plaintiff testified that when he first saw the truck it was off the edge of the pavement facing him about a block to a block and one-half away and appeared to be "completely stopped, standing still." He further testified that he saw the truck begin to pull out onto the pavement when he was less than one hundred feet away, and that when he was approximately forty-five feet away the truck entered his lane of travel. The plaintiff braked and geared down the motorcycle in an attempt to stop, but struck the truck somewhere in the side near the rear wheels, resulting in personal injury to him.

The issues of negligence, contributory negligence, and damages were submitted to the jury in each case. The jury for its verdict found in each case that the minor plaintiff was injured by the negligence of the defendants, and that the minor plaintiff, Edward Forest Johnson, did by his own negligence contribute to his injuries.

From the entry of judgment on the verdict in each case, the plaintiffs appealed.

Stevens, Burgwin, McGhee & Ryals, by Ellis L. Aycock, for plaintiff appellants.

Marshall, Williams & Gorham, by Lonnie B. Williams; John F. Crossley, by Robert White Johnson, for defendant appellees.

HEDRICK, Judge.

The plaintiffs bring forth and argue a total of twenty assignments of error which may be grouped into three major contentions.

[1-3] First, the plaintiffs argue that the court committed prejudicial error by failing to instruct the jury with regard to the doctrine of sudden emergency. The court is required to declare the law and apply the evidence thereto in regard to each substantial and essential feature of the case without any request for special instructions. *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785 (1962); *Tharpe v. Brewer,* 7 N.C. App. 432, 172 S.E. 2d 919 (1970). The principle of sudden emergency is not available to one who by his own negligence has brought about or contributed to the emergency. *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593 (1947); *Rodgers v. Thompson, supra.* Applying these principles to the instant case, the court was required to instruct the jury on the doctrine of sudden emergency, even in the absence of special request, only if the evidence disclosed that a sudden emergency did in fact exist and that the plaintiffs did not in any way contribute to it. *Hoke v. Greyhound Corp., supra.*

The minor plaintiff's testimony in the instant case reveals that when he first observed the defendants' truck it was off the edge of the pavement facing him about a block to a block and a half away and appeared to be completely stopped. He further testified that he saw the truck begin to pull out onto the pavement when he was less than one hundred feet away, and that when he was approximately forty-five feet away the truck entered his lane of travel. Thus, it appears that insofar as the plaintiffs are concerned any sudden emergency which may have existed arose as a result of the minor plaintiff's failure to keep and maintain a proper lookout, and his lack of due care under the circumstances then and there existing.

[4] Next, the plaintiffs contend that the court erred in the admission of certain testimony. An examination of each exception upon which these assignments of error are based reveals that the testimony complained of related to the negligence of the defendant. The jury answered the issue as to the negligence of the defendant in favor of the plaintiffs; therefore, the plaintiffs have not shown any prejudicial error by the admission of the challenged testimony.

[5] Finally, the plaintiffs contend that the court failed to charge the jury that the burden of proof with respect to the issue of contributory negligence was on the defendant. We have carefully reviewed the challenged portion of the charge, and find that the trial judge repeatedly instructed the jury that before they could answer the question of contributory negligence against the plaintiffs, the defendants must satisfy them by the "greater weight of the evidence" that the minor plaintiff was guilty of negligence and that such negligence in one or more respects concurred with the negligence of the defendants as a proximate cause of the injuries to the minor plaintiff.

We have examined and considered all the plaintiffs' assignments of error and find that the plaintiffs had a fair trial in the superior court free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

NORMAN D. DALY BY HIS AGENT GRACE W. DALY v. ALDRED WEEKS

— and —

GRACE W. DALY v. ALDRED WEEKS

No. 708DC624

(Filed 16 December 1970)

1. **Contracts § 26; Evidence § 40— opinion testimony — income from crops — failure to give basis for opinion**

In this action to recover damages for the alleged failure of defendant to perform properly his contract to farm plaintiffs' land during the crop year 1969, the trial court erred in allowing plaintiffs' witness to give his opinion as to the income which would have been received from each crop with proper care without basing the opinion upon facts in evidence.

2. **Contracts § 27— breach of contract to farm land — sufficiency of evidence for jury**

Plaintiffs' evidence was sufficient for the jury in this action for breach of a contract to farm plaintiffs' land during the crop year 1969.

3. **Appeal and Error § 31— assignment of error based on failure to charge**

An assignment of error based on failure to charge should set out appellant's contention as to what the court should have charged.

Daly v. Weeks

APPEAL by defendant from *Wooten, District Court Judge,* 25 May 1970 Session, WAYNE County District Court.

These are two actions brought by plaintiff to recover damages for the alleged failure of defendant to properly perform his contract to farm plaintiffs' land during the crop year 1969. Plaintiff brings one action in her own behalf and the second as agent for her husband.

The evidence tends to show the following: In the fall of 1968 defendant entered into an oral contract with plaintiff Grace W. Daly, acting for herself in one instance and as agent for her husband, Norman D. Daly, in the other. The contract called for defendant in 1969 to farm the lands owned by plaintiff and her husband on "thirds." "The contract was that he was to tend the crops and whatever the crops brought after the costs of the crop was made he would get two-thirds and we would get one-third. He would pay two-thirds of the fertilizer and curing gas and we would pay one-third."

During the 1969 crop season defendant planted 10 acres of wheat, 7 or 8 acres of soybeans, 35 acres of corn, and 5 acres of tobacco. Defendant harvested all of the wheat except about 1 and ½ acres which he left in the field.

In July 1969 plaintiff became concerned over the condition of the crops and the manner in which defendant was tending them. On 25 July 1969 plaintiff instituted actions for summary ejectment of defendant. These ejectment actions were dismissed upon defendant's appeal to the District Court, and the present actions were instituted shortly thereafter. Ancillary to the present actions, upon motion of plaintiff, a receiver was appointed to complete the marketing of the crops.

Upon trial the jury awarded damages to plaintiff in each action. Defendant appealed.

Joseph H. Davis for plaintiff.

Herbert B. Hulse and George F. Taylor, by Herbert B. Hulse, for defendant.

BROCK, Judge.

[1] Defendant assigns as error the admission of testimony as to damages. It is defendant's contention that plaintiffs' witness

merely gave an opinion as to the amount plaintiff should have received as one-third of each crop in 1969 without giving any basis for arriving at the opinion. We think defendant's assignment of error has merit.

Plaintiffs' witness Norman Daly was allowed to give opinion testimony. The record discloses the following question and answer with respect to the tobacco crop:

> "Q. All right, sir, Mr. Daly, do you have an opinion satisfactory to yourself as to how much the entire tobacco crop, this is the total sales yours and Mr. Weeks' part would amount to in 1969, based on your knowledge of the potential of the land, the season that you had during the crop year, 1969, and the market prices that tobacco brought in 1969, do you have an opinion satisfactory to yourself as to how much the 1969 crop would have brought properly taken care of, tended, cultivated, Mr. Daly? Objection. Overruled.
>
> A. I do.
>
> Q. Now, Mr. Daly, in your opinion how much would that tobacco crop have brought last year properly taken care of? Objection. Overruled.
>
> A. Around $8700.00."

In answer to similarly phrased questions the witness was allowed to answer over objections that the total income from the corn crop would have been $2,000.00; the total income from the wheat crop would have been $1,000.00; the total income from the soybean crop would have been $600.00; and that the total combined income from all of the crops would have been $12,300.00.

The only qualifying testimony and only explanatory testimony as to how the witness arrived at his figure is as follows: "We had farmed for about 38 to 40 years before I retired in 1965. I farmed my farm from 1941 until I retired and farmed my wife's farm from 1934 until I retired. I'm acquainted with the crop season that I had on mine and my wife's farm during the crop year 1969. I am familiar with the market prices that tobacco, corn, soybeans and wheat brought during 1969."

On cross-examination the witness made it clear that the figures he had given were not arrived at by any calculation of

soil quality, weather, expenses, sales, or any other factor; but only "what I thought the crop should bring."

"If any of the factors involved in revenue and costs are estimated, the estimates must be based on facts. A witness will not be permitted to give a mere guess or opinion, unsupported by facts, as to the amount of damages arising upon a breach of contract. The amount of damages is the ultimate issue to be determined by the jury. It is incumbent upon the plaintiff to present facts, as to all reasonable factors involved, that the jury may have a basis for determining damages," *Tillis v. Cotton Mills,* 251 N.C. 359, 111 S.E. 2d 606.

The admission of the opinion testimony as to damages without basing the opinion upon facts in evidence from which the jury could make its reasonable determination of damages was prejudicial error.

[2] Defendant assigns as error the failure of the trial judge to grant his motions for directed verdicts. The evidence of breach of contract required submission of the case to the jury. This assignment of error is overruled.

[3] Defendant's assignments of error to the charge of the Court to the jury are based on defendant's assertion that the Court failed to instruct the jury in certain respects. An assignment based on failure to charge should set out the defendant's contention as to what the Court should have charged. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. Defendant has failed to do this and the assignment of error is overruled.

For the errors in admission of evidence, there must be a

New trial.

Judges MORRIS and VAUGHN concur.

DELMA JEREMIAH MOORE v. JULIUS RAY BUTLER

No. 705DC662

(Filed 16 December 1970)

Automobiles § 79— accident at intersection — plaintiff's contributory negligence

In an automobile accident case arising out of a collision at an intersection not controlled by a stop sign or a traffic light, plaintiff's evidence established his contributory negligence as a matter of law in failing to yield the right of way to the defendant's car, which had approached the intersection from the plaintiff's right.

APPEAL by defendant from *Burnett, Judge,* 2 July 1970 Session, NEW HANOVER District Court.

In this action plaintiff seeks to recover for personal injury allegedly sustained by him in a collision between an automobile operated by him and an automobile operated by defendant at the unmarked and uncontrolled intersection of Ann and Seventh Streets in the City of Wilmington. Plaintiff was traveling east on Ann Street and defendant was traveling north on Seventh Street, with defendant approaching the intersection from plaintiff's right and plaintiff approaching the intersection from defendant's left. Plaintiff's evidence tended to show that each street was approximately 25 ft. wide at the intersection and that plaintiff's car was struck near the center of its right side by the front of defendant's car. Issues of negligence, contributory negligence and amount of damage were submitted to and answered by a jury in favor of plaintiff and from judgment entered thereon, defendant appealed.

Robert White Johnson for plaintiff appellee.

Smith and Spivey by W. G. Smith for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to allow his timely made motions for directed verdict on the ground of plaintiff's contributory negligence as a matter of law. The assignment of error is sustained.

Plaintiff's evidence pertaining to this assignment tended to show: At approximately 9:00 p.m. on 25 October 1969 plaintiff was driving his automobile east on Ann Street. As he

approached the intersection with Seventh Street "I looked both ways, I didn't see anything. As to how far I could see when I looked there, I could see about 10 or 12 feet each way. As to what prohibited me from seeing further than that, I say there was a couple of trees along about here and I couldn't see. And there was a funeral home." When plaintiff got to a point in the intersection where he could see, he stated, "While I was in the southbound lane of 7th Street, I did not at any time look to my right. I did not at any time look to my left. I was looking straight ahead. As to whether or not I focused my attention straight ahead to the exclusion of my right or left, I say 'while I was in the southbound lane, yes.' . . . . If my car was moving at 5 miles per hour I could still have seen his headlights 4 or 5 blocks to my right if I had looked down 7th Street. If I had looked, yes. I was looking straight ahead. I didn't look down 7th Street at all while I was in the southbound lane. As to whether I had gone all the way across the center of 7th Street before I ever looked, I say, no sir, I was in the middle of the street. Yes sir, I said I was half way across the street before I ever looked. . . . . And as to whether I had gone more than half way across 7th Street before I ever looked to my right, I say as I was going across, yes. As to whether I would not have looked then but for the fact his lights were shining in my face, I say 'it was shining on the side of my face.' That is the only reason I looked then. At that time, when I first looked, he was only 6 to 8 feet away from me, something like that, that's my best estimate."

We think this case is controlled by *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686 (1957) which has a very similar factual situation. The scene of the collision in that case was an uncontrolled intersection in the City of Rocky Mount on a clear November day in midmorning. As plaintiff approached the intersection where the collision took place he reduced his speed, looked to the left and right while about 10 feet from the intersection, and not seeing any vehicle on the intersecting street proceeded into the intersection without looking again and was struck on the right by the defendant's auto at a time when the front of plaintiff's vehicle was already across the intersection. Plaintiff testified that he could see in the direction that the defendant came for a distance of 100 to 125 feet.

In upholding the nonsuit awarded defendant in the trial court, the Supreme Court cited the controlling statute, G.S.

20-155(a), which is substantively identical to Section 15-45(a) of the Municipal Ordinances of the City of Wilmington relied on by plaintiff here, and said:

> "Where at about the same time two vehicles approach an intersection which has no stop signs or traffic control signals, the vehicle on the right has the right of way . . . , and they approach the intersection at approximately the same time within the purview of this rule when their respective distances from the intersection and relative speeds, and other attendant circumstances, show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed."

Although plaintiff in the case at bar might have arrived at the intersection a split second or two sooner that defendant, he did not have the right of way. Plaintiff approached the intersection from the left, and under the city's ordinance it was incumbent upon him to slow down and yield the right of way. *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147 (1953). Plaintiff's testimony indicates that he did not slow down and yield the right of way to the defendant for the reason that plaintiff was not maintaining a proper lookout and did not see the defendant's vehicle. Plaintiff's testimony further reveals that while he looked before entering the intersection, he did so at a point where he could not see vehicles approaching the intersection from his right. Plaintiff was faced with the duty of looking and seeing what he ought to have seen; his admitted conduct prohibits any recovery. *Taylor v. Brake, supra.*

Defendant's motion for a directed verdict on the ground that plaintiff's evidence showed contributory negligence on his part as a matter of law should have been sustained.

The judgment of the district court appealed from is

Reversed.

Judges CAMPBELL and HEDRICK concur.

WILLIAM H. DOTSON v. ALLIED CHEMICAL CORPORATION AND WILLIAM LOWNDES CAIN

No. 7010SC437

(Filed 16 December 1970)

1. **Appeal and Error § 49— failure of record to show what excluded testimony would have been**

The Court of Appeals cannot determine whether the exclusion of testimony was prejudicial error where counsel made no attempt to have the excluded testimony entered on the record.

2. **Evidence § 50— stipulation that witness is expert in orthopedic surgery — exclusion of testimony as to witness' qualifications**

In this action to recover for injuries allegedly sustained in an automobile accident, the trial court erred in refusing to permit plaintiff's expert medical witness to define his specialty (orthopedic surgery) for the jury or to state the length of his practice, notwithstanding defendants had stipulated that the witness was an expert in orthopedic surgery, since plaintiff was entitled to present evidence of the medical expert's qualifications to aid the jury in determining his credibility as a medical witness.

APPEAL by plaintiff from *Bailey, Judge of the Superior Court,* 17 November 1969 Session, WAKE Superior Court.

Plaintiff instituted this civil action to recover damages for injuries allegedly sustained on 24 July 1965, when an automobile, registered in the name of the corporate defendant, and allegedly being operated by the individual defendant within the scope of his employment as an agent of the corporate defendant, collided with the rear end of the plaintiff's automobile, by reason of the alleged negligence of the individual defendant. The defendants filed an answer denying the material allegations of the complaint, and pleading contributory negligence in bar of plaintiff's action.

Plaintiff's evidence tended to show the following: On 24 July 1965, plaintiff was proceeding northwardly on U. S. Highway 301, south of Weldon, North Carolina; the automobile operated by the defendant Cain was following the plaintiff's automobile at a distance of 200-250 feet; the weather was clear, the road dry, and the traffic heavy; the plaintiff stopped behind an automobile driven by one Smith, to allow the vehicle in front of the Smith vehicle to make a left turn; the plaintiff's stop was not sudden and plaintiff gave a hand signal; that, after skidding a distance of 175-200 feet, the defendant's auto-

mobile collided with the rear end of the plaintiff's automobile, with force sufficient to knock it a distance of 30 feet into the Smith vehicle; that no luggage was carried in the back seat of plaintiff's automobile; that plaintiff suffered serious and permanent injuries and was still subject to frequent pain at the time of the trial; that plaintiff has undergone painful and costly medical treatments.

Defendants' evidence tended to show the following: That the defendant Cain was engaged in a personal errand, and was not acting as the agent of the corporate defendant; that the plaintiff's rear window was completely obstructed with luggage; that the plaintiff did not stop, but was moving at the time of the collision; that the defendant was unable to swerve to the left because of oncoming traffic, or to the right because of a telephone pole; that the defendant braked as hard as he could and then "eased" into the plaintiff's automobile, with very slight impact; that defendant did not see plaintiff give a hand signal; that immediately after the collision, plaintiff stated to the defendant that no one in his car was injured, except plaintiff's daughter, whose nose was bleeding.

Defendants' motion for judgment as of nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence, was denied.

The jury answered in the negative the question, "Was the plaintiff injured by the negligence of the defendant William Lowndes Cain?", upon which verdict judgment was entered for the defendants.

Yarborough, Blanchard, Tucker & Denson, by Charles F. Blanchard for plaintiff-appellant.

Smith, Anderson, Dorsett, Blount & Ragsdale, by Willis Smith, Jr., for defendants-appellees.

BROCK, Judge.

[1] Plaintiff assigns as error that he was not permitted to testify as to his physical condition prior to the accident. We note that counsel made no attempt to have the answers to his questions entered on the record; thus we cannot determine whether the exclusion of this evidence was prejudicial. However, the plaintiff was allowed, in an earlier portion of his testimony,

to state facts indicative of good condition prior to the collision with defendant.

[2] Plaintiff assigns as error that the trial court did not permit his expert medical witness to define his specialty (orthopedic surgery) for the benefit of the jury, or to state the length of his practice. Defendants had stipulated that the witness was an expert in orthopedic surgery, and contended that no further evidence as to his qualifications was permissible.

Plaintiff contends that, because of the exclusion of this evidence of his witness' qualifications, the jury was unable to give due weight to his testimony as to the cause and extent of plaintiff's injuries, and thus, may have been led to find that plaintiff was not injured. We agree. Expert witnesses may state their opinions "for the reason lay jurors do not possess the expert knowledge, skill, or training necessary to enable them to make the deduction for themselves." *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828. The jury is unable to make independent judgments as to matters involving medical expertise; thus, the weight which it gives to such testimony must depend on its estimation of the knowledge, skill, and veracity of the witness. It follows that the plaintiff had a right that the jury be given some basis for arriving at such an estimation intelligently. The defendants' stipulation as to Dr. Moore's expertise merely removed the necessity for the trial judge to make a ruling on whether the witness would be allowed to testify as an expert. *Credibility* is quite another matter. Of course, it remains within the province of the trial judge to prevent protracted questioning in regard to qualifications after there has been a stipulation that the witness is an expert.

Plaintiff's assignment of error that he was prejudiced by the misconduct of a juror is abandoned on appeal. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

It is unnecessary to discuss plaintiff's remaining assignments of error.

New trial.

Judges MORRIS and GRAHAM concur.

JOHNNY RAY BAKER v. DR. PEPPER BOTTLING CO. OF WILSON, INC.

No. 707SC564

(Filed 16 December 1970)

Automobiles § 57— highway intersection collision — sufficiency of evidence

Plaintiff's evidence that defendant's agent, who was traveling on a servient road, approached the dominant road on which plaintiff was traveling and stopped in obedience to a stop sign controlling the servient road, and that defendant's agent then proceeded onto the dominant road at a time when plaintiff was in such proximity to the servient road that the agent's movement could not be made in safety, *held* sufficient to permit, but not compel, the jury to find that the agent was negligent in one or more respects and that his negligence proximately caused plaintiff's injuries.

APPEAL by plaintiff from *Peel, J.*, 4 May 1970 Civil Session, NASH Superior Court.

This civil action was instituted by plaintiff to recover damages for personal injuries allegedly received by plaintiff when a bread truck operated by him collided with a truck owned by defendant and operated by its employee at the intersection of U.S. Highway 301-A and rural paved road 1340 in Wilson County on 27 June 1969. Pertinent allegations of the complaint are summarized as follows: At about 10:45 a.m. on said date plaintiff was operating a bread truck in a southerly direction on U.S. 301-A and defendant's driver was operating defendant's truck in a westerly direction on road 1340. At the intersection of said roads 301-A was designated as the dominant highway and 1340 the servient highway, with stop signs being duly erected on 1340 on each side of 301-A. As plaintiff approached the intersection, he observed defendant's driver approach the eastern side of 301-A and stop; just before plaintiff arrived at the intersection, defendant's driver drove defendant's truck into the intersection, causing the collision and plaintiff's resulting injuries. The collision and injuries were proximately caused by defendant's driver's negligence, particularly his failure to yield the right-of-way to plaintiff, his failure to keep a proper lookout, and his failure to keep defendant's truck under proper control.

In its answer, defendant denied any negligence on the part of its driver and further alleged that plaintiff was contribu-

torily negligent in that he drove at an excessive rate of speed, failed to decrease his speed at an intersection and when a special hazard existed, failed to keep his truck under proper control, and failed to exercise due care in avoiding a collision.

Both parties offered evidence generally supporting their respective allegations. The posted speed limit on 301-A was 45 mph, and plaintiff testified that he was driving 40-45 mph. The investigating patrolman testified that one tire mark 39 feet long and another 53 feet long led northward from the vehicle operated by plaintiff; that plaintiff's vehicle was damaged about its front and defendant's vehicle was damaged near its right rear. Defendant's evidence disclosed that its truck was approximately 27 feet long—the same as the width of 301-A at the intersection—that it was loaded at the time giving it a total weight of 18,000 pounds, and that it was overturned in the highway.

At the conclusion of plaintiff's evidence and at the conclusion of all the evidence, defendant moved for a directed verdict on the grounds of (1) absence of negligence on the part of defendant's driver, (2) contributory negligence as a matter of law on the part of plaintiff, and (3) errors committed during the course of the trial. The motion was denied when first made but allowed at the close of all the evidence. From judgment dismissing the action and taxing him with the cost, plaintiff appealed.

Thorp and Etheridge by William D. Etheridge for plaintiff appellant.

Battle, Winslow, Scott and Wiley by Samuel S. Woodley, Jr. for defendant appellee.

BRITT, Judge.

Did the trial court err in allowing defendant's motion for a directed verdict? We hold that it did.

Considered in the light most favorable to him, plaintiff's evidence indicated that defendant's agent while traveling on the servient road approached the dominant road, stopped in obedience to a stop sign controlling the servient road, and proceeded onto the dominant road at a time when plaintiff was traveling thereon in such proximity that the agent's movement

could not be made in safety. The evidence was sufficient to permit, but not compel, the jury to find that defendant's agent was negligent in one or more of the respects alleged and that his negligence proximately caused plaintiff's injuries. *Day v. Davis,* 268 N.C. 643, 151 S.E. 2d 556; *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17. Plaintiff's evidence did not disclose contributory negligence as a matter of law.

The evidence for defendant concerning the length of the skid marks of plaintiff's vehicle, the great force with which plaintiff's vehicle struck the heavy truck of defendant, the openness of the road at the scene of the collision, and the ease with which plaintiff could have avoided the collision, was sufficient to permit, but not compel, the jury to find that plaintiff was contributorily negligent. *Hawes v. Refining Co., supra.*

The evidence presented made out a case for the jury on the usual issues of negligence, contributory negligence, and amount of damage, therefore, the judgment appealed from is

Reversed.

Judges CAMPBELL and HEDRICK concur.

WALTER FARR, JR., ADMINISTRATOR OF THE ESTATE OF JAMES EARL FARR v. THE CITY OF ROCKY MOUNT

No. 707SC545

(Filed 16 December 1970)

Municipal Corporations §§ 9, 42— action against city prior to new Rules of Civil Procedure — validity of service of process on city manager

The mayor was not the only official of the City of Rocky Mount upon whom service of process could be made in an action instituted against the City prior to 1 January 1970, and service of summons on the city manager was sufficient to give the court jurisdiction over the City.

APPEAL by defendant, The City of Rocky Mount, from *Peel, J.,* 4 May 1970 Session of NASH Superior Court.

This is a civil action instituted by plaintiff on 3 July 1969 as administrator of the estate of James Earl Farr for the recovery of damages for the wrongful death of plaintiff's intestate

on 26 June 1968 at a swimming pool allegedly owned and operated by the defendant in the City of Rocky Mount. Summons was served on 10 July 1969 upon defendant's City Manager. On 22 July 1969, defendant made a special appearance and moved to dismiss the action on the ground that the court had not acquired jurisdiction over the defendant by service on the City Manager. From an order entered on 21 May 1970 overruling the defendant's motion to dismiss, the defendant appealed to the North Carolina Court of Appeals.

Lucas, Rand, Rose, Meyer & Jones, by David S. Orcutt, for plaintiff appellee.

DeWitt C. McCotter III, for defendant appellant.

HEDRICK, Judge.

The question presented on this appeal is whether service of summons on the defendant's city manager on 10 July 1969 gave the court jurisdiction over the defendant municipal corporation. Section 62 of the Charter of the City of Rocky Mount provides:

"Duties of the mayor.

"The Mayor shall preside at all meetings of the City Council and shall have a casting vote in case of an equal division. He shall be recognized as the official head of the City for all ceremonial purposes by the courts for the purpose of serving civil process."

The defendant contends that prior to 1 January 1970, because of the provisions of Section 62 of its charter, the courts could obtain jurisdiction over the City of Rocky Mount only by service of summons upon its mayor. We do not agree. Section 62 of the Charter of the City of Rocky Mount enumerates the duties of its mayor. The statement, "[h]e shall be recognized as the official head of the City for all ceremonial purposes by the courts for the purpose of serving civil process," does not mean that the mayor is the only city official upon whom service of process might be had.

In *Grimes v. Lexington,* 216 N.C. 735, 6 S.E. 2d 505 (1940), our Supreme Court indicated that the courts might obtain jurisdiction over the city by service of summons upon its city manager. There the plaintiff, who had filed a verified complaint,

made a motion for judgment on the pleadings on the ground that the verification was insufficient. In holding that the verification was sufficient, the Supreme Court stated:

> "It is provided by C.S., 531, that when a corporation is a party, the verification of a pleading may be made by 'any officer, or managing or local agent thereof upon whom summons might be served.' And C.S., 483, provides that if the action is against a corporation, summons shall be served by delivering copy thereof 'to the president or other head of the corporation . . . managing or local agent thereof.' It follows, therefore, that as the City Manager of the defendant is its 'managing or local agent,' he is authorized to verify its answer herein."

In *Jester v. Steam Packet Co.*, 131 N.C. 54, 42 S.E. 447 (1902), Montgomery, J., in discussing the validity of the service of summons, stated:

> "The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice."

See also *Morton v. Insurance Co.*, 250 N.C. 722, 110 S.E. 2d 330 (1959); *Ryan v. Batdorf*, 225 N.C. 228, 34 S.E. 2d 81 (1945).

It is our opinion that the Mayor of the defendant City was not the only city official upon whom service of summons could have been made, and that service of summons upon the City Manager afforded the defendant proper notice.

The order appealed from is

Affirmed.

Judges CAMPBELL and BRITT concur.

WILLIAM T. MASON v. DOUBLE OAKS APT., INC.

No. 7026DC592

(Filed 16 December 1970)

1. **Injunctions § 12— temporary injunction — show cause hearing — burden of proof**

At a hearing to show cause why an injunction should not be continued pending the final hearing on the merits, the burden is on the party seeking the injunctive relief to establish (1) that there is probable cause to believe that the party will ultimately prevail in a final determination of the case, and (2) that irreparable harm will befall the party if the injunctive relief is not ordered.

2. **Ejectment § 1— summary eviction judgment — acceptance of subsequent rents — estoppel**

A landlord who accepts rents accruing after the entry of a summary eviction judgment against his tenant is not estopped from regaining possession of the premises pursuant to the summary eviction judgment.

3. ***Ejectment §§ 1, 5— summary eviction judgment — rights of landlord***

A landlord is clearly entitled to the amount of rent specified in the summary eviction judgment.

APPEAL by plaintiff from *Gatling, District Judge,* 27 April 1970 Civil Term of MECKLENBURG County District Court.

This is a civil action by the plaintiff, William T. Mason (Mason), to recover damages and injunctive relief allegedly resulting from the eviction of the plaintiff from an apartment owned by the defendant, Double Oaks Apt., Inc. (Double Oaks).

The facts pertinent to this appeal are as follows: Mason leased an apartment from Double Oaks on a week-to-week tenancy from 1952 until 28 February 1970. On 13 March 1970 Double Oaks instituted summary ejectment proceedings against Mason alleging that his rental term had expired on 28 February 1970 and demanded possession of the premises as well as $21.72 in rents allegedly due. On 23 March 1970 Eloise M. Stillwell, Magistrate, entered a default judgment against Mason awarding Double Oaks possession of the premises and $21.72 in rents plus costs of the action. On 24 March 1970 Mason gave Double Oaks two money orders totaling $44.00 which were accepted by Double Oaks in return for receipts which showed a $2.00 balance

still owing. On 1 April 1970 Mason tendered to Double Oaks another money order for $21.00 which was refused. On 7 April 1970, pursuant to a writ of possession issued on 3 April 1970 and served on 6 April 1970, the sheriff of Mecklenburg County removed Mason's belongings from Double Oaks Apartment. On 10 April 1970 Mason instituted this action against Double Oaks alleging that his eviction was illegal and praying that (1) the writ of possession which precipitated his eviction be quashed; (2) a writ of restitution be issued to restore him to possession of the premises; (3) he be awarded $95.00 in damages; (4) a temporary and preliminary injunction issue to prevent his eviction pending a final hearing on the merits; and (5) that a permanent injunction issue to permanently restrain the defendant from evicting the plaintiff unless consonant with law. On the same day, 10 April 1970, Grist, Superior Court Judge, entered an *ex parte* order temporarily restraining the defendant from renting or leasing the apartment in question pending further order of the court. An order of Thornburg, Superior Court Judge, dated 27 April 1970, remanded the matter to the District Court for a hearing which was held before Gatling, District Court Judge, on 28 April 1970. Following the hearing, Judge Gatling made findings of fact and conclusions of law in which he refused to issue the further injunctive relief prayed for, and ordered the temporary restraining order dissolved.

From this order the plaintiff appealed to the North Carolina Court of Appeals.

Gail F. Barber, James Long and Thomas Wyche, by James Long, Legal Aid Society of Mecklenburg County, for plaintiff appellant.

John D. Shaw for defendant appellee.

HEDRICK, Judge.

[1] The plaintiff was granted an *ex parte* temporary restraining order on 10 April 1970 which enjoined the defendant from renting or leasing the apartment previously occupied by the plaintiff pending further hearing and order of the court. At a hearing to show cause why the injunction ought not to be continued pending the final hearing on the merits, the burden is on the party seeking the injunctive relief to establish (1)

that there is probable cause to believe that the party will ultimately prevail in a final determination of the case, and (2) that irreparable harm will befall the party if the injunctive relief is not ordered. *Edmonds v. Hall,* 236 N.C. 153, 72 S.E. 2d 221 (1952); *Cablevision v. Winston-Salem,* 3 N.C. App. 252, 164 S.E. 2d 737 (1968).

[2, 3] The plaintiff contends that " . . . a lessor who accepts rent from his tenant *qua rent,* after judgment of summary eviction against the tenant and in an amount exceeding that awarded in such judgment, thereby waives his right to rely upon the eviction judgment and becomes estopped to issue out a writ of possession based thereon." This contention is without merit. The landlord is clearly entitled to the amount of rent specified in the summary eviction judgment. In addition, the landlord is entitled to accrued rents which are not included in the judgment. Acceptance of these subsequently accrued rents does not estop the landlord from regaining possession pursuant to the summary eviction judgment. *Mauney v. Norvell,* 179 N.C. 628, 103 S.E. 372 (1920); *Vanderford v. Foreman,* 129 N.C. 217, 39 S.E. 839 (1901). The plaintiff has therefore failed to show probable cause that he will prevail in a final determination of the question.

We do not discuss whether the appellant made a sufficient showing of irreparable harm since the failure of one of the requirements will support the dissolution of the temporary restraining order and a denial of further injunctive relief.

The order of the District Court dissolving the temporary restraining order is affirmed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ELVIN DAVID GRIFFIN

No. 7027SC607

(Filed 16 December 1970)

1. **Indictment and Warrant § 14— grounds for quashal of indictment**

An indictment may be quashed for want of jurisdiction, irregularity in the selection of the jury, or defect in the bill of indictment; however, an asserted variance between the allegations of the indictment and the proof is properly raised by motion for nonsuit.

2. **Criminal Law § 76— voluntariness of confession — necessity for findings of fact**

Where the evidence relating to the voluntariness of defendant's confession was conflicting, the admission of the confession without factual findings from which the appellate court could determine whether the trial court committed legal error is erroneous and entitles the defendant to a new trial.

APPEAL by defendant from *Falls, Judge of the Superior Court,* 9 June 1970 Session, GASTON Superior Court.

Defendant was charged in a two-count bill of indictment with felonious breaking or entering; and with felonious larceny after breaking or entering. The State elected to take a *nol pros* on the second count and to prosecute defendant only upon the felonious breaking or entering count.

From a verdict of guilty, and a sentence of not less than eight nor more than ten years, defendant appealed.

Attorney General Morgan, by Trial Attorney Magner, for the State.

Robert C. Powell for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial court denied his motion to quash the indictment. An indictment may be quashed for want of jurisdiction, irregularity in the selection of the jury, or for defect in the bill of indictment. 4 Strong, N. C. Index 2d, Indictment and Warrant, § 14, p. 359. But an asserted variance between the allegations of the indictment and the proof is properly raised by motion for nonsuit. *State v. McDowell,* 1 N. C. App. 361, 161 S.E. 2d 769.

We have carefully examined the bill of indictment, and although it is not a model to be followed, it adequately charges defendant with felonious breaking and entering, jurisdiction is apparent, and there is no contention of irregularity in selecting the jury.

Defendant undertakes to assign as error that defendant's confession was admitted in evidence "where there was no evidence of a written waiver of the defendant's constitutional rights and where there was no warning that the defendant could have an attorney present." Defendant argues that G.S. 7A-457 specifically requires that a waiver of counsel must be in writing. The question of the requirements of G.S. 7A-457 is not presented by defendant's assignment of error. The exception upon which the assignment of error is based is an exception to the failure of the trial judge to make findings of fact touching upon the voluntariness of defendant's confession; this same exception is the basis for defendant's further assignment of error which we consider below.

[2] Defendant assigns as error that the trial court made no findings of fact with respect to the voluntariness of defendant's confession. When defendant's confession was offered in evidence, defendant objected, and the trial court very properly sent the jury out and conducted a preliminary inquiry to determine the voluntariness of the confession. Testimony was taken from two witnesses for the State and two witnesses for defendant, and the evidence was in conflict. The only ruling or finding by the trial court was as follows:

> "Based upon the foregoing testimony elicted from the witness in the absence of the jury, the Court finds as a fact that the statement reduced to writing in the defendant's handwriting on the nineteenth day of March, 1970, in the Mt. Holly Police Department, was freely, voluntarily, and understandingly made, without the inducement of any promise or threat and the Court further finds it a fact that the paperwriting identified by Officer Hinson and signed by the defendant after the same was read to him—that the information contained in this statement was freely, voluntarily and understandingly given, without threats or promises of any kind or nature and that the evidence obtained at the Mt. Holly Police Department is competent and admissible before the jury."

From this ruling by the trial court it is impossible to determine upon what set of facts the conclusions of voluntariness are based. The evidence was such that varied fact situations could be found, depending upon the weight and credit given the testimony by the trial judge. Therefore we cannot tell whether the trial court's conclusions are supported by the facts. The admission of defendant's confession without factual findings from which we can determine whether legal error was committed by the trial court was erroneous and entitles defendant to a new trial. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569.

Defendant's remaining assignments of error are not discussed because they are not likely to arise upon retrial.

New trial.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. LARRY W. DOUGLAS AND ALFREDO BOYCE

No. 7012SC595

(Filed 16 December 1970)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

Evidence of defendants' guilt of armed robbery was sufficient to be submitted to the jury.

2. **Criminal Law § 113— joint trial of defendants — instructions on the guilt or innocence of both defendants — reversible error**

In a joint prosecution of two defendants for armed robbery, an instruction that it would be improper for the jury to find one defendant not guilty and the other defendant guilty, and that the jury must find either both defendants guilty or both defendants not guilty, *held* reversible error.

APPEAL by defendants from *Hobgood, J.,* 20 March 1970 Session, CUMBERLAND Superior Court.

In two bills of indictment proper in form defendants were jointly charged with (1) armed robbery of Stanley R. Beltowsky of the sum of $4, and (2) armed robbery of Elroy Uresti of the sum of $30. Defendants pleaded not guilty, were tried together,

were found guilty of common law robbery in each case, and from judgments imposing prison sentences they appealed.

Attorney General Robert Morgan by Assistant Attorney General R. S. Weathers for the State.

Elizabeth C. Fox for appellant Larry W. Douglas and Mitchel E. Gadsden for appellant Alfredo Boyce.

BRITT, Judge.

[1] Each defendant assigns as error the failure of the trial court to allow his motion for non-suit interposed at the conclusion of the State's evidence and renewed at the conclusion of all the evidence.

The evidence, viewed in the light most favorable to the State, tended to show: On 5 November 1969 Beltowsky, Uresti and the defendants were soldiers stationed at Ft. Bragg. Early that evening Beltowsky and Uresti were hitchhiking on Bragg Boulevard in Fayetteville attempting to get a ride to Ft. Bragg. A green two-door Buick, driven and owned by defendant Boyce, with defendant Douglas occupying the right front seat and one Leroy Amos the left rear seat, stopped near Beltowsky and Uresti; defendant Douglas rolled down the window next to him, asked the hitchhikers where they were going and when they replied "Ft. Bragg," defendant Douglas opened the right door, leaned forward and permitted them to get in the back seat. The hitchhikers did not know defendants and Amos at the time. Defendant Boyce began driving on Bragg Boulevard and at defendant Douglas' direction, turned left and proceeded on Yadkin Road. After traveling about one-half mile on Yadkin Road, Amos, who was sitting directly behind the driver, told defendant Boyce to stop, "that this was far enough." Amos then pulled a .32 calibre pistol, pointed it at Uresti's temple and ordered Uresti and Beltowsky to give them their wallets. After Amos removed all money from the wallets, he returned them to their owners and ordered them to get out of the car. Defendant Douglas thereupon opened the right door and let Uresti and Beltowsky out, after which defendant Boyce proceeded to drive northward on Yadkin Road. The robbery victims contacted police, provided them with their recollection of the license number on the Buick, and approximately thirty to forty-five minutes later that night police apprehended the Buick at

which time it was occupied by defendants, Amos, and a fourth person.

Both defendants testified as witnesses for themselves and not only denied the charges but denied being in a car with Uresti and Beltowsky on the night in question. Defendant Douglas attempted to establish an alibi by two witnesses and also presented evidence showing that he went to Beltowsky's barracks several days after the alleged offenses and that Beltowsky stated on that occasion that he had never seen defendant Douglas before.

We think the evidence was sufficient to survive the motions for non-suit made by both defendants and the assignment of error relating thereto is overruled.

[2] Defendants assign as error certain portions of the trial judge's charge to the jury. One of the parts of the charge assigned as error occurred after the jury had deliberated for some period of time and returned to the courtroom and requested further instructions. At that time the court gave further instructions which included the following: "The Court does instruct you here and now, and I have thought about this and I did not instruct you previously on the evidence as to this; the Court instructs you this, that under this evidence, it would not be proper for you to find one defendant not guilty and to find the other one guilty, but you would either find both defendants guilty or both defendants not guilty in reference to the evidence as presented here."

The assignment of error to the quoted instruction is well taken and entitles the defendants to a new trial. In *State v. Tomblin,* 276 N.C. 273, 171 S.E. 2d 901 (1970), we find the following:

> "This Court has repeatedly held that, when two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error. *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851; *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230; *State v. Harvell,* 256 N.C. 104, 123 S.E. 2d 103; *State v. Miller,* 253 N.C. 334, 116 S.E. 2d 790; *State v. Meshaw,* 246 N.C. 205, 98 S.E. 2d 13; *State v. Wolfe,* 227 N.C. 461, 42 S.E. 2d 515, *State v. Walsh,* 224 N.C. 218, 29 S.E. 2d 743; *State v. Norton,* 222 N.C. 418, 23 S.E. 2d 301."

In their brief defendants bring forward and argue other assignments of error but we do not deem it necessary to discuss them as they may not arise upon a new trial of this action.

New trial.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. BOBBY DEAN SHEDD

No. 7027SC664

(Filed 16 December 1970)

1. **Criminal Law § 84; Searches and Seizures § 2— warrantless search — consent by defendant**

Where an individual waives his immunity from unreasonable searches and seizures by consenting to a search of his person or premises, he may not thereafter complain that his constitutional rights were violated by the search.

2. **Criminal Law § 84; Searches and Seizures § 2— immunity from unreasonable searches and seizures — personal privilege**

The immunity from unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed.

3. **Criminal Law § 84; Searches and Seizures § 2— defendant serving prison sentence — search of wife's residence — consent to search — standing of defendant to complain**

If defendant, who was out of prison under the work release program on the night of the crime, was an occupant of the residence where his wife lived, he waived his right to complain of a warrantless search of the residence by police when he consented at the police station to such a search; if defendant was not an occupant of the residence, his wife waived the necessity of a search warrant by consenting to the search and defendant has no standing to complain of the search.

APPEAL by defendant from *Falls, J.*, July 1970 Criminal Session, GASTON Superior Court.

Defendant was charged in a bill of indictment with (1) feloniously breaking and entering a building occupied by John's Pharmacy of Stanley, Inc. and (2) felonious larceny of personal property from said place of business. The plea was not guilty,

a jury returned a verdict of guilty as charged, and from judgment imposing active prison sentences, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Charles A. Lloyd for the State.

Bob W. Lawing for defendant appellant.

BRITT, Judge.

In his first assignment of error defendant contends that the trial court committed error in admitting testimony relating to, and obtained as the result of, a search of the premises at 1611 Cole Street in the City of Gastonia. He contends his constitutional rights were violated in the search of the premises without a search warrant and seizure of evidence therefrom.

The record discloses: On the date of the alleged offense, defendant was serving a sentence at the Dallas Prison Camp. On the night in question he had been released from prison to work in a Gastonia mill under the work release program; however, he did not work in the mill that night. His wife and certain of her relatives resided in a house at 1611 Cole Street in Gastonia. Police Officer Auten testified that he asked defendant (who was at police headquarters at the time) if he had any objection to police searching the residence at 1611 Cole Street and defendant stated "that he had no objections but he didn't live there; that we had to talk to his wife." Officer Auten testified that he then went to the residence and that defendant's wife gave police permission to search the premises.

[1-3] It is well settled that an individual may waive any provision of the Constitution intended for his benefit, including the immunity from unreasonable searches and seizures; and where such immunity has been waived and consent given to a search of his person or his premises, an individual cannot thereafter complain that his constitutional rights have been violated. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968); *cert. den.,* 393 U.S. 1087, 21 L. Ed. 2d 780. It is also well settled that the immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1969). Applying these principles to the case at hand, if defendant was the occupant of the premises at 1611 Cole Street, he waived his

right that the premises not be searched without a search warrant; if his wife was the occupant, not only did she waive the necessity of a search warrant but defendant has no right to complain. The assignment of error is overruled.

In his assignments of error based on exceptions 6 and 14, defendant contends the trial court erred in not allowing his counsel to cross-examine a State's witness about certain matters and in admitting certain other testimony. Suffice to say, we have carefully considered these assignments and finding them without merit, they are overruled.

Defendant's remaining assignments of error relate to the judge's charge to the jury. We have carefully reviewed the charge and hold that when it is read contextually and considered as a whole, it is free from prejudicial error. 1 Strong N. C. Index 2d, Appeal and Error, § 50, p. 203. The assignments of error are overruled.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JIMMY FOSTER

No. 7022SC582

(Filed 16 December 1970)

1. **Constitutional Law § 28; Indictment and Warrant § 9— requisites of indictment**

Every person accused of a crime has a right to be informed of the accusation against him with sufficient definiteness (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or *nolo contendere*, to pronounce sentence according to the rights of the case. Art. I, §§ 11 and 12, N. C. Constitution.

2. **Indictment and Warrant § 9; Larceny § 4— larceny indictment — description of stolen property — "automobile parts" of specified company**

Indictment charging defendant with larceny of "automobile parts . . . of one Furches Motor Company" sufficiently identifies the property alleged to have been stolen to survive defendant's motion to quash.

APPEAL by defendant from *Seay, Judge,* 23 April 1970 Mixed Session of DAVIE County Superior Court.

The defendant was tried upon two bills of indictment returned by the April and January Sessions of the Davie County Grand Jury. The indictment in case No. 55 charged the defendant with larceny of certain goods belonging to Branch Banking and Trust Company and the indictment in case No. 56 charged the defendant with larceny of automobile parts from Furches Motor Company. The cases were consolidated for trial and the defendant entered a plea of not guilty to both charges. In case No. 55 the jury returned a verdict of not guilty, and in case No. 56, the jury returned a verdict of guilty of larceny of goods of a value of less than $200.00. The judgment of the court was that the defendant be confined in the Davie County jail for twelve months with a recommendation that he be placed on work release.

From this judgment, the defendant appeals to this Court.

Attorney General Robert Morgan by Assistant Attorney General Andrew A. Vanore, Jr., and Staff Attorney Charles A. Lloyd for the State.

Peter W. Hairston for the defendant appellant.

CAMPBELL, Judge.

Defendant, on this appeal, raises the question of the sufficiency of the bill of indictment on the grounds that it does not sufficiently identify the property alleged to have been stolen. The bill of indictment describes the property as "automobile parts of the value of $300.00 (Three Hundred Dollars) Dollars, of the goods, chattels and moneys of one Furches Motor Company."

[1] Sections 11 and 12 of Article I of the North Carolina Constitution guarantee that in all criminal prosecutions every person has the right to be informed of accusations against him, and not be put to answer any criminal charge but by indictment, presentment, or impeachment. The purposes of these provisions are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or *nolo contendere*, to pronounce sentence according to the rights

of the case. *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849 (1961).

[2] We are of the opinion that the description "automobile parts . . . of one Furches Motor Company" sufficiently identifies the property alleged to have been stolen and satisfies the provisions of the North Carolina Constitution and their purposes. The description identifies the type of parts and the owner from whom they were taken. In *State v. Upchurch,* 264 N.C. 343, 141 S.E. 2d 528 (1965), the Court, in referring to a description in the bill of indictment of cigarettes, beer, and sardines, said "no minute description . . . by brand names is required." The Court went on to say that if the defendant had desired a description by brand names, he could have requested one by a bill of particulars before the trial.

In the present case, the defendant waited until all of the evidence had been presented before moving to quash the bill of indictment because of insufficient description of the property alleged to have been stolen. Had his defense truly been hampered, he could have requested a bill of particulars prior to the trial.

We have examined defendant's remaining assignments of error and find them to be without merit.

For the reasons stated, the judgment of the trial court is,

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. THOMAS ELVERT CARROLL

No. 7027SC594

(Filed 16 December 1970)

Burglary and Unlawful Breakings § 3; Indictment and Warrant § 11 — description of building broken or entered — sufficiency

Indictment charging defendant with feloniously breaking and entering a "building occupied by one Duke Power Company, Inc.," is not fatally defective in failing to identify the subject premises with more particularity, although the better practice would be to identify the premises by street address, highway address, rural road address or some other clear description and designation.

State v. Carroll

APPEAL by defendant from *Falls, Superior Court Judge,* 27 April 1970 Session, CLEVELAND Superior Court.

Defendant was charged in a bill of indictment as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Thomas Elvert Carroll late of the County of Cleveland on the 10 day of February, 1970, with force and arms at and in the County aforesaid, a certain [*sic*] and building occupied by one Duke Power Company, Inc., a corporation, wherein merchandise, chattels, money, valuable securities and other personal property were being well kept, unlawfully, wilfully, and feloniously did break and enter with intent to steal, take and carry away the merchandise, chattels, money, valuable securities and other personal property of the said Duke Power Company, Inc., against the form and Statute in such case made and provided and against the peace and dignity of the State."

Defendant, through his court-appointed attorney, moved to quash the bill of indictment. The motion was denied and the defendant then tendered a plea of guilty. After due inquiry the court found that the plea was freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. The State then offered evidence tending to show the following: On 10 February 1970 officers of the Cleveland County Sheriff's Department received information that someone had entered Duke Power Company's building on Highway 74. Upon arrival on these premises the officers discovered that a hole had been cut in the wire fence around the property and that the glass had been broken out of a window at the rear of the building. Defendant was observed inside the building and arrested. From judgment imposing a prison sentence, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General R. S. Weathers for the State.

Robert L. Bradley for defendant appellant.

VAUGHN, Judge.

The defendant contends that the bill of indictment is fatally defective because it does not properly identify the premises the defendant was alleged to have feloniously broken and

entered. The question is properly presented by defendant's motion to quash in the trial court and his motion of arrest of judgment which was filed in this Court. This is the only question raised on appeal.

Under G.S. 14-54 as re-written by Chapter 543 of the Session Laws of 1969, the breaking or entering of *any* building with intent to commit a felony or larceny therein constitutes a felony. Thus the necessity for describing the building in the bill of indictment for the purpose of showing that it is within the statute no longer exists. It remains necessary, however, to identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. It would be contrary to reason to suggest that the defendant could have, in the preparation of his defense, thought that the building referred to in the indictment as "occupied by one Duke Power Company" was one other than the building occupied by Duke Power Company in which he was arrested on the date alleged in the bill. The bill also describes the crime alleged in such detail as would enable the defendant to plead his conviction or acquittal thereof as a bar to another prosecution for the same offense. In *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15, the building broken into was described in the bill only as one "occupied by one Leesona Corporation, a corporation." Although the description was held to be sufficient, the Supreme Court, as we do in the present case, quoted with approval the following language from *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105.

> " . . . In the light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures described in G.S. Chap. 14, Art. 14."

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. ANGELO McLAIN

No. 7010SC599

(Filed 16 December 1970)

1. **Criminal Law § 6— defense of intoxication — necessity for instructions**

Although there was evidence that the defendant had been drinking at the time he uttered a forged check, the trial court was not required to instruct the jury on the defense of intoxication where there was no evidence that the defendant's mental processes were deranged by intoxication.

2. **Criminal Law §§ 101, 170—dictionary definition of offense — consideration by jury**

Although it was improper for the jury to read a dictionary definition of one of the offenses charged in the bill of indictment, such impropriety was cured when the trial judge told the jury to disregard the dictionary definition and repeated his instructions on the elements of the offense.

APPEAL by defendant from *Ragsdale, Special Judge,* July 1970 Special Schedule "B" Session of WAKE Superior Court.

The defendant Angelo McLain was charged in a two-count bill of indictment, proper in form, with forgery and uttering a forged instrument. Upon the defendant's plea of not guilty, the case was submitted to the jury upon evidence which tended to show the following facts: On 27 March 1970, the defendant presented to Carol Terrill, a teller at First-Citizens Bank and Trust Company, Raleigh, North Carolina, a check in the amount of $82.19 drawn on the account of Wake Briarcliff, Inc., payable to Roy Adams and purportedly signed by Jeff Sugg.

Jeff Sugg testified that he was the owner of Wake Briarcliff, Inc., and that the check the defendant was charged with forging and uttering was not signed by him or by anyone else with his authority.

Carol Terrill testified that the defendant said he wanted to get the check cashed and that he signed the name of Roy Adams on the back.

Hague Bowman, an employee of the Bank, testified that the defendant presented the identification of Howard Thomas, Jr., not Roy Adams. Mr. Bowman stated that the defendant had a strong smell of alcohol on his breath, but that he did not appear intoxicated in any other way.

Angelo McLain testified in his own behalf that he had been drinking wine from about 6:00 a.m. until he went to the bank. He stated that shortly before 9:00 a.m. Roy Adams asked him to cash a check for him; that he asked Adams for some identification, but that he did not look at the check or at the identification to see if it belonged to Adams. He then went to the bank and handed the check to the teller and asked her if she would cash it. The defendant said, "I went up to the bank, I wasn't fully myself. If I had been I would have looked at that identification." The defendant testified that he did not know the check had been forged when he presented it for payment.

The jury returned a verdict of not guilty on the count charging the defendant with forgery and guilty on the count charging the defendant with uttering the forged check.

From judgment of imprisonment of two years, the defendan appealed.

Robert Morgan, Attorney General, and James L. Blackburn, Staff Attorney, for the State.

Jordan, Morris and Hoke, by Robert P. Gruber, for defendant appellant.

HEDRICK, Judge.

[1] The defendant first assigns as error the court's failure to instruct the jury on the defense of intoxication. In *State v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469 (1940), Barnhill, J., stated the rule with respect to the defense of intoxication as follows:

> "While intoxication is an affirmative defense no special plea is required. However, to avail the defendant and require the court to explain and apply the law in respect thereto, there must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan. As to this, he is not relegated to his own testimony. It is sufficient if the testimony of any witness tends to establish the fact. But it must be made to appear affirmatively in some manner that this defense is relied upon to rebut the presumption of sanity before the doctrine becomes a part

of the law of the case which the judge must explain and apply to the evidence."

Although there was evidence in the instant case that the defendant had been drinking, and the defendant himself testified that he was "pretty high" and that he was not fully himself, there is no evidence that the defendant's mental processes were deranged by intoxication, but, on the contrary, the defendant's own evidence tends to show that he was in complete control of his mental faculties. There was no prayer for special instructions, nor did the defendant indicate during the trial that he was relying on the defense of intoxication. This assignment of error is not sustained.

[2] Next, the defendant contends the court committed error by denying his motion for a new trial for alleged misconduct of the jury. The record reveals that during the jury's deliberation a definition of uttering copied from a dictionary by one of the jurors was taken into the jury room. The jury made inquiry of the court as to the definition of uttering, and told the judge what had happened. Judge Ragsdale told the jury to "disregard in every way" the dictionary definition and then proceeded to repeat his instructions as to the charge against the defendant of uttering the forged check. It was improper for the jury to obtain and read a dictionary definition of one of the offenses charged in the bill of indictment; however, the able trial judge properly instructed the jury to disregard the definition taken from the dictionary and the defendant has not shown that he was prejudiced in any way by the conduct of the jury. *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1 (1960).

We have carefully considered the record in this case and conclude that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD WOOD

No. 7027SC542

(Filed 16 December 1970)

1. **Constitutional Law § 31— denial of defendant's request to subpoena witnesses — opportunity to prepare for trial**

Defendant's request, made for the first time during the trial, that he be allowed to subpoena as witnesses certain police officers who lived in another county, *held* properly denied by the trial court, where it appeared that the defendant, who was arrested in June 1969 and tried in May 1970, had had ample opportunity to procure the witnesses prior to trial.

2. **Criminal Law § 117— instructions on the scrutiny of testimony**

Trial court's failure to instruct the jury to scrutinize the testimony of defendant's brother, a co-defendant, who testified for the State is not reversible error when defendant made no request for such instruction.

APPEAL by defendant from *Falls, J.*, 4 May 1970 Session, Superior Court of CLEVELAND County.

Defendant was charged with felonious breaking and entering and felonious larceny. True bills were returned by the grand jury at the August 1969 Session; defendant, in writing, waived his right to assigned counsel on 10 December 1969; and was tried at the 4 May 1970 Session. By his own choice, he acted as his own counsel at trial. Counsel was appointed to perfect his appeal.

Attorney General Morgan by Staff Attorney Blackburn for the State.

Ernest A. Gardner for defendant appellant.

MORRIS, Judge.

Defendant makes two assignments of error in the record on appeal.

[1] Defendant first assigns as error the court's failure to allow defendant to have witnesses subpoenaed. The record reveals the following: "THE COURT: Make this entry. During the progress of this trial, after the jury was sworn and empaneled and evidence presented on the part of the State, the defendant in open court for the first time advised this court that he had some witnesses and he named them, who were members of

the Rural Police in Gaston County and one was the Chief of Police of Kings Mountain; that he desired their presence, and that this fact was not known by this Court or the Clerk of the Court or any other court officials until this time during the progress of this trial; that the defendant was advised by statement by one of the Kings Mountain officers to the effect that the Chief of Police of Kings Mountain was out of the city and out of the county and not available to testify; that the other witnesses are police officers in Gaston County and their whereabouts are not known; that no request for a subpoena was made by this defendant and that none was issued. . . ."

Unquestionably the right of confrontation includes the opportunity fairly to present one's own defense. *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962). However, as was said in *State v. Graves,* 251 N.C. 550, 112 S.E. 2d 85 (1959), "[w]e do not suggest that an accused may be less than diligent in his own behalf in preparing for trial. He may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. But the officers and court have a duty to see that he has opportunity for so doing." In our opinion defendant has had ample opportunity. He was arrested in June; true bills were returned in August; in December he filed a written waiver of counsel; and he was tried the following May. It is also obvious that this defendant was certainly not unfamiliar with procedure. This purported assignment of error is without merit.

[2] Neither is there merit in defendant's other assignment of error, which is directed to the court's failure to instruct the jury to scrutinize the evidence of Donald Wood, a co-defendant and this defendant's brother, who testified for the State. "Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction." *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1942); *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654 (1966). The record reveals no request.

No error.

Judges BROCK and GRAHAM concur.

CHARLES WILTON THORNE v. VIOLET LEE THORNE

No. 707DC647

(Filed 16 December 1970)

1. **Divorce and Alimony § 24; Infants § 9— award of custody to maternal grandmother — insufficiency of evidence and findings**

In this child custody proceeding instituted by the child's father against the mother, order of the court awarding custody to the maternal grandmother is set aside where the court's determination that the best interest of the child would be served by an award of custody to the maternal grandmother is unsupported by the evidence and findings of fact, and the findings of fact supported by competent evidence would support the conclusion that the father is a fit person to have custody of the child.

2. **Divorce and Alimony § 24; Infants § 9— child custody — rights of parent — award to third person**

A court should not take a child from the custody of its parent and place it in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody or for some other extraordinary fact or circumstance.

APPEAL by plaintiff from *Harrell, District Judge,* 23 April 1970 Session of WILSON County District Court.

This is a civil action by Charles Wilton Thorne (father) against his wife, Violet Lee Thorne (mother), to recover custody of their four-year-old adopted child, Tony Edward Thorne. After hearing the testimony of witnesses for both parties, and argument of counsel, Judge Harrell made findings of fact which included the following:

"That because of the defendant's mental and emotional condition and because of her conduct, she is not now a fit and proper person to have the care and custody of her four year old, adopted son, Tony.

"On the other hand, the plaintiff, Charles Wilton Thorne, the child's father, is a healthy, able-bodied man who is gainfully employed by the State Highway Commission, who has a well furnished home available for the child and who has a 'take-home' income of $205.00 every two weeks;

"That this is the plaintiff's only child; that he is an active church member; that he has exhibited a father's love for the child and is not unfit to have the custody of the child although he has at times been abusive of and violent to

the defendant and has contributed to her condition;

"That the plaintiff has a good reputation in the community in which he lives and has made arrangements for assistance to look out for the child while he is on the job;

"That the defendant's mother, is a fit, suitable, proper and competent person to have the care and custody of her four year old grandson, Tony, and the best interest of said child would be served and his general welfare enhanced by the assignment of his custody to the defendant's mother."

From an order dated 8 July 1970 awarding "permanent custody" of Tony Edward Thorne to Rossie Williamson, the maternal grandmother, the plaintiff appealed.

Valentine, Valentine & Adams, by Robert K. Smith and I. T. Valentine, Jr., for plaintiff appellant.

Whitted & Cherry, by Earl Whitted, Jr., for defendant appellee.

HEDRICK, Judge.

[1] The plaintiff excepted to and assigns as error the following portion of the court's findings of fact:

"That the defendant's mother is a fit, suitable, proper and competent person to have the care and custody of her four year old grandson, Tony, and the best interest of said child would be served and his general welfare enhanced by the assignment of his custody to the defendant's mother."

The plaintiff also excepted to and assigns as error the court's entry of the order awarding the custody of the child to the maternal grandmother.

These exceptions present the question of whether the finding of fact challenged by the plaintiff is supported by competent evidence and whether the order entered is supported by appropriate findings of fact and conclusions of law.

That portion of the "Order for Custody of Child" challenged by the appellant was denominated by the court as a finding of fact. The appellant insists that it is a conclusion of law. If it be a finding of fact, it is unsupported by any evidence in this record. If it be a conclusion of law, it is not supported by any finding of fact. The only evidence in the record regarding the

maternal grandmother tends to show that she is sixty-two years of age; that she is employed every other day from 6:30 a.m. to 6:30 p.m., and that she lives with her eighty-year-old husband. The record is silent as to how "the best interest of said child would be served and his general welfare enhanced by the assignment of his custody to the defendant's mother." The court made findings of fact with respect to the plaintiff, father, as follows:

> "On the other hand, the plaintiff, Charles Wilton Thorne, the child's father, is a healthy, able-bodied man who is gainfully employed by the State Highway Commission, who has a well furnished home available for the child and who has a 'take-home' income of $205.00 every two weeks;
>
> "That this is the plaintiff's only child; that he is an active church member; that he has exhibited a father's love for the child and is not unfit to have the custody of the child although he has at times been abusive of and violent to the defendant and has contributed to her condition;
>
> "That the plaintiff has a good reputation in the community in which he lives and has made arrangements for assistance to look out for the child while he is on the job; . . . ."

The court's findings of fact with respect to the father are supported by competent evidence in the record, and would support the conclusion that the father is a fit person to have the custody of his four-year-old child. *In re McCraw Children,* 3 N. C. App. 390, 165 S.E. 2d 1 (1969). The trial court's statement that the father is "not unfit" is neither a proper finding of fact nor conclusion of law. It is the duty of the judge to make findings of fact and from those findings to make conclusions of law.

G.S. 1A-1, Rule 52(a)(1), Rules of Civil Procedure, provides:

> "(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

[2] "A court should not take a child from the custody of its parents and place it in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody of the child or for some other extraordinary fact or

circumstance." Lee, North Carolina Family Law, § 224, p. 25. See also *Shackleford v. Casey,* 268 N.C. 349, 150 S.E. 2d 513 (1966); *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759 (1955).

For the reasons stated, the order appealed from is reversed and the case remanded to the District Court of Wilson County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. CORINA BATES RHODES

No. 7017SC539

(Filed 16 December 1970)

1. **Automobiles § 3— status of operator's license — admissibility of records**

The records of the Department of Motor Vehicles, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege.

2. **Automobiles § 3— driving while license in state of suspension — cross-examination of defendant on driving record**

In a prosecution charging defendant with driving while her license was suspended, it was proper for the solicitor to cross-examine the defendant with respect to her driving record, the status of her driver's license, and the number of times her license had been suspended, where defendant did not request that her driving record, as certified by the Motor Vehicles Department, be limited or restricted in any way.

APPEAL by defendant from *McConnell, Superior Court Judge,* 7 May 1970 Session of SURRY Superior Court.

The defendant Corina Bates Rhodes was charged in a warrant, proper in form, with operating a motor vehicle while her driver's license was suspended in violation of G.S. 20-28(a). Upon the defendant's plea of not guilty in the superior court, the case was submitted to the jury upon evidence which tended to show that on 30 October 1968, at about 3:20 p.m., North Carolina Highway Patrolman S. C. Foster saw the defendant operating a 1959 Ford automobile on the C. C. Camp Road (rural paved road 1138) near its intersection with Interstate 77. The defendant's driver's license had been suspended by the

North Carolina Department of Motor Vehicles on 14 October 1970 under the provisions of G.S. 20-16(a) (5) for an accumulation of twelve points. The defendant offered evidence tending to show that on 30 October 1968 her driver's license was in a state of suspension and that she did not drive an automobile on that date at all, and that her sister, Linda Bates Jenkins, did drive the 1959 Ford automobile on the C. C. Camp Road in the afternoon of the date in question and saw the highway patrolman.

The jury returned a verdict of guilty as charged. From a judgment of imprisonment for six months, suspended on condition that the defendant pay a fine of $200.00 and the costs, the defendant appealed to the North Carolina Court of Appeals.

Robert Morgan, Attorney General, and James B. Richmond, Trial Attorney, for the State.

Franklin Smith for defendant appellant.

HEDRICK, Judge.

[1] By assignments of error one through seven, and nine, the defendant contends the court committed prejudicial error in its several rulings with regard to the State's introduction into evidence and use of the "Drivers License Record Check for Enforcement Agencies" of the defendant Corina Bates Rhodes. These assignments of error are without merit. The record reveals that the State's exhibit identified as the "Drivers License Record Check for Enforcement Agencies" was admitted into evidence over the defendant's objection after Patrolman Foster had testified that the defendant's driver's license had been suspended by the Department of Motor Vehicles on 14 October 1968 for an accumulation of twelve points. The records of the Department of Motor Vehicles, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. *State v. Mercer,* 249 N.C. 371, 106 S.E. 2d 866 (1959); *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838; G.S. 8-35; G.S. 20-42(b). The defendant does not contend that the record introduced into evidence was not properly authenticated.

In *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608 (1959), our Supreme Court said:

> "In our opinion the defendant was entitled to have the contents of the official record of the status of his driver's

license limited, if he had so requested, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offenses for which he was being tried.

"Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558, General Statutes, Volume 4A, page 175, *et seq; Brewer v. Brewer,* 238 N.C. 607, 78 S.E. 2d 719; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557.

"In the instant case, the defendant made no request that the contents of the certified record of the status of his driver's license be limited to the portion or portions thereof relating to the status of his driver's license on the date he was charged with committing the offenses for which he was being tried. Hence, this assignment of error is overruled." See also *State v. Teasley, supra.*

[2] In the instant case, when the State introduced the "Drivers License Record Check for Enforcement Agencies," the defendant lodged only a general objection and did not request that the certified record be limited in any way, nor did the defendant move to strike any particular portion of the record.

When the defendant took the witness chair in her own behalf, it was not improper for the court to allow the solicitor to cross-examine her regarding her driving record, the status of her driver's license, and the number of times her license had been suspended.

Defendant's eighth assignment of error is as follows:

"The court erred in allowing the State through its attorney Scott to argue to the jury that these traffic offenses such as the one which the defendant was being tried for was the reason why people were complaining about high automobile insurance."

The record does not disclose what, if anything, the solicitor argued to the jury regarding automobile liability insurance rates; therefore, we cannot determine whether his argument was in any way improper. Because the appellant has failed to show any prejudicial error, this assignment of error is overruled.

We have examined all of the defendant's assignments of error and conclude that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. MARK RAY LLOYD

No. 705SC640

(Filed 16 December 1970)

1. **Criminal Law § 25— voluntariness of nolo contendere plea — defendant's expectation of suspended sentence**

   Defendant's contention that he entered a plea of *nolo contendere* with the expectation of receiving a suspended sentence and that the trial court erred in accepting the plea and imposing a five-year prison sentence on him, *is held* without merit, where the record discloses (1) that the trial court explicitly told the defendant that a *nolo contendere* plea would not benefit him and (2) that the defendant clearly understood the possible consequences of such plea.

2. **Criminal Law § 25— voluntariness of nolo contendere plea — applicable standards**

   The rules which apply to the voluntariness of guilty pleas also apply to the voluntariness of *nolo contendere* pleas.

APPEAL from *Cowper, Superior Court Judge,* 5 June 1970 Session of NEW HANOVER Superior Court.

Defendant was charged with five counts of possession and sale of narcotic drugs. Drugs involved included heroin, LSD and cannibis resin in excess of 1/10 of a gram. Five true bills of indictment were returned against the defendant by the New Hanover County Grand Jury on 27 April 1970. All five cases were consolidated for trial on 26 May 1970, and defendant, through his court-appointed counsel, pled *nolo contendere* to five counts of possession of narcotic drugs. Defendant was sentenced

to a total of five years in the North Carolina State Prison. Defendant appealed, and counsel was appointed by the court to perfect this appeal.

Attorney General Morgan by Staff Attorneys Ricks and Satisky for the State.

Carlton S. Prickett, Jr., for defendant appellant.

MORRIS, Judge.

[1] The defendant's only assignment of error is that the court erred in accepting the defendant's plea of *nolo contendere* when the defendant submitted the plea with the expectation of receiving a suspended sentence or some expectation of being helped by the plea.

The record discloses that when the defendant was being questioned by the court in regard to his plea of *nolo contendere,* in response to the court's question "Has the solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead NOLO CONTENDERE?", the following transpired:

"DEFENDANT: Uh—

MR. PRICKETT: May I approach the bench?

COURT: Yes, sir.

COURT: As I understand, you say that Agent Christian indicated to you that you could be helped by a plea?

DEFENDANT: Yes, sir.

COURT: You understand that is not true?

DEFENDANT: (NO ANSWER)

COURT: I am telling you that it is not?

DEFENDANT: Yes, sir.

COURT: All right.

COURT: Do you still want to enter your plea of *nolo contendere*?

DEFENDANT: Yes, sir.

COURT: Has anyone violated your constitutional rights?

DEFENDANT: No, sir.

COURT: Do you freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of *nolo contendere*?

DEFENDANT: Yes, sir.

COURT: Do you have any questions or any statement to make about what I have just said to you?

DEFENDANT: No, sir."

The record further discloses that defendant, in writing, answered all the questions asked orally and signed the "transcript of plea" certifying to the truth of his answers. The court thereupon entered its adjudication that the defendant's plea was freely, understandingly, and voluntarily made.

"[A] plea of *nolo contendere* to a warrant or an indictment, good in form and substance, when accepted by the Court, becomes an implied confession of guilt, and for the purposes of that case only is equivalent to a plea of guilty." *State v. Barbour,* 243 N.C. 265, 90 S.E. 2d 388 (1955).

"A plea of *nolo contendere,* although not strictly a confession of guilt, nevertheless will support the same punishment as a plea of guilty. The rule of strict construction in favor of an accused, therefore, requires that a plea of *nolo contendere* be treated as a plea of guilty in so far as the right to be examined by the judge and to be informed as to the consequences of such plea." *State v. Payne,* 263 N.C. 77, 138 S.E. 2d 765 (1964).

[2] The rules which apply to voluntariness of guilty pleas also govern this case. This Court in *State v. McKinnon,* 4 N.C. App. 299, 166 S.E. 2d 534 (1969), said that defendant's plea of guilty would not be disturbed on appeal where the facts showed that "defendant executed an affidavit in the form of twelve questions and answers to the effect that he fully understood the charges against him, that he was guilty of the charges, that he understood that upon a plea of guilty he could be imprisoned for as much as ten years, that he was satisfied with the services of his attorney and that he freely, understandingly and volun-

tarily authorized and instructed his attorney to enter a plea of guilty."

[1] Here the court was apprised of defendant's statement that an agent had indicated that a plea would be helpful to him. The court immediately informed defendant that the entering of a plea would make no difference, and the defendant clearly indicated that he understood and still wanted to enter his plea. This was reiterated by his written and signed answers to the questions asked him in open court. The record is replete with evidence of the fact that defendant thoroughly understood the charges, the possible punishment and the effect of his plea. With commendable candor, counsel for defendant informed the Court that the appeal was perfected through insistence of defendant and not upon his recommendation.

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM A. BRINKLEY AND CHRISTOPHER SPICER

No. 705SC589

(Filed 16 December 1970)

1. **Criminal Law § 114— instructions — statement that defendants do not deny crime was committed — expression of opinion**

Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," *held* an unauthorized expression of opinion on the evidence in violation of G.S. 1-180.

2. **Criminal Law §§ 24, 32— plea of not guilty — burden of the State**

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 necessary elements of the offense.

3. **Criminal Law § 114— assumption that controverted fact was established — expression of opinion**

The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. G.S. 1-180.

State v. Brinkley

APPEAL by defendants from *Burgwyn, Emergency Superior Court Judge,* 27 April 1970 Session of NEW HANOVER Superior Court.

Defendants were charged in separate bills of indictment with the offense of robbery with firearms (G.S. 14-87). The cases were consolidated for trial and both defendants entered pleas of not guilty. The jury returned verdicts of guilty and defendants appealed from judgments of imprisonment imposed upon the verdicts.

Attorney General Morgan by Trial Attorney Magner and Assistant Attorney General Briley for the State.

Carlton S. Prickett, Jr., for defendant appellant William A. Brinkley and George Sperry for defendant appellant Christopher Spicer.

GRAHAM, Judge.

[1] Defendants assign as error the following portion of the court's charge to the jury:

> "They [defendants] do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves."

Defendants did not take the stand or offer evidence. While it may be inferred from the defendants' cross-examination of the State's witnesses that they relied for their defense, at least in part, upon a contention that they had been erroneously identified as participants in the alleged robbery, there is nothing in the record to show that they made any judicial admission that the offense had actually occurred. Consequently, that portion of the court's charge quoted above must be held as prejudicial error requiring a new trial.

[2] Defendants' 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 necessary elements of the offense. *State v. Mitchell,* 260 N.C. 235, 132 S.E. 2d 481; *State v. Patton,* 2 N.C. App. 605, 163 S.E. 2d 542, and cases therein cited.

[3] " '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.' *S. v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99." *State v. Mitchell, supra.* In the *Mitchell* case the defendant assigned as error the trial court's statement to the jury that " 'He [the defendant] doesn't challenge the question of whether or not it is tax-paid whiskey or non-tax-paid. He doesn't challenge the question of who had it for what purpose. He simply denies that he was the driver of the car and simply challenges the statement by the Patrolman that he was driving.' " In an opinion awarding a new trial the Supreme Court stated through Justice Parker (later Chief Justice):

> "A reading of the challenged part of the charge leads to the unescapable conclusion that the only controverted fact which was left to the jury to determine was whether defendant was the driver of the Ford automobile which the State's evidence shows contained 30 gallons of non-tax-paid whisky. This expression of opinion or assumption by the trial court that all the essential elements of the offenses charged in the three counts, which were controverted and put in issue by defendant's plea of not guilty, were not challenged and not denied by the defendant, except who was driving the Ford automobile which the State's evidence shows contained 30 gallons of non-tax-paid whisky, is prejudicial error."

In the case of *State v. Patton, supra,* the trial judge interrupted his charge to the jury and inquired if defendant's contentions had been correctly stated. As defense counsel was attempting to answer, the judge 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."

In the opinion, written by Britt, Judge, we find the following:

> "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."

[1] The statement here excepted to, like the statements challenged in the cases cited above, was an unauthorized expression of opinion by the trial court in violation of G.S. 1-180.

Since a new trial will be necessary, we refrain from discussing other assignments of error made by defendants.

New trial.

Chief Judge MALLARD and Judge PARKER concur.

JACK T. BLAND, E. R. BROWN, F. R. RAY, HAYWOOD BROWN AND C. C. JORDAN, JR., ON BEHALF OF THEMSELVES AND OTHER MEMBERS OF THE FIRE DEPARTMENT OF THE CITY OF WILMINGTON, AND WILMINGTON FIREFIGHTERS' ASSN., LOCAL 1284 v. CITY OF WILMINGTON, NORTH CAROLINA, MAYOR L. M. CROMARTIE, COUNCILMEN JOHN SYMMES, W. ALEX FONVIELLE, JR., HERBERT BRAND AND B. D. SCHWARTZ

No. 705SC523

(Filed 16 December 1970)

1. **Declaratory Judgment Act § 1— action for anticipatory judgment**

The courts of this state do not issue anticipatory judgments resolving controversies that have not arisen.

2. **Municipal Corporations § 9; Declaratory Judgment Act § 2— right of city firemen to live outside the city — action for declaratory judgment — dismissal of action**

Action by municipal firemen seeking a declaratory judgment on their right to reside outside the municipality while continuing their employment with the municipality, in apparent violation of municipal policy, *is held* properly dismissed by the trial court when no firemen were residing outside the municipality at the time of the action.

APPEAL by plaintiffs from *Cowper, Superior Court Judge,* 20 April 1970 Term, NEW HANOVER Superior Court.

This is an action instituted under the declaratory judgment act, G.S. 1-253 *et seq.* by and on behalf of employees of the Fire Department of the City of Wilmington. Plaintiffs, in substance alleged the following: Plaintiffs desire to reside outside of the city but have been informed by representatives of the city that if they do so their employment will be terminated. Plaintiffs have demanded that defendant comply with G.S. 160-115.1 which is as follows:

> "The governing bodies of every incorporated city and town are authorized to employ members of the fire department and to prescribe their duties. Persons employed as members of the fire department may reside outside the corporate limits of the municipality."

The answer of defendant admitted that certain employees of the fire department have requested permission to live outside the city and that such permission has not been granted. It also alleged in the answer that G.S. 160-25, enacted after the enactment of G.S. 160-115.1 repealed the earlier statute. G.S. 160-25 is as follows:

> "No person shall hold any elective office of any city or town unless he shall be a qualified voter therein. Residence within a city or town shall not be a qualification for or prerequisite to appointment to any nonelective office of any city or town unless the governing body thereof shall by ordinance so require."

The answer further asserted that no controversy existed between the parties.

From judgment dismissing the action, plaintiffs appealed.

James L. Nelson for plaintiff appellants.

Cicero P. Yow for defendant appellees.

VAUGHN, Judge.

[1, 2] Although we express no opinion on the reasons and findings of the trial judge set out in the judgment, we affirm the result reached in dismissing the action. No firemen presently reside outside the city and it is not known if any will do so. What action, if any, the city will take in the event of such an occurrence is also unknown. In effect plaintiffs assert that defendant will act contrary to law, as plaintiffs contend the law to be, if plaintiffs act contrary to law as the defendants contend the law to be. These allegations do not present a justiciable controversy. The courts of this state do not issue anticipatory judgments resolving controversies that have not arisen.

> "Our Uniform Declaratory Judgment Act does not authorize the adjudication of mere abstract or theoretical questions. Neither was this act intended to require the

Court to give advisory opinions when no genuine controversy presently exists between the parties. Actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. *Lide v. Mears, supra.*" *Angell v. Raleigh,* 267 NC. 387, 148 S.E. 2d 233.

A similar, though not identical, issue was presented in *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L. Ed. 754. In that case individual Civil Service employees and the United Public Workers of America joined in a suit alleging that the individuals desired to engage in political management and political campaigns contrary to the provisions of the Hatch Act and the Civil Service Rules which they contended were unconstitutional. A declaratory judgment was sought. As to all parties except the one who had actually engaged in the prohibited activity and faced dismissal under the Act, the Supreme Court of the United States held that no actual controversy existed which would support a declaratory judgment.

The result reached in dismissing the action is affirmed. The cause is remanded for the entry of a judgment dismissing the action for the reasons stated in this opinion.

Remanded.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. DAVID TRIPLETT

No. 7017SC645

(Filed 16 December 1970)

1. Criminal Law §§ 145.1, 153— probation revocation proceeding — void order extending probation — transfer to county of original sentencing — hearing held while appeal pending — jurisdiction

In this probation revocation proceeding wherein an order entered in the Superior Court of Wilkes County extending the period of probation was void because defendant had requested that he be returned to Surry County where he was originally placed on probation, jurisdiction of the Superior Court of Wilkes County was not affected by defendant's notice of appeal from the void order, and the proceeding was properly transferred to and heard in the Superior Court of Surry

County while defendant's appeal from the void Wilkes County order was pending in the Court of Appeals.

2. **Criminal Law § 145.1— probation revocation proceeding — request for transfer to county of sentencing — warrant and capias**

"Probation Violation Warrant and Order for Capias" directing that defendant be returned for hearing to the county where he was originally placed on probation, entered in response to defendant's request to be returned to that county, was required by G.S. 15-200 and was not subject to quashal in this case.

3. **Criminal Law §§ 26, 145.1— probation revocation — plea of former jeopardy based on void hearing**

Even if revocation of probation for breach of condition is properly the subject of a plea of former jeopardy, the court properly denied defendant's plea based on a prior hearing which was a nullity.

APPEAL by defendant from *McConnell, Superior Court Judge,* Regular May 1970 Criminal Session, SURRY Superior Court.

The defendant was convicted of breaking, entering and larceny at the May 1967 Term of Surry Superior Court and was sentenced to not less than three (3) nor more than five (5) years. The active sentence was suspended upon the usual conditions of probation and the special condition that the defendant pay the costs, a fine of $200.00 and restitution to Howard Hinson in the amount of $150.00, all to be paid at the rate of $20.00 per month. Thereafter, the probationer, a resident of Wilkes County, was transferred to the supervision of E. J. Durham, Probation Officer assigned to Wilkes County.

On 17 April 1970, appellant appeared before Wilkes Superior Court for a hearing as to whether he had complied with the judgment in Surry County. Judge Gambill found as a fact that appellant had violated the terms and conditions of probation and entered an order extending probation from 10 May 1970 until 9 May 1971. Pursuant to appellant's written request, Judge Gambill also issued a "Probation Violation Warrant and Order for a Capias" directing that appellant be returned to Surry County for a further hearing. Appellant appealed to this Court from the orders of Judge Gambill. On 4 May 1970, while that appeal was pending, appellant appeared before Surry Superior Court for a further hearing pursuant to the probation violation warrant and order for capias. At that hearing Judge McConnell found as a fact that defendant had violated the terms and conditions of the probation in that no payments for cost, fine and restitution had been made since 15 March 1968, and

there was an outstanding balance of $223.90 as of 16 April 1970. Judge McConnell ordered probation revoked and ordered the sentence of three (3) to five (5) years into effect immediately. From the order revoking probation and imposing an active sentence, defendant appeals.

Attorney General Robert Morgan by Assistant Attorney General Henry T. Rosser for the State.

Franklin Smith for defendant appellant.

VAUGHN, Judge.

[1] Appellant contends that Surry Superior Court was without jurisdiction to hear this matter until the case from Judge Gambill's chambers could be heard by this Court on appeal. We disagree.

In *State v. Triplett,* 9 N.C. App. 443, 176 S.E. 2d 399, this Court held:

> "When the motion was made by the defendant to be returned to Surry County the statute required that he be returned. It was error for Judge Gambill to conduct a hearing and extend the period of probation and the order purporting to do so is hereby vacated."

The rule regarding appeals from void judgments is found in 1 Strong, N.C. Index, Appeal and Error, § 16, p. 137: "Notice of appeal from a void order does not take the cause out of the Superior Court, and the judge has power thereafter to enter a subsequent order in the cause." Since jurisdiction was not affected by notice of appeal, it remained in Wilkes Superior Court until transferred by Judge Gambill. This Court has already held that "[t]he order of Judge Gambill transferring the case to Surry County was proper." *State v. Triplett, supra.* Therefore, Surry Superior Court had jurisdiction in the matter.

[2, 3] Appellant also assigns as error the failure to quash the probation violation warrant and order for capias entered in Wilkes Superior Court, and the failure to grant his plea of former jeopardy. The probation violation warrant and order for capias was entered in response to appellant's request and was required by N. C. Gen. Stat. 15-200. *State v. Triplett, supra.* Even if revocation of probation for breach of condition were properly

the subject of a plea of former jeopardy, the defendant's plea was properly denied because, among other reasons, the hearing in Wilkes Superior Court was a nullity.

All of the appellant's remaining assignments of error pertain to the conduct of the hearing and to the alleged inadequacy of the evidence to support the judgment. We have carefully examined the record, and we find it free from prejudicial error. The findings of fact and the judgment entered thereon are adequately supported by the evidence.

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. EUGENE PHILLIP WATSON

No. 706SC642

(Filed 16 December 1970)

1. **Larceny § 7— larceny of coins — sufficiency of evidence**

In a prosecution charging defendant with the larceny of $40 in coins from a supermarket, the State's evidence, which included testimony by the supermarket owner that a roll of nickels found in defendant's possession was identical to the coins stolen, was sufficient to be submitted to the jury on the issue of defendant's guilt, even though the owner's positive identification of the coins on direct examination was weakened on cross-examination.

2. **Criminal Law § 104— motion of nonsuit — contradictions in the State's evidence**

Contradictions in the State's evidence are for the jury to resolve and do not warrant nonsuit.

APPEAL by defendant from *Copeland, Special Superior Court Judge,* July 1970 Term, HERTFORD Superior Court.

Defendant was convicted of larceny of property of the value of not more than $200.00. From judgment imposing an active prison sentence for a term of two (2) years, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey and Staff Attorney Richard N. League for the State.

Jones, Jones and Jones by Carter W. Jones and L. Bennett Gram, Jr., for defendant appellant.

VAUGHN, Judge.

[1, 2] Defendant assigns as error the denial of his motion for nonsuit. Evidence for the State, in part, tended to show the following: Defendant formerly worked for W. M. Odom, owner and operator of the Red and White Supermarket in Ahoskie. Upon opening his store on the morning of 30 June 1970, Odom found that a glass in the rear door had been broken and the latch lifted. He found that about $40.00 in coins was missing from his cash register. Among other coins missing were rolls of quarters, dimes and nickels. At about 4:30 a.m. on 30 June 1970 defendant approached the attendant at a service station located about one-half mile from the Red and White Supermarket. He asked the attendant, Dunning, to give him paper money for some coins. Dunning did so and received one roll of dimes and two rolls of nickels, one roll of quarters and five dollars worth of loose change for which he gave defendant $24.00 in paper currency. State's Exhibit "A," a roll of nickels, was identified as being one of the rolls of coins which defendant exchanged. The witness Odom was recalled and testified that Exhibit "A" was one of the rolls of nickels which was in his store. When considered in the light most favorable to the State, the evidence was sufficient to withstand defendant's motion for nonsuit. The thrust of defendant's argument is directed at the weakness of the State's evidence in identifying the coins in the defendant's possession as being the identical coins stolen. The witness Odom, when questioned on direct examination with reference to Exhibit "A," testified, "This is the roll that was in my store." He testified that he could identify the roll "because the 70 was blotted out and there is the June 29th date on it and the 1970 is blurred." It is true that this witness' positive identification on direct examination was undoubtedly weakened on cross-examination by defendant's counsel. Contradictions in the State's evidence, however, are for the jury to resolve and do not warrant nonsuit. Only the evidence favorable to the State will be considered. 2 Strong, N. C. Index 2d, Criminal Law, § 104, pp. 649, 650.

The defendant also contends that the trial judge erroneously instructed the jury with reference to the inference arising from the possession of recently stolen goods. We disagree. The court's charge when considered in context, made it clear that the inference arising from the possession of recently stolen goods did

not apply unless the jury found from the evidence and beyond a reasonable doubt that the coins possessed by defendant were the same coins stolen from Odom's store. In the entire trial we find no error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. EARLIE OWENBY

No. 7025SC650

(Filed 16 December 1970)

1. **Automobiles § 126; Criminal Law §§ 34, 85— second offense of drunken driving — evidence of prior conviction — admissibility**

Evidence that the defendant had been previously convicted of drunken driving was admissible in a prosecution charging defendant with a second offense of drunken driving, even though the defendant neither testified as a witness nor offered evidence of good character.

2. **Automobiles §§ 125, 127, 130— second offense of drunken driving — allegations and proof of prior offense**

For a defendant to be subjected to the infliction of the heavier punishment for a second offense of drunken driving, it is necessary that a prior conviction, and the time and place thereof, be alleged in the warrant and proved by the State. G.S. 20-179.

APPEAL by defendant from *McLean, J.*, 30 July 1970 Session of CATAWBA County Superior Court.

Defendant was tried and convicted at the 30 July 1970 Session of Catawba County Superior Court upon a warrant charging him with a second offense of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor. The warrant charged and the evidence tended to show that defendant was convicted of a first offense in Lexington Recorder's Court on 28 February 1968. From judgment imposed pursuant to G.S. 20-179 defendant appealed.

Attorney General Morgan by Assistant Attorney General Rich for the State.

Douglas F. Powell for defendant appellant.

GRAHAM, Judge.

[1, 2] Defendant did not testify or offer evidence. He now contends that since he did not voluntarily place his character in issue by testifying, it was error for the court to permit the State to introduce evidence of his prior conviction and to permit the solicitor to read to the jury the warrant which alleged the prior conviction. In support of his contention, defendant cites the elementary proposition that where a defendant neither testifies as a witness nor offers evidence of good character, the State may not show his bad character for any purpose whatever. *State v. Tessnear,* 265 N.C. 319, 144 S.E. 2d 43; *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537; *State v. Nance,* 195 N.C. 47, 141 S.E. 468. However, the evidence complained of here was admitted, not to show defendant's bad character, but for the purpose of establishing an essential fact which the State had the burden of proving beyond a reasonable doubt. For a defendant to be subjected under G.S. 20-179 to the infliction of the heavier punishment for a second offense of driving while under the influence of intoxicating liquor, it is necessary that a prior conviction, and the time and place thereof, be alleged in the warrant and proved by the State. *State v. White,* 246 N.C. 587, 99 S.E. 2d 772; *Harrell v. Scheidt, Comr. of Motor Vehicles,* 243 N.C. 735, 92 S.E. 2d 182; *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203. Whether there was in fact a prior conviction is a question for the jury and not the court. *State v. Cole, supra.*

We hold that it was entirely proper for the court to read the charge alleged in the warrant to the jury and to permit evidence tending to prove an essential element of that charge.

No error.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. LEMUEL PALMER OLDHAM

No. 7015SC605

(Filed 16 December 1970)

1. **Automobiles § 112; Criminal Law § 55— manslaughter — probative value of blood alcohol test**

In this manslaughter prosecution arising out of an automobile accident, the result of a blood alcohol test administered to defendant two hours and twelve minutes after the accident occurred had probative value and was properly admitted in evidence.

2. **Criminal Law § 163— assignment of error to the charge**

Assignment of error to "those portions of the charge of the Court as they appear of record herein" is insufficient.

APPEAL by defendant from *Braswell, Superior Court Judge,* 8 June 1970 Criminal Session, ALAMANCE Superior Court.

Defendant was prosecuted on two bills of indictment for manslaughter. Evidence for the State tended to show that shortly after 7:30 p.m. on 17 February 1970 the defendant was operating a motor vehicle on Kitchen Street in Burlington, North Carolina at an unlawful rate of speed. As he approached the intersection of Kitchen Street with South Mebane Street, the defendant did not slow down but disregarded a stop sign and ran into an automobile proceeding along South Mebane Street. The automobile was occupied by Linda Isely Smith and Stephen Selensky who were killed. Defendant had a strong odor of alcohol on his breath. His speech was slurred, loud and profane. At 9:50 p.m., approximately two hours and twelve minutes after the accident, it was determined that the percent by weight of alcohol in defendant's blood was 0.16. The evidence further tended to show that defendant did not consume any alcohol between the time of the accident and the time of the blood analysis. The defendant offered no evidence. The jury returned a verdict of involuntary manslaughter on each count. From judgment thereon, defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Ralph Moody for the State.

Donnell S. Kelly for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first assignment of error is that it was error to admit the result of the blood test. He contends that it was not timely made and that a test made two hours and twelve minutes after the occurrence is without probative value. Defendant admits that the test was properly administered and that there is ample evidence that defendant consumed no alcohol between the time of the wreck and the time the test was administered. Under all the circumstances of this case we hold that the result of the test had probative value and was properly admitted into evidence. This assignment of error is overruled.

[2] Defendant's final assignment of error is to the charge of the court and is set out as follows:

> "The defendant assigns as error those portions of the charge of the Court as they appear of record herein."

Although the assignment of error is insufficient, we have carefully reviewed the entire charge of the court and find no prejudicial error.

No error.

Judges BROCK and MORRIS concur.

ANTHONY DUDLEY, ADMINISTRATOR OF THE ESTATE OF FLOSSIE PHILLIPS, DECEASED v. LARRY JAMES BATTEN

No. 703SC546

(Filed 16 December 1970)

1. **Appeal and Error § 49; Automobiles § 45— automobile accident case — harmless error**

   Where it had already been stipulated that the defendant was driving the car that hit and killed the deceased, plaintiff could not be prejudiced by exclusion of his witness' testimony that the defendant's car hit the deceased.

2. **Automobiles § 50— accident case — sufficiency of evidence**

   Plaintiff's evidence in an automobile case was sufficient to go to the jury, and the trial court erred in directing a verdict for the defendant.

Dudley v. Batten

APPEAL by plaintiff from *Ragsdale, Special Superior Court Judge,* 25 May 1970 Session PITT County Superior Court.

Plaintiff brought this action seeking to recover damages for the death of plaintiff's intestate allegedly caused by the negligence of the defendant. Plaintiff's intestate was killed when struck by defendant's automobile. At the time she was either standing or walking in a westerly direction and she was either on the southern shoulder or on the southerly hard surface of paved Highway #102 approximately one mile west of Ayden, North Carolina. Plaintiff alleged that the defendant was negligent in that he drove his automobile at an excessive rate of speed, failed to keep a proper lookout, and failed to maintain proper control of his automobile.

At the close of plaintiff's evidence, the trial judge granted a directed verdict for the defendant and the plaintiff appeals to this Court.

Richard Powell and Samuel S. Mitchell for plaintiff appellant.

Gaylord and Singleton by L. W. Gaylord, Jr., and James C. Mills for defendant appellee.

CAMPBELL, Judge.

[1] Plaintiff first assigns as error the exclusion of certain testimony by Willie Best, one of plaintiff's witnesses, as to what his wife said as the accident occurred. While the substance of what the testimony would have been is not properly in the record, it appears that it would have been to the effect that the defendant's car hit the deceased. As it had already been stipulated that the defendant was driving the car that hit and killed the deceased, the exclusion of this testimony could not have been prejudicial if it were, in fact, improperly excluded. Plaintiff's first assignment of error is overruled.

[2] Plaintiff next assigns as error the granting of the directed verdict in favor of the defendant. Two of plaintiff's witnesses testified that the car of the defendant "ducked" off the road and hit the deceased. The highway patrolman, a witness for plaintiff, who investigated the accident testified that there were no skid marks or tire tracks on the shoulder of the road

and that there were chips of paint approximately two feet in from the shoulder on the pavement. The chips of paint were not identified as being from the automobile involved. He testified, without objection, that he calculated that the point of impact was two feet onto the pavement.

The conflict between the eyewitnesses' and the patrolman's opinion did not take the case from the twelve fact finders.

New trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROGER W. DAVIS

— AND —

STATE OF NORTH CAROLINA v. FRANKLIN H. DAVIS, JR.

No. 7015SC638

(Filed 16 December 1970)

Criminal Law § 92— defendant charged with breaking and entering and larceny — second defendant charged with receiving stolen goods — consolidated trial

The trial court did not err in the consolidation for trial of charges against one defendant for felonious breaking and entering and larceny and a charge against a second defendant for feloniously receiving the goods allegedly stolen by the first defendant.

APPEAL by defendants from *Bowman, Special Superior Court Judge,* 22 June 1970 Criminal Session, ALAMANCE Superior Court.

Roger Wayne Davis was charged in a bill of indictment with felonious breaking and entering and larceny. Franklin H. Davis, Jr. waived the return of the bill of indictment and was tried on information signed by himself, his counsel and the solicitor alleging that Franklin H. Davis, Jr. feloniously received the goods specified in the bill of indictment returned against Roger Wayne Davis, knowing the same to have been stolen. Both defendants were represented by the same privately employed counsel. Based upon inquiry made by the trial judge in open court, the court ascertained, determined and adjudicated that the plea of guilty entered by each defendant was freely, understandingly and voluntarily made, and was made without

any undue influence, compulsion or duress and without promise of leniency.

From judgments imposing an active prison sentence as to each defendant, the defendants appeal.

Attorney General Robert Morgan by Staff Attorney Walter E. Ricks III for the State.

Fred Darlington III for defendant appellants.

VAUGHN, Judge.

The only questions presented by these appeals are whether errors appear on the face of the record proper and whether the sentence imposed is in excess of statutory limits. We answer these questions in the negative.

Counsel for defendants on this appeal did not represent them at trial. The defendants assert that their only assignment of error is the improper consolidation of the cases for trial. The record contains no exception. Under the circumstances, we have nevertheless considered on its merits the question defendants attempt to raise on appeal and find the defendants' position to be without merit.

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. FREDDIE FRANKLIN STOKES

No. 704SC665

(Filed 16 December 1970)

1. **Indictment and Warrant § 14; Criminal Law § 127— quashal of indictment — arrest of judgment**

A fatal defect in the warrant or bill of indictment should be the subject of a motion to quash before pleading, or the subject of a motion in arrest of judgment after a verdict.

2. **Intoxicating Liquor § 9— possession of distillery — sufficiency of warrant**

Warrant adequately charged defendant with possession of property designed for the manufacture of liquor. G.S. 18-4.

3. Criminal Law § 168— prejudicial error in instructions

Trial court's recapitulation of the State's evidence and contentions prejudiced the defendant by their fullness, warmth, and vigor; and defendant is thereby entitled to a new trial.

ON *certiorari* to review trial before *Burgwyn, Judge of the Superior Court,* 28 April 1969 Session, SAMPSON Superior Court.

Defendant was charged in a warrant with possession of two distilleries and 1400 gallons of mash for the purpose of manufacturing liquor in violation of G.S. Chapter 18, Art. 1. He was found guilty in Sampson County Court and appealed to the Superior Court. Upon trial *de novo* in Superior Court he was again found guilty.

Attorney General Morgan, by Staff Attorney Sauls, for the State.

Ray B. Brady and Alfonso Lloyd, by Ray B. Brady for the defendant.

BROCK, Judge.

[1] Defendant moves this Court in arrest of judgment upon the grounds that the warrant does not charge defendant with an offense. If there is a fatal defect in the warrant or bill of indictment it should be the subject of a motion to quash before pleading, or the subject of a motion in arrest of judgment after a verdict.

[2] G.S. 18-4 provides that it shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violation of G.S. Chap. 18, Article 1. In this case defendant is charged with violating this statute as it pertains to possessing property designed for the manufacture of liquor. Although the warrant does not appear to be artfully drawn, it adequately charges defendant with the offense under G.S. 18-4 of possession of property designed for the manufacture of liquor intended for use in violation of G.S. Chap. 18, Article 1.

[3] Defendant assigns as error several portions of the judge's charge to the jury. Without encumbering these reports with a seriatim discussion of these assignments of error, in our opinion the fullness, the warmth, and the vigor of the trial judge's recapitulation of the State's evidence and the State's contentions

prejudicially influenced the jury against defendant and entitles him to a new trial.

New trial.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. GREGORY FRAZIER

No. 708SC457

(Filed 16 December 1970)

Robbery § 5— common-law robbery — submission of lesser included offense

Where all of the State's evidence tended to show a completed common-law robbery of $156 from the victim's person as she came out of a laundromat, the trial court was not required to instruct the jury as to a lesser included offense.

APPEAL by defendant from *Bundy, J.*, 12 January 1970 Session of LENOIR County Superior Court.

Defendant was tried upon his plea of not guilty to an indictment, proper in form, charging him with the offense of common law robbery. The jury returned a verdict of guilty and from judgment imposed upon the verdict defendant appealed.

Robert Morgan, Attorney General, by Roy A. Giles, Jr., Staff Attorney, for the State.

Aycock, LaRoque, Allen, Cheek & Hines by F. Fred Cheek, Jr., for defendant appellant.

GRAHAM, Judge.

The sole assignment of error brought forward and argued by defendant is based upon the failure of the trial court to submit to the jury the issue of defendant's guilt of lesser included offenses. This assignment of error is overruled.

"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." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

In the present case the prosecuting witness testified that she was attacked by defendant and another man as she came out of a Launderama near the Winn-Dixie Shopping Center in Kinston. She stated that defendant grabbed her around the throat and told her not to scream. He also hit her on the chin and knocked her down. While she was on the pavement defendant and his companion removed her pocketbook from her arm and fled. The pocketbook contained $156 and other personal articles of value. This evidence tends to show a completed robbery. Defendant did not testify and no conflicting evidence relating to the incident described by the prosecuting witness was presented. Hence, it was not incumbent upon the court to instruct the jury as to a lesser included offense. *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24.

No error.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. GARY WARE

No. 7029SC659

(Filed 16 December 1970)

Escape § 1— plea of nolo contendere to felonious escape charge — sentence

The record reveals that defendant freely, understandingly and voluntarily entered a plea of *nolo contendere* to a valid indictment charging him with a second offense of escape, a felony, and that the sentence imposed is within the limits prescribed by G.S. 148-45(a).

APPEAL by defendant from *Grist, J.,* 10 August 1970 Session of RUTHERFORD Superior Court.

The defendant Gary Ware was charged in a bill of indictment, proper in form, with a second offense of escape, a felony,

in violation of G.S. 148-45(a). The defendant, an indigent, represented by his court-appointed attorney, entered a plea of *nolo contendere*. From a judgment of imprisonment for six months, the defendant appealed to this Court.

Robert Morgan, Attorney General, and Richard N. League, Staff Attorney, for the State.

Robert G. Summey for defendant appellant.

HEDRICK, Judge.

Defendant brings forward no assignments of error, but requests this Court to review and examine the record on appeal for any prejudicial error appearing on the face thereof.

"A plea of *nolo contendere* is equivalent to a plea of guilty insofar as it gives the court the power to punish, and the court may impose sentence thereon as upon a plea of guilty." 2 Strong, N. C. Index 2d, Criminal Law, § 25, p. 513.

The record on appeal reveals that the judge carefully questioned the defendant in open court as to whether he freely, understandingly, and voluntarily entered the plea of *nolo contendere* to the charge set out in the bill of indictment, and on 12 August 1970 the court made an adjudication that the defendant's plea was " . . . freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency."

We have carefully examined the record and conclude that the defendant pleaded *nolo contendere* to a valid bill of indictment, and the sentence imposed by the judgment is within the limits prescribed for a violation of the statute, G.S. 148-45(a).

In the trial below, we find no error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. HARRY MARTIN, JR.

No. 7010SC611

(Filed 16 December 1970)

Criminal Law § 161— assignment of error to the entry of judgment — review on appeal

An assignment of error to the entry of judgment presents the case for review for error appearing on the face of the record.

APPEAL by defendant from *Bailey, Judge of the Superior Court,* 2 June 1970 Session, WAKE Superior Court.

Defendant was charged in a bill of indictment (in case number 70 CR 14985) with a felonious breaking or entering of the Ligon High School building, and with felonious larceny of property therefrom. He was charged in another bill of indictment (in case number 70 CR 14987) with a felonious breaking or entering of the Mary E. Phillips School building, and with felonious larceny of property therefrom.

The two cases were consolidated for trial. Upon defendant's pleas of guilty as charged, the two counts in 70 CR 14985 were consolidated for judgment, and judgment of imprisonment for ten years was entered; the two counts in 70 CR 14987 were consolidated for judgment, and judgment of imprisonment for ten years was entered; it was ordered that the two sentences run concurrently.

Defendant appealed.

Attorney General Morgan, by Trial Attorney Jacobs, for the State.

Peyton B. Abbott for defendant.

BROCK, Judge.

Defendant excepts to and assigns as error the entry of judgment in each case; these assignments of error present the cases for review for error appearing on the face of the records. 3 Strong, N. C. Index 2d, Criminal Law § 161, p. 112.

The bill of indictment in each case is proper in form and clearly identifies the premises broken into. Defendant was represented by experienced counsel appointed by the Court. The

trial judge painstakingly examined defendant concerning his understanding and the voluntariness of his pleas of guilty; and upon competent evidence determined that the pleas were understandingly and voluntarily entered. The sentences imposed are well within the limits of what legally might have been imposed.

On appeal defense counsel candidly states that he can find no error; with this appraisal we agree.

No error.

Judges MORRIS and VAUGHN concur.

RACHEL B. HICE CREASMAN v. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF HENDERSONVILLE AND KENNETH YOUNGBLOOD, SUBSTITUTE TRUSTEE

No. 7028SC643

(Filed 16 December 1970)

Rules of Civil Procedure § 50— motion for directed verdict — motion for "dismissal"

Defendants' motion for "dismissal" on grounds of insufficient evidence to go to the jury, rather than for a "directed verdict," *held* not fatal where the defendants stated grounds entitling them to a directed verdict. G.S. 1A-1, Rule 50.

APPEAL by plaintiff from *Superior Court Judge Hasty,* 16 March 1970 Schedule A Session of Superior Court held in BUNCOMBE County.

Cecil C. Jackson, Jr., for plaintiff appellant.

Prince, Youngblood, Massagee & Groce by Boyd B. Massagee, Jr., for defendant appellees.

MALLARD, Chief Judge.

At the close of the plaintiff's evidence in this action to declare void a note and deed of trust, the court allowed the defendants' motion "for an involuntary dismissal with prejudice" on the grounds that there was insufficient evidence to go to the jury.

In a case tried to a jury, after a plaintiff has put on evidence and rested, a defendant who asserts that the evidence of the plaintiff is insufficient to permit a recovery is restricted to making a motion for a directed verdict under Rule 50(a) of the Rules of Civil Procedure. Under Rule 50, a motion for a directed verdict must state the grounds therefor.

In the case before us the defendants' motion was "for *dismissal* and *(sic)* grounds of insufficient evidence to go to the jury." (Emphasis added.) The defendants used the words "dismissal and grounds" when they should have used "directed verdict on the grounds." However, the defendants stated grounds entitling them to a directed verdict. The failure to use the words "directed verdict" is not fatal to their motion.

We hold that the trial judge was correct in allowing the motion.

Affirmed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES ALTON WILLIAMS, CHARLIE EARL BOYD, JR. AND THERMAN DAVENPORT

No. 703SC623

(Filed 16 December 1970)

Criminal Law § 76— instruction that confession, if made, was voluntary

The trial court erred in instructing the jury that if they should find from the evidence beyond a reasonable doubt that a confession was made by each defendant, they were "not concerned with whether it was freely and voluntarily made, because the court has ruled it was freely and voluntarily made."

APPEAL by defendants from *Parker, J.*, June 1970 Session of PITT Superior Court.

The three defendants were jointly indicted and tried for the crime of attempting to burn a dwelling house, a violation of G.S. 14-67. Each defendant pleaded not guilty, was found guilty by the jury, and appealed from the sentence imposed.

Attorney General Robert Morgan by Staff Attorneys Howard P. Satisky and Walter Ricks III, for the State.

Clifton W. Everett, Jr., for defendant appellants, James Alton Williams and Charlie Earl Boyd, Jr.

James T. Cheatham for defendant appellant, Therman Davenport.

PARKER, Judge.

After a *voir dire* hearing, the trial court allowed in evidence testimony of a deputy sheriff concerning extrajudicial confessions which each defendant had made while in the presence of the others. In its charge the court instructed the jury that if they should find from the evidence beyond a reasonable doubt that the confession was made, they were "not concerned with whether it was freely and voluntarily made, because the court has ruled it was freely and voluntarily made." In this instruction the court committed error.

"It is error for the judge to instruct the jury that he has ruled or determined that the statements, if any, attributed to defendant, were made by defendant freely and voluntarily." *State v. Logner,* 269 N.C. 550, 153 S.E. 2d 63. For error in the charge, defendants are awarded a

New trial.

Chief Judge MALLARD and Judge GRAHAM concur.

STATE OF NORTH CAROLINA v. CHARLES GORDON JONES

No. 7019SC669

(Filed 16 December 1970)

Constitutional Law § 36— cruel and excessive punishment — sentencing of youthful offender

Consecutive sentences of two years' imprisonment, each of which was imposed upon a youthful offender's pleas of guilty to nonfelonious breaking and entering and to felonious larceny, were not cruel and excessive punishment. G.S. 148-49.4.

APPEAL by defendant from *Thornburg, Special Judge,* August 1970 Session CABARRUS Superior Court.

The defendant was tried on a bill of indictment containing two counts: one, a count of felonious breaking and entering, and the second count with felonious larceny of two hams after the breaking and entering.

The defendant, in person and through his court-appointed attorney, in open court, entered a plea of guilty to non-felonious breaking and entering and non-felonious larceny. The trial judge found that the plea in each case was entered freely, voluntarily and understandingly and thereupon sentenced the defendant to two consecutive sentences of two years each to the custody of the Commissioner of Corrections for treatment and supervision under G.S. 148 Section 49.4 entitled "Sentencing a Youthful Offender." The defendant appealed.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

Williams, Willeford and Boger by Thomas M. Brady for defendant appellant.

CAMPBELL, Judge.

The defendant asserts that the punishment was cruel and excessive. There is no merit in this exception. *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34 (1967). We have reviewed the record and agree with the candid statement of counsel for the defendant that no error appears in the record.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN MICHAEL BUSH

No. 704SC619

(Filed 16 December 1970)

1. Criminal Law §§ 91, 145.1— probation revocation hearing — denial of continuance

No abuse of discretion has been shown in the trial court's denial of defendant's motion for a continuance of his probation revocation hearing.

2. Criminal Law § 145.1— revocation of probation — sufficiency of evidence

There was sufficient evidence to support the findings of the trial court that defendant had violated the conditions of his probation in each of two separate cases.

APPEAL by defendant from *Copeland, Special Superior Court Judge,* 20 May 1970 Session, ONSLOW Superior Court.

This is an appeal from judgments revoking probation. During the course of defendant's trial in another case, he was duly informed in writing of his probation officer's intention to ask the court to revoke probation in two separate cases. The hearing was scheduled the day following the end of the trial then in progress. After hearing the evidence, the presiding judge, in detailed findings of fact, found that defendant had violated the conditions of his probation. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Thomas B. Wood for the State.

Jerry Paul for defendant appellant.

VAUGHN, Judge.

[1] Defendant's assignment of error based on the trial judge's denial of his motion for a continuance is overruled. The motion was addressed to the sound discretion of the trial judge and no abuse of discretion is shown. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476.

[2] The defendant's remaining assignments of error have been carefully considered and found to be without merit. There was sufficient evidence to sustain the findings of the trial judge that the defendant had violated the conditions of his probation in each case.

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. MONROE SYLVESTER KORN

No. 704SC434

(Filed 16 December 1970)

Automobiles § 129— driving under the influence — failure to explain law arising on evidence

In this prosecution for driving while under the influence of intoxicating liquor, defendant is entitled to a new trial for failure of the court to "declare and explain the law arising on the evidence in the case." G.S. 1-180.

APPEAL by defendant from *Burgwyn, J.*, 2 March 1970 Session of DUPLIN Superior Court.

Defendant was charged by warrant with operating a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor. In the district court he pleaded not guilty, was found guilty, and from sentence imposed appealed to the superior court, where he was tried *de novo*. He again pleaded not guilty, was found guilty by the jury, and from judgment imposed appealed to the Court of Appeals.

Attorney General Robert Morgan by Assistant Attorney General William B. Ray for the State.

Narron & Holdford by William H. Holdford for defendant appellant.

PARKER, Judge.

When the court's charge to the jury is considered as a whole, it is apparent that in this case the experienced trial judge failed to properly "declare and explain the law arising on the evidence given in the case." G.S. 1-180. For this failure, defendant is entitled to a

New trial.

Chief Judge MALLARD and Judge GRAHAM concur.

STATE OF NORTH CAROLINA v. GEORGE FRANKLIN FARRIS

No. 7025SC661

(Filed 16 December 1970)

Criminal Law § 138— sentence of defendant different than sentence of co-conspirator

The fact that defendant did not receive the same sentence as that received by one of his co-conspirators is not ground for legal objection.

APPEAL by defendant from *McLean, Judge,* 31 August 1970 Criminal Session of CATAWBA County Superior Court.

The defendant, along with eight others, was charged in a bill of indictment with conspiracy to utter forged instruments, namely, payroll checks drawn on Broyhill Furniture Industries.

The defendant, in person and through his court-appointed attorney, entered a plea of guilty. The trial judge ascertained and adjudicated in open court that the plea was entered freely, voluntarily and understandingly. From a sentence of not less than nine and one-half years to not more than ten years in the State Department of Correction, the defendant appeals.

Attorney General Robert Morgan, by Deputy Attorney General R. Bruce White, Jr., and Staff Attorney Ladson F. Hart for the State.

Larry W. Pitts for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error that he did not receive a sentence the same as the sentence imposed upon one of the co-conspirators. There is no merit in this assignment of error. *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901 (1965).

We have reviewed the record in this case and find no prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. HARRY MARTIN, JR.

No. 7010SC609

(Filed 16 December 1970)

APPEAL by defendant from *Bailey, Judge,* 2 June 1970 Criminal Session of WAKE County Superior Court.

The defendant was charged in a two-count bill of indictment with the felonious breaking and entering of Ligon High School in the City of Raleigh, and in the second count with larceny of two typewriters from said school.

The defendant, in person and through his court-appointed attorney, entered a plea of guilty to both counts. The trial judge ascertained and adjudicated in open court that the plea of guilty was entered freely, voluntarily and understandingly. The two counts were consolidated for judgment, and the defendant was sentenced to a term of ten years in the custody of the Commissioner of the North Carolina Department of Correction. The defendant appealed.

Attorney General Robert Morgan by Staff Attorney Walter E. Ricks III, for the State.

Peyton B. Abbott for defendant appellant.

CAMPBELL, Judge.

The court-appointed attorney for the defendant, with candor and frankness, presents the record for review and states that he is unable to designate any error sufficient to warrant a new trial.

We have reviewed the record in this case and find no prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN ARTHUR COUNCIL

No. 7014SC660

(Filed 16 December 1970)

APPEAL by defendant from *Ragsdale, S.J.*, 23 September 1969 Session, DURHAM Superior Court. (*Certiorari* allowed 25 August 1970).

In three bills of indictment, proper in form, defendant was charged with forgery and uttering forged instruments; in a fourth bill of indictment, proper in form, he was charged with store breaking and felonious larceny. Defendant pleaded not guilty to all charges; a jury found him guilty of store breaking, felonious larceny, and forgery in the three cases charged. From judgment imposing active prison sentences on the verdicts, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Russell G. Walker, Jr. for the State.

Nicholas A. Smith for appellant.

BRITT, Judge.

The only assignment of error brought forward and argued in defendant's brief relates to the trial court's instructions to the jury. Specifically, defendant contends that the court erred in its instructions with respect to testimony of an alleged accomplice; also, that the court expressed an opinion on the evidence in violation of G.S. 1-180. The assignment of error is without merit. We have carefully reviewed the jury charge, with particular reference to the portion complained of, and conclude that the charge was fair to defendant and was free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

RAY G. REGISTER AND WIFE, ELIZABETH B. REGISTER v. JOSEPH M. GRIFFIN, TRUSTEE, AND PIEDMONT PRODUCTION CREDIT ASSOCIATION

No. 7026SC440

(Filed 30 December 1970)

1. **Mortgages and Deeds of Trust § 7— notes executed after deed of trust**

Deed of trust executed by plaintiffs on 21 November 1963 secured not only the note executed by plaintiffs contemporaneously therewith, but, as between the original parties thereto, also secured four additional notes executed by plaintiffs in 1964 and 1965.

2. **Mortgages and Deeds of Trust § 19— default in notes — right to foreclose**

There was sufficient evidence to sustain the trial court's finding that notes secured by a deed of trust were in default, and the court properly concluded that the trustee had a right to foreclose on the deed of trust.

3. **Attorney and Client § 9; Costs § 4— attorneys' fees for collection of notes — liability of debtor — statutes**

Provisions in notes executed prior to the repeal in 1965 of [former] G.S. 25-8 that required the debtors to pay reasonable attorneys' fees for collection of the notes were rendered unenforceable by that statute, notwithstanding the enactment in 1967 of G.S. 6-21.2 permitting such provisions, since the former statute became a part of the contracts between the parties and the new statute could not vary the terms of those contracts.

APPEAL by plaintiffs from *Froneberger, Judge of the Superior Court,* 16 March 1970 Schedule "D" Session, MECKLENBURG Superior Court.

Plaintiffs instituted this action to restrain defendants from foreclosing under the power of sale contained in a deed of trust executed by plaintiffs on 21 November 1963.

The deed of trust provides, in pertinent part, as follows:

"THIS INDENTURE, entered into this 21st day of November, 1963, by and between Ray G. Register and wife, Elizabeth B. Register, (hereinafter called Undersigned, whether Borrower or other person(s),) and Joseph M. Griffin Trustee (hereinafter called Trustee), and Piedmont Production Credit Association (hereinafter called Lender): WITNESSETH: Whereas, Lender has made or agreed to make advances to Ray G. Register and Elizabeth B. Register,

(hereinafter called Borrower, whether one or more), in an aggregate amount not exceeding Twelve Thousand Two Hundred and No/100 ($12,200.00) Dollars, evidenced by an installment note of this date executed by Borrower to Lender, providing for interest rate, amounts and dates of advances, maturity date(s), and other terms:

"THEREFORE, in consideration of said advances and One Dollar ($1.00) paid to Undersigned, receipt acknowledged, and for better securing said indebtedness, and any additional advances (not exceeding an equivalent amount) that may subsequently be made to Borrower by Lender, and all renewals and extensions thereof, and all other indebtedness now due or to become due or hereafter to be contracted, with interest and costs, Undersigned has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell and convey unto Joseph M. Griffin Trustee, his successors and assigns, a certain tract of land situate . . . "

"A default under this instrument or under any other instrument heretofore or hereafter executed by Borrower to Lender shall at the option of Lender constitute a default under any one or more, or all instruments executed by Borrower to Lender . . . "

Contemporaneously with the execution of the deed of trust plaintiffs executed a note of the same date which may be summarized as follows:

$12,200.00 advanced
9,200.00 on 22 November 1963
3,000.00 on 6 December 1963

Repayment schedule

$1,930.00, 15 November 1964
1,930.00, 15 November 1965
1,940.00, 15 November 1966
1,800.00, 15 November 1967
1,800.00, 15 November 1968
1,400.00, 15 November 1969
1,400.00, 1 November 1970

The note further contained an acceleration clause in the event of default of payment as provided.

Thereafter plaintiffs executed four additional notes which may be summarized as follows:

$2,000.00, 9 March 1964
1,500.00, 18 August 1964
3,050.00, 29 June 1965
3,900.00, 1 October 1965

Each of the above four notes contains the following language: "The maker hereof, by executing this note, amends his application for loan heretofore submitted, and requests an increase equal to the amount of this note, for the following purposes: . . . " On three of the additional notes the purpose for which the additional loan was requested was set forth, and on one the purpose was not stated. Also each of the four additional notes contains an acceleration clause in the event of default of payment as provided.

In September 1967, pursuant to the power of sale contained in the deed of trust, defendant trustee commenced advertisement for sale of the lands described. On 20 October 1967 plaintiffs instituted an action for injunction to prevent the sale. Plaintiffs did not deny that they had failed to make payments in accordance with the terms of the various notes, but alleged a promise on the part of defendant to extend the due dates for certain payments. A temporary restraining order was issued 16 November 1967, and a trial on the merits was continued from time to time until 29 January 1969 at which time judgment was issued dismissing the action for failure of plaintiffs to prosecute.

On 14 February 1969 defendant trustee commenced a new advertisement of sale under the power of sale contained in the deed of trust. Plaintiffs instituted the present action on 13 March 1969 seeking an injunction against the foreclosure sale on the grounds that the note secured by the deed of trust was not in default. A temporary restraining order was issued 13 March 1969, and on 21 March 1969 was continued to the trial of the action on the merits (The order of 21 March 1969 is the subject of appeal to this Court. See opinion in 6 N. C. App. 572).

The action came on for trial on the merits in March 1970 before Judge Froneberger, by consent sitting without a jury. He

made findings of fact, conclusions of law, and entered judgment as follows:

"THIS CAUSE COMING ON TO BE HEARD and being heard at the Schedule 'D' Civil Term of the Superior Court of Mecklenburg County, North Carolina, the Honorable P. C. Froneberger, Judge Presiding, and by stipulation of counsel of both parties in open court it was agreed that:

"1. The court would hear the matter without a jury as well as act as referee, determining all matters and things in controversy.

"2. This judgment may be signed in or out of term.

"AND THE COURT FINDS the facts to be as follows:

"1. That the defendant Joseph M. Griffin is trustee in that certain deed of trust dated November 21, 1963, made by the plaintiff to secure a loan from the defendant Piedmont Production Credit Association, said deed of trust being recorded in Book 2483 at page 555 in the office of the Register of Deeds for Mecklenburg County, North Carolina.

"2. That said deed of trust is in the face amount of $12,200.00 but is so drafted that it secures additional advances not exceeding an equivalent amount of $12,200.00, therefore making said deed of trust secure an amount up to $24,400.00.

"3. That said deed of trust secures five notes, said five notes being described as follows:

Note A: Dated November 21, 1963, amount of	$12,200.00
Note B: Dated March 9, 1964, amount of	2,000.00
Note C: Dated August 18, 1964, amount of	1,500.00
Note D: Dated June 29, 1965, amount of	3,050.00
Note E: Dated October 1, 1965, amount of	3,900.00
Total	$22,650.00

"4. That each of said notes bears interest at the rate of 6% per annum, provided, however, that 'should the rate of interest which payee charges its members increase or decrease before this note is paid in full, then interest shall accrue on this note at the increased or decreased rate from

the effective date of each such increase or decrease . . . '; that the interest on the unpaid balance is payable when each installment of principal is payable and that each note, respectively, sets out on its face the dates upon which the principal installments of each, respectively, are due; and that the plaintiffs in signing these notes promised to pay all costs of collection, including reasonable attorney fees of not less than 10% unless contrary to the laws of the State where the note is executed.

"5. That as a condition of the loans made to the plaintiffs by the defendant Piedmont Production Credit Association, the plaintiffs were required to purchase and did purchase 170 shares at $5.00 per share of Class B stock in the defendant Piedmont Production Credit Association, which stock said defendant Piedmont Production Credit Association held as additional security.

"6. That advances were made by the defendant Piedmont Production Credit Association to the plaintiffs, principal payments and interest payments were received by the defendant Piedmont Production Credit Association from the plaintiffs, that the defendant Piedmont Production Credit Association sold plaintiffs' stock and applied the proceeds from the sale of said stock to plaintiffs' indebtedness; that defendant Piedmont Production Credit Association paid attorney fees (foreclosure advertisement fees included therein) in attempts to collect said indebtedness, all in the amounts and on the dates as set forth in Exhibit A attached hereto and made a part hereof.

"7. That the interest rate of the defendant Piedmont Production Credit Association changed on July 1, 1968, from 6% to 7%, and was again changed on February 13, 1969, back to 6%.

"8. That said deed of trust mentioned in paragraph one above has therein a 'cross default' provision whereby a default on any instrument executed by plaintiffs constitutes a default on all instruments executed by plaintiffs to the defendant Piedmont Production Credit Association.

"9. That this action was instituted by filing a complaint in the Superior Court of Mecklenburg County, North Carolina, on March 13, 1969.

"10. That no payments have been received by the defendant Piedmont Production Credit Association, except for the sale of plaintiffs' stock sold by the defendant Piedmont Production Credit Association and applied to the plaintiffs' account, since January 20, 1967, and further, that if all payments of every nature paid by the plaintiffs to the defendant Piedmont Production Credit Association had been applied to Note A mentioned above that said Note A would have been in default as of the filing of this action, and that therefore all notes are now in default and have been in default since prior to the commencement of this action.

"11. That the defendant Piedmont Production Credit Association should be reimbursed, in accordance with the language in the notes, for all attorney fees, advertisement costs and court costs, reasonably incurred and paid by it to date in attempts to collect said notes, and for any further cost or attorney fees, advertisement fees or court costs that the defendant Piedmont Production Credit Association reasonably incurs in collecting the sum due, including a reasonable amount for attorney fees incurred in the trial of this very action.

"12. That there was owed as of February 24, 1970 the sum of $14,065.00 in principal plus the sum of $5,358.69 interest, making a total sum owed as of February 24, 1970 of $19,423.69 and that interest has accrued thereafter and shall accrue thereafter at the rate of $2.312 per day plus additional attorney fees which the court finds to be reasonable in the amount of $500.00.

"13. That, in view of the default, the defendant Piedmont Production Credit Association has the right to foreclose said deed of trust immediately.

"CONCLUSIONS OF LAW:

"From the foregoing facts the court makes the following conclusions of law:

"1. That the defendant Piedmont Production Credit Association rightfully charged the plaintiffs $691.20 for attorney fees previously incurred, said attorney fees including the cost of foreclosure advertisement, and rightfully

charged the plaintiffs the sum of $10.00 paid to the Clerk of Superior Court in attempting to collect said notes.

"2. That the defendant Piedmont Production Credit Association is owed by the plaintiffs the sum of $14,065.00 principal plus $5,358.69 interest to February 24, 1970, plus interest at the rate of $2.312 per day thereafter.

"3. That said notes secured by said deed of trust as found in Book 2483 at page 555 in the office of the Register of Deeds for Mecklenburg County, North Carolina, are in default and have been in default since the commencement of this action and that the defendant Piedmont Production Credit Association should and does have the right to foreclose same immediately.

"4. That the firm of Griffin and Gerdes is rightfully due compensation for defending and trying this action, and said compensation in the amount of $500.00 should be charged to the plaintiffs herein.

"5. That the court should retain jurisdiction in this matter pending foreclosure and full settlement thereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

"1. That the defendant Piedmont Production Credit Association is owed by the plaintiffs the sum of $14,065.00 principal plus $5,358.69 interest up to February 24, 1970, plus interest at a daily rate thereafter at the rate of $2.312 per day.

"2. That the firm of Griffin and Gerdes, attorneys for the defendant Piedmont Production Credit Association, have and recover of the plaintiffs the sum of $500.00 attorney fees for defending at the trial of this action.

"3. That all costs of this matter be taxed to the plaintiffs.

"4. That the defendant Piedmont Production Credit Association is entitled to have the deed of trust foreclosed through its trustee, the defendant Joseph M. Griffin, immediately, and that the trustee shall be entitled to recover normal trustee's commission out of the proceeds of said sale, as well as all costs taxed herein, plus said attorney fees

for the firm of Griffin and Gerdes in the sum of $500.— hereinbefore awarded.

"5. That the Court retains jurisdiction of this matter pending foreclosure and full settlement thereof.

This the 20th day of March, 1970.

/s/ P. C. Froneberger
Judge Presiding

"EXHIBIT A

ADVANCEMENTS BY PIEDMONT PRODUCTION CREDIT ASSOCIATION TO PLAINTIFFS

Note A: 11/22/63	$ 9,200.00
12/6/63	3,000.00
Note B: 3/16/64	2,000.00
Note C: 8/24/64	1,500.00
Note D: 6/28/65	3,050.00
Note E: 10/1/65	3,900.00
Total Advanced Plaintiffs	$22,650.00

EXPENSES INCURRED BY PIEDMONT PRODUCTION CREDIT ASSOCIATION TO DATE

Attorney Fees 3/25/69	$ 239.60
Clerk of Superior Court 4/4/69	10.00
Attorney Fees 11/3/69	451.60
Total Expenses Incurred	$ 701.20

PAYMENT ON PRINCIPAL BY PLAINTIFFS

12/6/63	$ 193.00
1/10/64	190.00
2/14/64	190.00
3/11/64	190.00
4/17/64	40.00
7/28/64	3,057.00
7/28/64	800.00
8/31/64	100.00
11/17/64	50.00
4/9/65	50.00
8/13/65	300.00

6/27/66	435.00
10/20/66	550.00
8/15/66	500.00
1/20/67	1,940.00
Total Principal Payments	$ 8,585.00

PAYMENTS ON INTEREST BY PLAINTIFFS

7/28/64	$ 143.00
8/13/65	78.91
6/27/66	168.48
8/15/66	60.32
10/20/66	231.43
Total Interest Payments	$ 682.14

SALE OF PLAINTIFFS' STOCK BY PIEDMONT PRODUCTION CREDIT ASSOCIATION

2/12/69	$ 850.00"

Plaintiffs assign as error each finding of fact, each conclusion of law, and the entry of the judgment.

H. Parks Helms for plaintiffs.

Joseph M. Griffin for defendants.

BROCK, Judge.

The evidence by each side dwells at length upon dollar figures, *i.e.* the face amounts of notes, the interest accrued on the various notes, and the payments and applications thereof to interest and principal due. Obviously a summary of the evidence would be difficult to follow, and, in our opinion, would serve no useful purpose.

[1] All of plaintiffs' assignments of error are directed to two contentions asserted by plaintiffs. *First,* plaintiffs contend that the 21 November 1963 deed of trust secures only the note which was executed contemporaneously therewith, and specifically that the said deed of trust does not secure the four additional notes executed in 1964 and 1965. And it is their contention that they were not in default in payments on the 21 November 1963 note; therefore, they assert the trustee had no authority to foreclose. *Second,* plaintiffs contend that, even if it should be determined that the trustee was correct in instituting foreclosure proceed-

ings, defendants are not entitled to recover attorney fees from plaintiffs under the provisions contained in the several notes.

Plaintiffs' first contention

[1] The deed of trust executed by plaintiffs, as set out in the foregoing statement of facts, contains the following provision: "THEREFORE, in consideration of said advances and One Dollar ($1.00) paid to Undersigned, receipt acknowledged, and for better securing said indebtedness, *and any additional advances (not exceeding an equivalent amount) that may subsequently be made by Borrower to Lender,* and all renewals and extensions thereof, *and all other indebtedness now due or hereafter to be contracted,* . . . " (emphasis added). By this provision the parties contemplated that additional loans not exceeding $12,200.00 made by defendants to plaintiffs would be secured by the deed of trust. Also, each of the four additional notes executed by plaintiffs in 1964 and 1965 contains the following provision: "The maker hereof, by executing this note, amends his application for loan heretofore submitted, and requests an increase equal to the amount of this note . . . . " Although the provisions of the deed of trust, and the provisions of the notes are not models to be followed, they are a sufficient agreement as between the contracting parties, and, we hold that as between the original parties the deed of trust secures the four additional notes. We are not called upon to decide, and specifically do not decide, the effect of the provisions upon an innocent third party.

[2] There was sufficient evidence to sustain the finding that the notes are in default. Therefore, it follows that the conclusion that the trustee has the right to proceed with foreclosure of the deed of trust is correct and it is hereby affirmed.

Plaintiffs' second contention.

[3] After the dismissal of plaintiffs' first action defendant charged plaintiffs' account with $691.20. In his conclusions of law, Judge Froneberger concluded "[t]hat the defendant Piedmont Production Credit Association rightfully charged the plaintiffs $691.20 for attorney fees previously incurred . . . . " Plaintiffs except and assign this conclusion as error. Also, Judge Froneberger concluded "[t]hat the firm of Griffin and Gerdes [defendants' attorneys] is rightfully due compensation for defending and trying this action, and said compensation in

the amount of $500.00 should be charged to the plaintiffs herein." Plaintiffs except and assign this conclusion as error. These assignments of error are sustained.

Each of the notes executed by plaintiffs contained the following provision: "We also promise to pay all costs of collection including a reasonable attorney's fee of not less than ten per centum of the total amount due hereon, unless contrary to the laws of the state where this note is executed." At the time of the execution of the notes in 1963, 1964, and 1965, such a provision for attorney fees in a note was contrary to the laws of North Carolina. G.S. 25-8 provided in part that " . . . a provision incorporated in the instrument to pay counsel fees for collection is not enforceable . . . . " This statutory provision became a part of the contracts between the parties and the repeal of G.S. 25-8 in 1965 and the enactment of G.S. 6-21.2 in 1967, which permits such a provision, did not vary the terms of the original contracts between the parties. Article I, § 10 [1], Constitution of the United States. Therefore, as between the parties, the terms of the notes relative to attorney fees is inapplicable and contrary to law.

This holding does not effect any rights defendants may have to make a motion in the cause under G.S. 1A-1, Rule 65(e).

The $691.20 attorney fees which defendant charged to plaintiffs' account is included in the figure of $5,358.69 denominated as "interest" in the judgment; therefore this interest figure must be modified.

The judgment entered by Judge Froneberger is modified to read as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the defendant Piedmont Production Credit Association is owed by the plaintiffs the sum of $14,065.00 principal plus $4,667.49 interest up to February 24, 1970, plus interest at a daily rate thereafter at the rate of $2.312 per day.

2. (Deleted)

3. That the cost of this action be taxed against the plaintiffs.

4. That the defendant Piedmont Production Credit Association is entitled to have the deed of trust, as security for the five notes, foreclosed through its trustee, the defendant Joseph M. Griffin, after due advertisement according to law.

5. That the court retains jurisdiction of this matter pending foreclosure and full settlement thereof.

Except as modified as above, the judgment appealed from is affirmed.

Modified and affirmed.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. PHILLIP LEIGH

No. 702SC465

(Filed 30 December 1970)

1. **Arrest and Bail § 6— delaying or obstructing police officer**

In order to convict one of a violation of G.S. 14-223, the State does not have to show that a defendant resisted, delayed *and* obstructed an officer, but it is sufficient if a defendant unlawfully and wilfully resists, *or* delays, *or* obstructs an officer in discharging or attempting to discharge a duty of his office.

2. **Arrest and Bail § 6— delaying or obstructing police officer**

There does not have to be an assault or actual physical interference with the officer to constitute an offense under G.S. 14-223, nor does the conduct of a defendant have to be so effective that it permanently prevents the officer from making his investigation.

3. **Arrest and Bail § 6— delay of officer's investigation of crime — abusive language — violation of G.S. 14-223**

Evidence of the State tending to show that defendant, by the continued use of loud and abusive language over a period of several minutes, prevented a deputy sheriff from talking with a suspect at the scene of a reported assault, thereby delaying the officer in making his investigation, *held* sufficient for submission to the jury in a prosecution under G.S. 14-223.

4. **Arrest and Bail § 6— obstructing or delaying officer — sufficiency of warrant**

Warrant charging that defendant unlawfully and wilfully delayed and obstructed a deputy sheriff in discharging his duty to investigate

a reported assault "by abusive language directed at the officer" and by "trying to convince the person being investigated from cooperating with the officer," *held* sufficient to charge an offense under G.S. 14-223.

Judge PARKER dissenting.

APPEAL by defendant from *May, Superior Court Judge,* 27 April 1970 Criminal Session of Superior Court held in WASHINGTON County.

Defendant was tried on his plea of not guilty on a warrant charging that on 20 January 1970 he unlawfully and wilfully "delayed and obstructed Deputy Sheriff Walter Peel, a duly empowered law enforcement officer of Washington County, in the discharge of his duty," a violation of G.S. 14-223. Specifically, the warrant charged: "Said officer was investigating a reported assault and attempting to prevent a breach of the peace on Main Street in Creswell. The hinderance *(sic)*, delay and obstruction of the officer was accomplished by abusive language directed at the officer and by Phillip Leigh trying to convince the person being investigated from cooperating with said officer."

In the district court defendant was found guilty and was sentenced to imprisonment for four months, suspended upon payment of a fine of $250 and costs. He appealed, and on trial *de novo* in the superior court, the State presented evidence in substance as follows:

Deputy Sheriff Peel (deputy sheriff) testified that on the night of 20 January 1970 he went to Main Street in Creswell to investigate an assault reported to him to have been committed by one Raymond Blount. There were about twenty-five people there. He found Blount sitting in defendant's car. Defendant was on the driver's side of the car, and there were two shotguns in the car. The deputy sheriff walked to the car and asked Blount what was the matter. He testified that then the following occurred:

"Leigh was under the driver's side of the car. I observed two shotguns in his car. Leigh spoke up and said 'By, By, By,' and kept repeating it. I turned to the Spencer boy and asked what he meant by 'By, By, By.'

I was not able to talk to Blount because of Phillip Leigh. I couldn't get any information from Blount because of

Leigh. I asked Blount to get out of the car and come on go with me and Leigh said 'You don't have to go with that Gestapo Pig.' There was a surrounding of people there and I could not navigate properly and I told Blount to come on and go with me. When he started toward my car, Leigh kept saying 'You don't have to go with that Pig.' After I put Blount in my car, Phillip Leigh went to my car and told him to roll the window down and said that he did not have to go with that Pig and to give him five, and I pushed Raymond. Leigh was right up close to me. I pushed him back and told him to move out of the way. He kept coming up to the car when I was trying to put the man in the car."

The deputy sheriff also testified that Blount at no time refused to go with him, that Blount "cooperated nicely," that the defendant did nothing to prevent him from driving off, that he did drive away with Blount in his car, and that after he got away from Leigh, he was able to talk to Blount. At the time of these events Blount was a suspect in an assault which had not been committed in the presence of the deputy, and the deputy did not then have a warrant for Blount's arrest and did not then place him under arrest. Two other witnesses testified to substantially the same occurrences, except that they did not see the deputy push the defendant.

One of the State's witnesses testified that "Leigh talked in a loud voice for 5, 7 or 8 minutes. Peel left with Blount about five minutes after he got there. When Peel put Blount in his car, Leigh was standing to his (Leigh's) car door, with a gun beside him."

The defendant testified that he did not delay or obstruct or attempt to delay or obstruct the deputy and that he referred to the deputy as a "Pig" only after the deputy told him to "Move Nigger."

Defendant's motions for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence were denied. The jury found defendant guilty as charged. From judgment sentencing defendant to imprisonment for a term of six months, defendant appealed.

Attorney General Morgan and Staff Attorney Evans for the State.

John H. Harmon for defendant appellant.

MALLARD, Chief Judge.

Defendant was charged with violation of G.S. 14-223. This statute makes it a misdemeanor "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office."

[1] This statute condemns the activity of any person wilfully and unlawfully resisting or *delaying* or obstructing a public officer in discharging or attempting to discharge a duty of his office. One of the duties of a deputy sheriff is to investigate alleged assaults with shotguns when they are reported to him. When the evidence is taken in the light most favorable to the State, the conduct and language of the defendant on this occasion was such as to prevent the officer from then and there talking to a person at the scene of the alleged crime. The evidence reveals that after the officer got in his car and drove away from the defendant, he was able to talk to Blount. The conduct of the defendant caused a delay in the investigative process which was an official duty of the officer. In order to convict one of a violation of this nature, the State does not have to show that a defendant resisted, delayed *and* obstructed an officer. It is sufficient if a defendant unlawfully and wilfully resists, *or* delays, *or* obstructs an officer.

[3] Blount was not arrested and did not have to go with the deputy sheriff. Neither did he have to answer the questions the officer may have desired to ask. It was not improper for the defendant to tell Blount he did not have to go with the officer, but he did not have the right, by the continued use of loud and abusive language, to prevent the officer from talking to Blount. It was a duty of the deputy sheriff to investigate the alleged assault that had been reported to him. In doing so, it was proper to question Blount who was on the Main Street of Creswell at night with a shotgun. The deputy sheriff was unable to talk to Blount because of the loud and abusive language of the defendant over a period of several minutes. He had to drive away from the scene in order to talk to Blount, and this constituted a delay in the performance of his duty as an officer.

[2] There does not have to be an assault on or actual physical interference with the officer in order to constitute the crime. Neither does the conduct of a defendant have to be so effective that it permanently prevents the officer from making his investigation.

[3] The evidence here was sufficient for the jury to find that the defendant unlawfully and wilfully, by his loud and abusive language directed at the officer delayed him in making his investigation. This required the submission of the case to the jury. The judgment imposed is within the limits prescribed by the statute.

[4] Although the warrant is not a model one, we think it was sufficient to charge an offense under the statute.

Defendant assigns as error certain portions of the charge, but when the charge is considered as a whole, no prejudicial error appears.

Defendant has other assignments of error which we find to be without merit under the applicable rules of law.

We hold that the defendant has had a fair trial, free from prejudicial error.

No error.

Judge GRAHAM concurs.

Judge PARKER dissents.

Judge PARKER dissenting:

A corollary to the rule that a valid warrant under G.S. 14-223 must allege at least in a general way the manner in which the accused obstructed the officer (see *State v. Wiggs,* 269 N.C. 507, 153 S.E. 2d 84, and cases cited therein), is that the State must prove its case according to its allegations. Here, defendant was not charged with physically obstructing the officer in any manner, nor was he charged with delaying the officer's investigation by means of continuous loud talking. The only allegations in the warrant as to the manner in which defendant delayed or obstructed the officer is that he did so by language he directed at the officer and by what he said to Blount. When the evidence in this case is related to the allegations in the warrant, I find no more than that defendant made statements to the effect that Blount did not have to go with the deputy, which was correct (*State v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703; *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100), and that Blount

should "give him five," the meaning of which was unclear. (The officer testified he did not know what these words meant, that he thought they meant "give him a fist"; defendant testified he referred to the Fifth Amendment.) If it would not have been a crime for Blount to refuse to talk to the officer *(Miranda)* or to go with him *(McGowan* and *Mobley, supra),* it is difficult to see how it is a crime for defendant to so advise him. There was plenary evidence that defendant directed insulting remarks toward the officer. While certainly offensive and in poor taste, these did not in themselves constitute a violation of G.S. 14-223. On this record I find the evidence simply too thin to support a jury finding that anything defendant said, either to the officer or to Blount, actually resulted in delaying or obstructing the officer in the performance of his duties. The officer's testimony that he was "not able to talk to Blount because of Phillip Leigh" and that he "couldn't get any information from Blount because of Leigh," was merely the officer's conclusion as to the very question the jury was called upon to decide. When the factual basis for that conclusion was more closely examined, particularly in the clearer light cast by cross-examination, the officer testified: "After I went to Leigh's car, it was maybe a minute before Blount got out of the car. . . . Blount at no time refused to go with me. He just said I am not going anywhere, but he cooperated nicely. He went right on with me. He was only sort of hesitant."

First Amendment problems aside, it is possible a case may arise in which conviction under G.S. 14-223 should be sustained where violation consisted in the defendant's directing insulting remarks to the officer or in advising another of his rights while in presence of the officer. I do not think it proper to do so where the evidence that such conduct actually effected a delay or obstruction of the performance of the officer's duties is no more substantial than is disclosed on the present record. It appears to me that defendant was arrested and convicted, not because he obstructed or delayed the officer, but because he offended him. I think nonsuit should have been allowed.

MARY ALICE BRYANT v. HAYWARD KELLY, JR., AND CLARETHA SIMMONS KELLY; LINSTER O. SIMMONS AND WIFE, BLANCHIE SIMMONS; RAYMOND C. SIMMONS AND WIFE, REATHER SIMMONS; RANDOLPH SIMMONS AND WIFE, ETHEL SIMMONS; AND KADELL SIMMONS AND WIFE, LOUISE M. SIMMONS; ROBERT H. SIMMONS AND WIFE, FANNIE SIMMONS; CLEO ROOSEVELT SIMMONS; AND CHARLIE EDWARD SIMMONS

No. 703DC439

(Filed 30 December 1970)

1. **Rules of Civil Procedure § 50— motion for directed verdict — jury trial**

Motion for a directed verdict under Rule 50(a) is proper when trial is being held before a jury. G.S. 1A-1, Rule 50(a).

2. **Rules of Civil Procedure § 41— motion for involuntary dismissal — trial without jury**

Motion for involuntary dismissal under Rule 41(b) is proper when the case is tried by the judge without a jury. G.S. 1A-1, Rule 41(b).

3. **Rules of Civil Procedure § 41— trial without jury — motion to dismiss — function of the judge**

In a nonjury case, the function of the judge on a motion to dismiss under Rule 41(b) is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case.

4. **Rules of Civil Procedure § 52; Appeal and Error § 57— findings of fact by the trial court — review on appeal**

Where the trial court as the trier of facts has found the facts specially, such findings are conclusive on appeal if supported by competent evidence, even though there may be evidence which might sustain findings to the contrary.

5. **Rules of Civil Procedure § 41— motion for involuntary dismissal — incorrect designation as motion for directed verdict**

Although the defendants' motion for dismissal in a nonjury trial was incorrectly designated as a motion for a directed verdict, the trial court properly treated the motion as a motion for involuntary dismissal under Rule 41(b).

6. **Rules of Civil Procedure § 52— findings of fact by the trial court — prerequisites**

The trial court in a nonjury trial must find the facts specially and state separately its conclusions of law thereon. G.S. 1A-1, Rule 52(a).

7. **Trusts § 13— action to impose parol trust on land — evidence precluding existence of trust**

In an action to impose a parol trust on land held by the heirs of plaintiff's brother, plaintiff's evidence that her brother acquired title

to the land more than one year *prior* to the time that she and her brother made an oral agreement whereby the brother was to purchase the land and hold title for the benefit of plaintiff, *is held* to preclude the existence of a parol trust.

8. **Trusts § 13— action to impose resulting trust on land — evidence precluding existence of trust**

In an action to impose a resulting trust on land held by the heirs of plaintiff's brother, plaintiff's evidence that her brother purchased and received title to the land more than one year *prior* to the time that payment was made on behalf of plaintiff for the land, *is held* to preclude the existence of a resulting trust.

APPEAL by plaintiff from *Roberts, Chief District Judge,* 23 March 1970 Session of CRAVEN District Court.

This is a civil action to establish a trust in favor of plaintiff in a described tract of real property in Craven County, N. C. In her complaint plaintiff alleged: That on or about 16 November 1946 plaintiff and Leonard Nixon Simmons entered into an agreement for the purchase of a larger tract; that the purchase price was $805.00; that it was then agreed between the parties that plaintiff should contribute $250.00 in cash toward the purchase price and that plaintiff should own a certain described portion of the land; that plaintiff did contribute and pay said sum of money and Leonard Nixon Simmons, using said money, "did purchase said property pursuant to said agreement and a Deed thereof was taken in the name of said Leonard Nixon Simmons, and said Leonard Nixon Simmons thereupon agreed with plaintiff that he would hold in his name plaintiff's interests in said property in trust for plaintiff, and he did so until his death on or about August 26, 1966." Plaintiff further alleged that she had demanded of defendants, heirs at law of Leonard Nixon Simmons, that they convey plaintiff's portion of the lands to her, but that they have refused to do so, "claiming to own the whole of said property, repudiating said trust imposed on the property by said Leonard Nixon Simmons, and denying that plaintiff has any interest in said property."

Defendants answered, denying the material allegations in the complaint, and affirmatively pleading laches and the statute of limitations.

The case was tried before Chief District Judge Roberts without a jury. The parties stipulated that Miles Simmons, father of Mary Alice Bryant and Leonard Nixon Simmons,

owned the subject lands prior to 1942, that the lands were part of those which were foreclosed for taxes by Craven County and conveyed by John A. Guion, Commissioner, to Craven County by deed dated 20 April 1942, and that the subject lands were conveyed to Leonard Simmons for a consideration of $805.00 on 16 November 1946, by deed recorded in the office of the Register of Deeds of Craven County.

Plaintiff introduced evidence in substance as follows:

Plaintiff testified that she was living on the land in 1942 and in 1946 and continued to live there for about fifteen years after 1946, that she farmed the land and cut timber off it, and that no objections were made to her farming or cutting timber until after her brother, Leonard, died.

Earl Bryant, plaintiff's husband, testified that he paid Leonard Simmons $250.00 for the purpose of buying the land back in, and that Romance Simmons, wife of Leonard Simmons, wrote a receipt for the money and gave it to him in Leonard Simmons' presence; that this occurred before the deed was drawn to Leonard Simmons; that he paid the money before Leonard Simmons got the land; that Leonard told Romance to give him a receipt; that at the time the money was paid and Romance Simmons wrote the receipt, she was married to Leonard Simmons; and that he only paid Leonard money for the land one time.

Romance Simmons testified that she was home when Earl Bryant came to the house and Leonard Simmons told her to write the receipt for $250.00; that "[t]he receipt was supposed to be for Mary Alice's part of the land"; that she was married to Leonard at the time the receipt was written, and she and Leonard were married on 28 January 1947; that when she wrote the receipt she made a copy, which she still had, and the copy of the receipt reads: "November 28, 1947, received from Earl Bryant $250 for property; $250 (signed) Leonard Simmons"; that she wrote the receipt and signed it and Leonard told her to do so.

Madeline Banks, daughter of the plaintiff, testified that she had heard her mother and father and her uncle Leonard Simmons discussing the purchase of the land; that her uncle Leonard asked them if they wanted to buy the land in with him, and they said that they did; that later they got the money

together and gave him the money; that she did not know the date, but it was in the fall of the year.

At the close of plaintiff's evidence, defendants moved for a directed verdict in their favor, which motion was allowed. The trial judge then signed judgment which, after reciting the plaintiff's evidence, is as follows:

"Upon the foregoing evidence as above recited, the undersigned finds as a fact, that:

"(a) Leonard Nixon Simmons purchased the subject lands for $805.00 on November 16, 1946, and took a deed in his name on that date, having the same recorded in Book 402, at Page 149, in the Office of the Register of Deeds of Craven County, North Carolina;

"(b) Leonard Nixon Simmons married Romance Simmons on January 28, 1947;

"(c) Earl Bryant paid $250.00 to Leonard Nixon Simmons on behalf of his wife, the plaintiff, after Leonard Nixon Simmons married Romance Simmons;

"(d) Earl Bryant paid $250.00 'for property' to Leonard Nixon Simmons on behalf of his wife, the plaintiff, on November 28, 1947;

"(e) There was no agreement between plaintiff and Leonard Nixon Simmons on the subject lands binding on Leonard Nixon Simmons unless and until plaintiff paid the sum of $250.00.

"Upon the foregoing Findings of Fact, the undersigned makes the following

"CONCLUSIONS OF LAW:

"At the time of his death on August 26, 1966, Leonard Nixon Simmons did not hold the subject lands in trust for the plaintiff, Mary Alice Bryant, as a result of the plaintiff paying or causing to be paid a portion of the purchase price of the said lands, neither as a result of any agreement binding between the parties prior to the purchase of said subject lands by Leonard Nixon Simmons.

"NOW, THEREFORE, it is ORDERED and ADJUDGED that defendants' motion for directed verdict in favor of defend-

ants at the close of plaintiff's evidence should be and the same hereby is allowed. Plaintiff to pay the costs.

"This 23rd day of March, 1970.

"/s/ J. W. H. Roberts
"Chief Judge"

To the entry of this judgment plaintiff excepted and appealed, assigning errors.

Brock & Gerrans by Donald P. Brock for plaintiff appellant.

Beaman & Kellum by Norman B. Kellum, Jr., for defendant appellees.

PARKER, Judge.

[1, 2] Motion for a directed verdict under Rule 50(a) of the Rules of Civil Procedure is proper when trial is being held before a jury. This case was tried by the judge without a jury. The appropriate motion in such case is for involuntary dismissal under Rule 41(b). Therefore, we will treat defendants' motion as a motion for an involuntary dismissal under Rule 41(b).

Rule 41(b) reads in part:

"After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits."

Rule 52(a) contains the following:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts spe-

cially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

[3, 4] In a nonjury case, in which all issues of fact are in any event to be determined by the judge, the function of the judge on a motion to dismiss under Rule 41(b) is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case. (See cases cited in 2 B, Barron and Holtzoff, Federal Practice and Procedure, § 919, interpreting the cognate Federal Rules.) Where, as in the present case, the trial court as the trier of the facts has found the facts specially, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which might sustain findings to the contrary. In such case "[t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. *Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected." *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29.

[5, 6] In the present case, even though defendants' motion was incorrectly designated as a motion for a directed verdict, the trial judge complied with the provisions of Rule 41(b). As trier of the facts, he determined them and rendered judgment on the merits against the plaintiff. He also complied with Rule 52(a) by finding the facts specially and stating separately his conclusions of law thereon. His findings of fact are clearly supported by the evidence, and are binding upon this Court on appeal. The question before us, therefore, is whether the facts found support the conclusions of law and the judgment. We hold that they do.

[7] In her complaint, plaintiff alleged facts which would support recovery on either of two theories: That either a parol trust or a resulting trust came into existence by reason of her dealings with her brother. To recover upon the theory of a parol trust, plaintiff must prove the existence of the alleged oral agreement with her brother, Leonard, to purchase the land and hold title for the benefit of the plaintiff, and must prove that this agreement was entered into before or at the time title passed to her brother. "One who is already the holder of the legal title

to land cannot create a valid trust therein by an oral declaration that he or she will hold the land in trust for another, or by an oral promise to convey the land to another at a future date." *Beasley v. Wilson,* 267 N.C. 95, 147 S.E. 2d 577. Here, on competent evidence, the trial judge has found that there was no binding agreement between plaintiff and her brother until plaintiff paid the sum of $250.00, and that this payment was made on 28 November 1947. The parties stipulated, and the court found, that title passed to the brother on 16 November 1946. Therefore, under the facts found and stipulated, no binding parol trust could arise.

[8] The same is true of a resulting trust. "A resulting trust arises, if at all here, from the payment of the purchase money, and accordingly it is essential to the creation of such a trust that the money or assets furnished by or for the person claiming the benefit of the trust should enter into the purchase price of the property at or before the time of purchase." *Vinson v. Smith,* 259 N.C. 95, 130 S.E. 2d 45. Here, on competent evidence, the trial judge has found that the $250.00 payment was made on behalf of plaintiff to her brother more than a year after he had purchased and received title to the property. On this finding, no resulting trust could arise.

In their brief on this appeal, plaintiff's counsel contend that at the time the property was conveyed to Craven County in 1942 for failure to pay taxes, the plaintiff and her brother were tenants in common. From this they argue that when Leonard purchased in 1946, his acquisition of the outstanding title inured to the benefit of his cotenant, citing *Bailey v. Howell,* 209 N.C. 712, 184 S.E. 476. This theory, however, is not available to plaintiff on this appeal. There was here neither allegation nor proof that plaintiff and her brother ever held title as cotenants. It was stipulated that their father owned the subject lands prior to 1942, but there was no evidence to indicate when their father died and whether testate or intestate.

We note also that while plaintiff alleged that defendants were the heirs at law of her brother, Leonard, her evidence indicates that her brother left a will which has been admitted to probate. However, in any event defendants appear to be proper parties in this case as successors in interest to Leonard Nixon Simmons, since it is stated in their brief on this appeal that they are his devisees.

We have reviewed plaintiff's other assignments of error and find no prejudicial error.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

AZILEE PARKER VALEVAIS, CHARLES N. PARKER, JOHN R. PARKER AND EDGAR L. PARKER, JR. v. THE CITY OF NEW BERN

No. 703SC504

(Filed 30 December 1970)

1. **Municipal Corporations § 12— governmental immunity**

In the absence of statutory provision, there can be no recovery against a municipal corporation for injuries resulting from its negligence or nonfeasance in the exercise of functions essentially governmental in character.

2. **Municipal Corporations § 5— fire department — governmental function**

The maintenance and operation of a fire department is a function which a municipality undertakes in its govenmental capacity.

3. **Municipal Corporations § 4— water and sewer easement — property outside corporate limits — purchase or condemnation**

Municipality had authority to acquire an easement for water and sewer purposes over property lying outside the municipality by purchase or condemnation, G.S. 160-204, G.S. 160-205, but also had the obligation to compensate the landowners for any such property rights acquired. U. S. Constitution, Amendment XIV; N. C. Constitution, Article I, § 17.

4. **Municipal Corporations § 4— compensation for easement outside city limits — fire protection**

Municipality had authority to compensate landowners for a water and sewer line easement across a tract of land located outside the municipal limits by agreement to furnish fire protection for any buildings located on such tract. G.S. 160-238.

5. **Municipal Corporations §§ 12, 44— contract to provide fire protection — failure to respond to fire call — tort or breach of contract**

Although a municipality had contracted to furnish fire protection for property of plaintiffs lying outside the municipal limits, alleged failure of members of the municipal fire department to respond promptly to a call for assistance in fighting a fire upon such property would

constitute a negligent omission, not a breach of contract, for which the municipality has governmental immunity.

6. **Municipal Corporations § 5— water easement — contract for fire protection — sale of water at profit — fire protection as proprietary or governmental function**

Fact that a water and sewer easement obtained by a municipality in exchange for its promise to furnish fire protection permitted the municipality to sell water at a profit did not make the furnishing of such fire protection a proprietary rather than a governmental function.

7. **Municipal Corporations § 12— contract to furnish fire protection — property outside municipality — waiver of governmental immunity**

Agreement by a municipality to furnish fire protection for property lying outside the municipality as compensation for a water line and sewer easement across such property did not constitute a waiver of the municipality's governmental immunity with respect to torts committed in the maintenance or operation of its fire department.

APPEAL from *Parker, Superior Court Judge,* May 1970 Civil Session of CRAVEN County Superior Court.

On 10 January 1964 plaintiffs filed complaint against defendant, a municipal corporation, seeking to recover for damages caused by fire which destroyed a building owned by plaintiffs. The complaint alleged in substance, except where quoted, the following:

(1) On or about 9 March 1951, after negotiations, plaintiffs joined in the execution of an agreement wherein defendant was granted a 10-foot wide easement for underground sewer and water lines across a certain tract of land owned by plaintiffs and others.

(2) On 5 June 1951, "in accordance with the agreement of the parties hereto and to carry out the terms of the easement agreement the following resolution or ordinance was adopted:

> WHEREAS, it has become necessary for the City of New Bern to construct and establish certain water and sewer lines known as waste water wash lines across the lands of Azilee Parker Valevais, Charles N. Parker, John R. Parker, Edgar L. Parker, Jr. and Charles N. Parker, dated August 4, 1937, and recorded in book 327, page 289, public registry of Craven County;
>
> AND WHEREAS, Azilee Parker Valevais and her husband, William Valevais; Charles N. Parker and his wife, Janice C. Parker; John R. Parker and his wife, Louise S. Parker;

and Edgar L. Parker and his wife, Ann G. Parker, have executed a deed of easement to the City of New Bern, dated March 9, 1951, permitting the establishment and maintenance of said water waste wash lines across said land and premises on condition that the City of New Bern furnish fire protection;

BE IT RESOLVED BY THE BOARD OF ALDERMEN OF THE CITY OF NEW BERN that the fire department of the City of New Bern be empowered, and it is hereby directed to answer fire alarms and calls to the property described in said deed for the purpose of fighting any fire that might occur in any building on said premises;

BE IT FURTHER RESOLVED that the City of New Bern shall establish and maintain a fire hydrant on said premises at some point adjacent to U.S. Highway No. 70."

(3) On or about 28 September 1963, a fire was discovered upon the property described in the easement and was reported to a member of the City Police Department at a time when the same could have been easily controlled and damage would have been minimal. Members of the Police Department notified the City Fire Department, but the Fire Department: "willfully and without just cause refused to answer said call or to furnish any fire protection . . . for a period of more than two hours when it was too late either to save the building or any of the contents thereof."

(4) "[S]uch refusal [of the Fire Department] to furnish fire protection and refusal to answer fire alarms was careless and negligently done in violation of the contract between the parties hereto and the resolution or ordinance. . . ."

(5) As the direct and proximate result of defendant's failure to answer the fire calls, plaintiffs' building burned to the ground and was destroyed.

Defendant answered admitting the adoption of the resolution alleged in the complaint, but denying all other allegations and asserting its "governmental immunity" as a plea in bar.

When the cause came on for trial, defendant moved that the complaint be dismissed for failure to state a claim upon which relief could be granted; that its plea in bar be allowed; and that, judgment in its favor be allowed upon the pleadings.

Judgment was entered allowing all of defendant's motions and dismissing the action with prejudice. Plaintiffs appealed.

Robert G. Bowers for plaintiff appellants.

Barden, Stith, McCotter & Sugg by Laurence A. Stith and A. D. Ward for defendant appellee.

GRAHAM, Judge.

[1, 2] It is universally recognized that in the absence of statutory provision, there can be no recovery against a municipal corporation for injuries resulting from its negligence or nonfeasance in the exercise of functions essentially governmental in character. In the exercise of such functions, the municipal corporation is acting for the general public as well as the inhabitants of its territory, and in such capacity represents the general sovereignty of the state. *Metz v. Asheville,* 150 N.C. 748, 64 S.E. 881; *Stone v. City of Fayetteville,* 3 N.C. App. 261, 164 S.E. 2d 542; 38 Am. Jur., Municipal Corporations, § 572, p. 261. The maintenance and operation of a fire department is a function which a municipality undertakes in its governmental capacity. *Mabe v. Winston-Salem,* 190 N.C. 486, 130 S.E. 169.

Plaintiffs do not dispute these principles, but contend they are not applicable here because their complaint alleges a breach of contract action rather than an action grounded in tort.

[4] We examine first the question of whether a valid contract existed between the defendant and plaintiffs. Although the complaint does not specifically show the location of plaintiffs' property with respect to the corporate limits of defendant, for purposes of this opinion we treat the complaint, as did the parties in their briefs and upon oral argument, as sufficient to show that: (1) at the time of the execution of the easement, the enactment of the ordinance, and the fire which is the subject of this suit, plaintiffs' property was located outside defendant's corporate limits and (2) defendant's duty to afford fire protection to plaintiffs' property arose, if at all, out of its acquisition of the easement and the subsequent resolution or ordinance.

[3, 4] The resolution or ordinance adopted by the Board of Aldermen specifically acknowledged that the granting of the easement by plaintiffs was conditioned upon the City's promise to afford them fire protection. The City had plenary authority to acquire an easement over plaintiffs' property for water and

sewer purposes by purchase or condemnation. G.S. 160-204 and 160-205. It also had the obligation to justly compensate plaintiffs for the property rights acquired. U.S. Const. amend. XIV, § 1; N.C. Const. art. 1, § 17. We know of no law or public policy which would have precluded the City from compensating plaintiffs for the property rights acquired by agreeing to furnish them fire protection. The legislature has authorized municipalities to agree to furnish and to furnish fire protection outside their corporate limits within certain specified areas. G.S. 160-238. No contention is made by the defendant that the resolution or ordinance authorizing the protection of plaintiffs' property was *ultra vires*. We therefore hold that the City was obligated, by contract, to furnish fire protection to plaintiffs' property.

[5] It does not follow, however, that plaintiffs' complaint states a claim for relief based upon breach of contract. There are no allegations that defendant has ever denied the obligation it assumed by resolution or ordinance to provide fire protection to plaintiffs' property. This action, insofar as the record shows, has never been rescinded. The alleged claim is based upon the failure of the members of the Fire Department to promptly respond to the fire call in spite of their duty to do so which arose under the direction of the resolution or ordinance. The members of the Fire Department were not the governing body of the City. They could not extend or withhold from plaintiffs a right to have the benefit of their fire protection services. Their failure to comply with the direction of defendant's ordinance would constitute, not a breach of contract, but a negligent omission. This negligent conduct, arising out of a governmental function, cannot be imputed to the City.

[6] Plaintiffs further contend that the obtaining of the easement by the City was profitable in that it permitted the City to sell water at a profit. This, plaintiffs say, makes the furnishing of fire protection given in exchange for the easement a proprietary function rather than a governmental function. We do not agree.

In point is the case of *Bagwell v. City of Gainesville,* 106 Ga. App. 367, 126 S.E. 2d 906. There plaintiff alleged that he owned a hatchery and other equipment located just beyond the defendant's corporate limits and that he purchased water from the City and the City agreed "to furnish all necessary water for the use of his hatchery and to *extinguish any fire which might originate therein.*" (Emphasis added.) Plaintiff's suit sought

recovery for damages occasioned in part by the defendant's refusal to permit any of its available fire equipment to extinguish a fire at plaintiff's hatchery. In affirming the sustaining of a demurrer to plaintiff's petition, the Court of Appeals of Georgia recited the general principles relating to the immunity of a municipality for damages arising out of the performance of a governmental function and concluded: "It necessarily follows that so much of the petition as sought to impose liability upon the city for refusal to dispatch its fire fighting equipment to extinguish the fire did not delineate any actionable liability." In accord: *Banks v. City of Albany,* 83 Ga. App. 640, 64 S.E. 2d 93. See also 63 C.J.S., Municipal Corporations, § 776, p. 84.

[7] We also reject plaintiffs' contention that the agreement of the City in this case constituted a waiver of its immunity. "Every incorporated city or town . . . shall have the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. In the absence of statutory authority, a municipality has no authority to contract away or waive its governmental immunity in respect to torts committed in the exercise of its governmental function. 5 Strong, N.C. Index 2d, Mun. Corp., § 12, pp. 634, 635, and cases therein cited. We know of no statute, and none has been cited to us, which authorizes a city to waive its governmental immunity with respect to torts committed in connection with the maintenance and operation of a fire department.

We conclude that defendant's plea in bar was properly sustained and the action dismissed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

ELIGHUE BRYANT HUGGINS v. LEE KYE

No. 705SC654

(Filed 30 December 1970)

1. **Automobiles §§ 11, 90— rear-end collision case — instructions — following too closely**

Plaintiff's evidence in a rear-end collision case warranted an instruction on the issue of defendant's negligence in following plaintiff's vehicle too closely, where plaintiff testified that he was traveling in the inside lane of a southbound highway; that defendant was traveling in the outside lane of the same highway; and that, as plaintiff's car came to a stop in obedience to a traffic signal, defendant's car pulled in behind plaintiff's car and then violently collided into the rear of plaintiff's car. G.S. 20-152.

2. **Rules of Civil Procedure § 51— charge to the jury — application of law to the evidence**

In charging the jury in a civil action, the judge must declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a).

Judge CAMPBELL dissenting.

APPEAL by defendant from *Tillery, J.*, May 1970 Session, NEW HANOVER Superior Court.

This is a civil action to recover for personal injuries arising out of a collision which occurred around 1:38 p.m. on 12 September 1959 in the City of Wilmington between a Ford operated by plaintiff and a Cadillac operated by defendant. Plaintiff alleged, in pertinent part, as follows: He was operating the Ford in a southerly direction on Carolina Beach Road when a traffic control light emitted a red signal. In obedience to the signal plaintiff stopped the Ford some 12 feet behind a preceding vehicle. A short time thereafter, defendant, operating the Cadillac in the same direction, violently drove the Cadillac into the rear of the Ford, resulting in serious and painful injuries to plaintiff. The collision and plaintiff's injuries were proximately caused by defendant's negligence, particularly his (1) careless and reckless driving in violation of G.S. 20-140, (2) operating his vehicle at a speed greater than was reasonable under existing conditions, in violation of G.S. 20-141, (3) following too closely, in violation of G.S. 20-152, and (4) failing to keep a proper lookout.

In his answer defendant pleaded the "Sudden Emergency Doctrine" alleging that: Defendant was proceeding on Carolina

Beach Road in a southerly direction and the cars in front of him were stopping for a red light. As defendant was about to stop, a bee entered his car and lighted on defendant's neck. Defendant is extremely allergic to bee stings and for fear that a bee sting might prove fatal for him, defendant struck at the bee who then got between defendant's eyeglass and his eye. Thereupon, as defendant twisted to his left in an effort to rid himself of the bee, defendant's foot slipped from the brake and onto the accelerator of the Cadillac, resulting in the collision.

Both parties presented evidence. Issues of negligence and amount of damages were submitted to the jury who answered the first issue in the affirmative and the second issue $30,000. From judgment entered on the verdict, defendant appealed.

Hogue, Hill and Rowe by William L. Hill II for plaintiff appellee.

Goldberg and Scott by Herbert P. Scott and Poisson, Barnhill and Jackson by M. V. Barnhill, Jr. for defendant appellant.

BRITT, Judge.

[1] In his assignment of error number five defendant contends the trial court erred in charging the jury on following too closely for that there was no evidence to support the charge, and in failing to apply the law to the evidence as required by statute.

Evidence for plaintiff pertinent to this assignment tended to show: The collision in question occurred just north of a crosswalk near Greenfield Park in the City of Wilmington. Carolina Beach Road at this point had four vehicular traffic lanes, two for southbound traffic and two for nothbound traffic. Southbound traffic (and presumably northbound traffic) at the crosswalk was controlled by electric signal lights. As plaintiff approached the crosswalk, the light turned red for southbound traffic; traffic ahead of plaintiff stopped and he came to a complete stop some ten feet behind the car immediately in front of him. While plaintiff was applying his brakes preparatory to stopping, he saw through his rearview mirror two cars following him at a distance of some 200 or 300 feet; one car, a 1955 Ford, was in the left lane directly behind plaintiff and the other, the Cadillac driven by defendant, was in the right lane. Plaintiff observed the two cars behind him until they were between 100 feet and 175 feet from the point of collision; when he last observed the two cars, defendant was "a little ahead" in the

right lane. The Cadillac ran into the back of the Ford plaintiff was driving with such force that the impact "broke the seat loose" from the frame. The right front of the Cadillac was damaged all the way across the radiator which was knocked back into the motor and was "steaming water." The Ford plaintiff was driving was knocked into the car in front of it, causing considerable damage to the front and rear of the Ford.

Evidence for defendant pertinent to this assignment tended to show: As defendant approached the red light at the crosswalk, he pulled in behind the car driven by plaintiff. At that time a bee flew into defendant's window and lit on defendants' neck. Defendant hit the bee and it then got under defendant's glasses. Defendant then turned his head after which his foot slipped off the brake and onto the accelerator. Defendant was stopped at the time the bee entered his car and other traffic was stopped. Defendant was highly allergic to bee stings and had been advised by his physician that a be sting could be fatal.

[2] G.S. 1A-1, Rule 51(a), requires the judge, in charging a jury in a civil action, to declare and explain the law arising on the evidence given in the case. Numerous decisions of our Supreme Court and of this court have established the rule that it is error for the trial court to charge upon an abstract principle of law which is not presented by the allegations and evidence; the following cases are illustrative: *Motor Freight v. DuBose,* 260 N.C. 497, 133 S.E. 2d 129 (1953), where the court charged on but there was no evidence that defendant failed to give a signal for a left turn or was speeding; *White v. Cothran,* 260 N.C. 510, 133 S.E. 2d 132 (1963), where the court charged on statute requiring hand signals to indicate turning movements where traffic lights and not the statute controlled at an intersection; *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62 (1962), where the court charged on reckless driving when there was no evidence of excessive speed or perilous operation; and *Nance v. Williams,* 2 N.C. App. 345, 163 S.E. 2d 47 (1968), where court charged on reckless driving and there was insufficient evidence to present this question.

Although we recognize that the rule above stated is well settled in this jurisdiction, we think the decision of the Supreme Court in *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184 (1960), is controlling in the case at bar. In that case the evidence tended

to show that plaintiff, while driving in a line of traffic, stopped when some four cars ahead of him stopped, and that after he had been stopped in the line of traffic for some thirty seconds, he was struck from the rear by an automobile driven by defendant; the court held that the evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in following plaintiff's vehicle too closely or in failing to keep a proper lookout. In that opinion, written by Parker, Justice, (later Chief Justice), we find:

> "Accepting plaintiff's evidence as true * * * * * * * it permits a legitimate inference by a jury that defendant was following plaintiff's automobile ahead more closely than was reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles ahead and the traffic upon and the condition of the highway, or was not keeping a reasonably careful lookout considering the conditions then and there existing, so as to avoid collision with plaintiff's automobile ahead, and that such negligence proximately contributed to plaintiff's injuries and damage to his automobile. 10 Blashfield Cyclopedia of Automobile Law and Practice, Per. Ed., Vol. 10, p. 600, says: '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.' "

Defendant's assignment of error number five is overruled.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but conclude that they are likewise without merit; they are all overruled.

No error.

Judge HEDRICK concurs.

Judge CAMPBELL dissents.

Judge CAMPBELL dissenting:

As I read the record in this case, the plaintiff, when stopping his automobile pursuant to a traffic control signal, was in the inside lane of a four-lane road with two lanes going in

each direction. The automobile of the plaintiff occupied the inside or center lane. At that time the plaintiff observed in his rearview mirror two automobiles approaching from his rear but a considerable distance away. The automobile in the lane occupied by the plaintiff was a Ford automobile. The Cadillac automobile driven by the defendant was not even in the lane occupied by the plaintiff's vehicle, but to the contrary was in the outside or curb lane. Thereafter, and before reaching the point at which the plaintiff's vehicle was stopped, the defendant changed lanes so that he got into the lane occupied by the plaintiff's vehicle. Thereafter, the plaintiff's vehicle was struck from the rear by the defendant's vehicle resulting in the alleged personal injuries sustained by the plaintiff. There is nothing in the plaintiff's testimony that calls into play the statute, G.S. 20-152, which prohibits operating a vehicle behind another vehicle more closely than is reasonable and prudent. The facts in this case do not make that statute in any way applicable. It was prejudicial error on the part of the trial judge to instruct the jury to the effect that such statute did apply when it was not applicable. I think the facts in this case clearly distinguish it from the case of *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184 (1960). In my opinion the other cases referred to in the majority opinion are controlling, and it was prejudicial on the part of the trial court to charge upon an abstract principle of law which was not presented by the evidence.

For the prejudicial error that was committed, I think a new trial should be awarded and hence this dissent.

WILLIAM BENJAMIN STRICKLAND, JR., BY HIS NEXT FRIEND, ROLAND L. STRICKLAND v. WILLARD POWELL

— AND —

WILLIAM BENJAMIN STRICKLAND v. WILLARD POWELL

No. 706DC455

(Filed 30 December 1970)

1. Automobiles §§ 56, 76— actions by driver and passenger against second driver — negligence and contributory negligence — issues submitted

In actions by the driver and a minor passenger of an automobile which struck defendant's automobile while it was stopped in the road during a rainstorm, the trial court properly submitted issues of

defendant's negligence in both actions and the issue of contributory negligence in plaintiff driver's action.

2. **Automobiles § 90— striking car stopped on highway — alleged violation of G.S. 20-154(a) — instructions**

In an action by the driver of an automobile which struck defendant's automobile while it was stopped on the highway during a rainstorm, the charge of the court, when read contextually, did not confuse or mislead the jury as to the alleged negligence of defendant in stopping on the highway without first seeing that such movement could be made in safety in violation of G.S. 20-154(a).

3. **Automobiles §§ 90, 93— collision between two automobiles — passenger's action against one driver — proximate cause — instructions**

In an action for injuries sustained by minor plaintiff while riding as a passenger in an automobile which struck defendant's automobile, the trial court erred in failing clearly to inform the jury that possible negligence on the part of the driver of the automobile in which the minor plaintiff was a passenger would not shield defendant from liability if his negligence was one of the proximate causes of plaintiff's injuries.

4. **Automobiles § 91— actions by driver and passenger against second driver — negligence of second driver — issues**

In actions by the driver and a minor passenger of an automobile which struck defendant's stopped automobile, the trial court erred in instructing the jury that if it answered negatively the first issue as to whether minor plaintiff was injured and damaged as a result of the negligence of defendant, it was required as a matter of law to answer negatively the third issue as to whether plaintiff driver was damaged by the negligence of defendant, since the jury could have based its negative answer to the first issue either upon a finding that plaintiff passenger was not damaged or upon a finding that defendant was not negligent.

APPEAL by plaintiffs from *Gay, District Court Judge,* 9 February 1970 Session HALIFAX County District Court.

These two actions, brought for the recovery of damages as a result of an automobile collision on 20 August 1966, were, by consent of all parties, consolidated for trial. Defendant's motions for directed verdict were overruled, and the jury answered the issue of defendant's negligence against the plaintiffs. Plaintiffs appealed, assigning as error certain portions of the court's charge to the jury. Facts necessary and pertinent to decision are set out in the opinion.

Allsbrook, Benton, Knott, Allsbrook and Cranford, by Richard B. Allsbrook, for plaintiff appellants.

Charlie D. Clark, Jr., for defendant appellee.

MORRIS, Judge.

Plaintiffs' evidence is summarized as follows: William Benjamin Strickland, his minor son, and some others had been to the Strickland cabin at Roanoke Rapids Lake. They left earlier than planned because of the imminence of a storm. Strickland, Sr., was driving the lead car, followed by A. R. Robinson. The minor plaintiff was a passenger in his father's car. It started to sprinkle as they left the cabin. About a mile from the lake, Strickland, Sr., turned on his windshield wipers. N. C. Highway 46 is about two miles from the cabin. When he reached Highway 46, he turned right and headed east toward Gaston. It was then raining "a good downpour." The speed limit in that area was 55 miles per hour. At the time he started toward Roanoke Rapids on Highway 46, he was driving approximately 35 to 40 miles per hour and had his parking lights on. As he approached Squire School which is located on a hill, he observed a car about 75 yards ahead of him over the crest of the hill. At that time he was traveling at approximately 30 miles per hour. The car was in the highway with no lights on. About half the distance between him and the car—between 35 and 40 yards—he realized the car was not moving. He saw someone jump from the embankment of the road onto the shoulder of the road "as to enter the car" and realized the car was "at a dead stop." He immediately applied his brakes, skidded approximately two or three car lengths, and struck the rear of the car. Approaching in the left lane at the time he applied brakes was a vehicle pulling a trailer. Mr. Robinson testified that at the time Mr. Strickland went over the hill, he was probably ten car lengths behind him and driving 35 or 40 miles per hour. As he came over the crest of the hill all he saw in the right lane of travel was Mr. Strickland's car until he applied his brakes and his brake lights came on. When his brake lights came on, Robinson realized something was in the road in front of Strickland and he started trying to stop. His car started skidding but he was able to get his right wheels on the shoulder of the road and was able to stop within three to five feet of Strickland's car.

The investigating officer testified that the composition of the road was black top. "At the point that I found these vehicles when I arrived, the highway is downgraded as you go from west to east with the lower end on the east end. If you are going down

the grade as you go from west to east, it's more than gradual. I hesitate to say it's steep but it's a pretty good drop." There were five signs on each shoulder in this particular area indicating no parking at any time. The wording on those signs was "No Parking at Any Time." The officer arrived at the scene 19 minutes after the collision occurred. At that time it was raining and it was dark, "not completely dark but dusky dark, dark enough to have lights on your vehicle." Glass and debris were found in the eastbound lane about 100 feet east of the hillcrest.

Defendant chose not to put on any evidence.

[1] In our opinion, the trial court properly submitted the case to the jury on the issue of defendant's negligence in the minor plaintiff's case and William B. Strickland's case and on the issue of contributory negligence in Strickland, Sr.'s case.

The jury was given five issues:

"1. Was the minor plaintiff, William Benjamin Strickland, Jr., injured and damaged as a result of the negligence of the defendant as alleged in his complaint?"

"2. What amount, if any, is the minor plaintiff, William Benjamin Strickland, Jr., entitled to recover from the defendant for his personal injuries?"

"3. Was the plaintiff, William Benjamin Strickland, damaged as a result of the negligence of the defendant as alleged in his complaint?"

"4. If so, did the plaintiff, William Benjamin Strickland, by his own negligence contribute to his damages as alleged in the answer?"

"5. What amount, if any, is the plaintiff, William Benjamin Strickland, entitled to recover from the defendant:

A. For medical expenses incurred by his minor son?

. . .

B. For property damage?"

They answered the first and third issues "No."

[2] Plaintiffs' first assignment of error is that the court committed prejudicial error in the charge to the jury because he

failed to instruct with respect to the provisions of G.S. 20-154(a) that the driver of a vehicle upon a highway has the legal duty before stopping to "first see that such movement can be made in safety."

Each complaint alleges that the defendant was negligent "in that in violation of G.S. 20-154(a), defendant stopped his automobile upon N. C. Highway No. 46 as above set out without first seeing that such movement could be made in safety." G.S. 20-154(a) reads as follows:

> "The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement."

Plaintiffs do not contend that defendant was guilty of violating G.S. 20-161 (stopping on highway), and concede that the mere fact that a driver stops his vehicle on the traveled portion of a highway for the purpose of receiving or discharging a passenger, nothing else appearing, does not constitute negligence. Their contention is that G.S. 20-154(a) is applicable to the facts here and the jury was misled by the charge of the court.

Conceding arguendo that the statute is applicable, we are of the opinion that the charge, read contextually, did not confuse or mislead the jury as to the negligence of defendant in the case of Strickland, Sr. The first assignment of error is, therefore, overruled.

[3] By the second assignment of error, the minor plaintiff contends that the trial court committed prejudicial error in failing adequately to instruct the jury that there can be more than one proximate cause of an injury and that, in order to hold defendant liable to plaintiff, it is sufficient if his negligence was one of the proximate causes. We are of the opinion that this assignment of error is well taken. In the charge on the first issue, the court, with only one exception, instructed that in order

to recover, plaintiff must satisfy the jury that defendant's negligence was *the* proximate cause of his injuries. It is true that after having so charged several times, the court charged that if the plaintiff "has further proven it by the greater weight of the evidence the negligence of the defendant in this regard not only exists but that the defendant's negligence was the proximate cause of the collision between the vehicles, that it was the cause or one of the causes without which the collision would never have occurred, resulting in and causing damage to plaintiff's automobile or injury to plaintiff's person, or both such damage and injury, then it would be your duty to answer the first issue, Yes." We cannot say that this one reference to the fact that there can be more than one proximate cause of an injury, clearly informed the jury that the possible negligence on the part of the driver of the car in which the minor plaintiff was a passenger would not shield defendant from liability if his negligence was also one of the proximate causes of the minor plaintiff's injury. *White v. Realty Co.*, 182 N.C. 536, 109 S.E. 564 (1921). This is particularly true in view of the previous language of the court in several instances in requiring that defendant's negligence be *the* proximate cause of plaintiff's injury.

[4] The error in the charge set out above is equally applicable to the plaintiff William Benjamin Strickland's case. Additionally, the court instructed the jury "if you answer the first issue No, then the court instructs you that as a matter of law, you will answer the third issue No." In answering the first issue "No," the jury could conceivably have based its answer upon a finding that the plaintiff was not damaged or upon a finding that defendant was not negligent. Since the issue as framed, gave the jury an alternative upon which to base its answer as to the first issue, they should not have been bound by that answer in answering the third issue. The court should have given them separate instructions as to the third issue.

As to appeal of William Benjamin Strickland—new trial.

As to appeal of William Benjamin Strickland, Jr., by his next friend, Roland L. Strickland—new trial.

Judges BROCK and VAUGHN concur.

Lee v. Shor

IRA D. LEE, D/B/A LEE ELECTRICAL SERVICE v. HARRY SHOR; ROBERT B. BROUGHTON, TRUSTEE; ENGLEWOOD DEVELOPMENT CORPORATION, FORMERLY CITIZENS MORTGAGE CORPORATION; AND BESSIE L. SHOR, WIFE OF HARRY SHOR

No. 7010SC561

(Filed 30 December 1970)

1. **Rules of Civil Procedure § 56— summary judgment — prerequisites**

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment. G.S. 1A-1, Rule 56.

2. **Rules of Civil Procedure § 56— summary judgment — extreme remedy**

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear.

3. **Rules of Civil Procedure § 56— summary judgment — parties entitled to presumptions**

Upon a motion for summary judgment, both the opposing and moving parties are entitled to any presumption that is applicable to the facts before the court.

4. **Witnesses § 3— credibility of interested witness — jury issue**

The fact that the witness is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to the jury.

5. **Rules of Civil Procedure § 56— hearing on summary judgment — issues of credibility — trial by affidavits**

The court should not resolve an issue of credibility or conduct a trial by affidavits at a hearing on a motion for summary judgment, especially where knowledge of the facts is largely under the control of the movants.

6. **Corporations § 12; Rules of Civil Procedure § 56— action to set aside fraudulent deed of trust — loan transaction between corporation and its officers — summary judgment**

In an action by the creditor of defendant corporation to set aside as fraudulent a deed of trust executed by the corporation to secure a loan from another defendant who was a director of the corporation, the trial court erred in granting summary judgment in favor of the defendants where (1) all but one of the affidavits in support of the summary judgment were made by witnesses who were interested in the result of the action and (2) the affidavits did not cover all of the facts that were material to a determination of the controversy.

7. **Rules of Civil Procedure § 56— summary judgment — objections or answer to interrogatories**

It was improper to grant a summary judgment in favor of defendants prior to their filing of objections or answer to plaintiff's interrogatories.

APPEAL by plaintiff from *Bailey, Superior Court Judge*, 30 March 1970 Session, WAKE Superior Court.

The pleadings disclose the following events. On 18 November 1968 plaintiff instituted suit against Citizens Mortgage Corporation. The name of this corporation was later changed to Englewood Development Corporation. (This defendant will hereinafter be referred to as "Corporation.") The suit was to recover $5,586.57 with interest from 31 January 1968. On 3 March 1969 a deed of trust from the Corporation to secure the payment of a promissory note to defendant Harry Shor and Bessie L. Shor in the amount of $30,000.00 was recorded. The deed of trust was dated 3 December 1968 and was signed for the Corporation by Gerald T. Shor, president. Harry Shor and wife Bessie Shor are the father and mother of Gerald T. Shor. Harry Shor is a director of the Corporation. The Corporation has been dormant since 5 June 1969. On 30 October 1969 plaintiff recovered judgment against the Corporation as prayed for in the complaint. On 5 December 1969 execution on this judgment was returned unsatisfied. On 29 December 1969 plaintiff instituted the present action to have the deed of trust declared void as fraudulent and to subject the property purportedly conveyed thereby to the payment of the debt due plantiff. In substance, the plaintiff alleged and defendants denied the following: The deed of trust conveyed substantially all the assets of the Corporation. Although the deed of trust was dated 3 December 1968, it was actually executed on or about 3 March 1969, the date of its recordation. At the time of the execution, delivery and registration of the deed of trust and for several months prior thereto the Corporation was in declining financial circumstances and was on the verge of insolvency. The fair market value of the property conveyed was in excess of the recited indebtedness. The indebtedness purportedly secured was ficticious in whole or in part and was, in whole or in part, already existing on the effective date of the conveyance. It was made without retaining property sufficient to pay existing creditors and was made with the intent to hinder, delay and defraud the plaintiff, a creditor.

On 30 January 1970 defendant Harry Shor filed a motion for summary judgment together with affidavits tending to show the following: On 3 December 1968 he withdrew $30,000.00 from sundry savings accounts and delivered the same to Citizens

Mortgage Corporation on the same date which was also the date the note and deed of trust were executed. Prior to that date the Corporation was not indebted to him. At the time the loan was made "the corporation was a going concern actively engaged in its business."

On 11 February 1970 plaintiff filed an affidavit to the effect that he could not present by affidavit facts essential to justify his opposition to the motion for the reason that the knowledge of such facts was largely or exclusively under the control of defendants. On 13 February 1970 Judge Bailey signed an order denying the motion for summary judgment.

On 23 March 1970 defendant Harry Shor filed another motion for summary judgment and filed additional affidavits tending to show that $10,000.00 of the $30,000.00 came from a savings account in the name of Gerald T. Shor and defendant Bessie L. Shor but that the funds were in fact solely his.

On 2 April 1970 plaintiff filed and served interrogatories on the Corporation. No objections to these interrogatories were filed and they were not answered.

On 6 April 1970 Judge Bailey entered a judgment granting defendant's motion for summary judgment. From the entry of summary judgment for defendant, the plaintiff appealed.

Harris and Harris by Jane P. Harris for plaintiff appellant.

W. G. Parker for defendant appellee Harry Shor.

Jack P. Gulley for defendant appellee Englewood Development Corporation.

VAUGHN, Judge.

[1, 2] Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56 North Carolina Rules of Civil Procedure. It is an extreme remedy and should be awarded only where the truth is quite clear. *American Insurance Company v. Gentile Brothers Company,* 109 F. 2d 732 (5th Cir. 1940). "Upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to

determine whether there is an issue of fact to be tried." *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016 (3rd Cir. 1942). We hold that there are issues of fact to be tried in the present case and that summary judgment was improperly entered.

Transactions in the nature of the one under attack here are generally considered as follows:

> "It is said that secured loan tranactions between a corporation and its officers or directors are fundamentally suspect, and will be closely scrutinized by the courts; and that they must be open and free from fraud or impropriety. The officer or director making the loan must act in good faith, must be free from all suspicion, and may seek no unfair advantage or undue benefit—in short there must be no conflict in interest between the lender and the borrower. The terms of the loan must be fair and reasonable, and the loan itself must be for the corporation's benefit; a real need for the loan must have existed, and the funds obtained by the loan must be for use in the business of the corporation.
>
> "In establishing the validity of a secured loan transaction between a corporate officer or director making the loan and the corporation furnishing the security therefor, *the burden of proof of the lender's good faith and of the justice of the transaction rests upon the officer or director. . . .* " [Emphasis ours] 19 Am. Jur. 2d, Corporations, § 1302, p. 709.

[3] This has long been the law of this State:

> " . . . [T]here would be nothing to hinder a director from loaning money and taking liens upon the corporate property as security for its repayment, and in enforcing his lien, provided it was an open and entirely fair transaction, *but even then it would be looked upon with suspicion, and strict proof of its bona fides would be required.* [Emphasis ours.]
>
> . . . .
>
> " . . . [W]here a corporation is insolvent, its capital is a trust fund for the payment of its debts. A director creditor upon a debt theretofore existing cannot take advan-

tage of his superior means of information to secure his debt as against other creditors." *Hill v. Lumber Co.*, 113 N.C. 174, 18 S.E. 107.

Upon a motion for summary judgment both the opposing and moving parties are entitled to any presumption that is applicable to the facts before the Court. Moore's Federal Practice, 2d Vol. 6, § 56.15(3), p. 2343.

[4-6] With the exception of affidavits tending to show that on 3 December 1968 Harry Shor withdrew $30,000.00 from his personal account and that on the same date the funds were deposited in the bank account of the Corporation, all of defendants' affidavits were from the defendants and Gerald T. Shor. The fact that the witness is interested in the result of the suit has been held to be sufficient to require the credibility of his testimony to be submitted to the jury. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408, 19 S.Ct. 233, 236, 43 L. Ed. 492, 495. It is well established that the court should not resolve an issue of credibility or conduct a "trial by affidavits" at a hearing on a motion for summary judgment, especially in cases where, as here, knowledge of the fact is largely under the control of the movants. Some of the reasons for this sound rule have been expressed as follows:

> "For the affidavits do not supply all the needed proof. The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. As we observed in *Arnstein v. Porter*, 2 Cir., 154 F. 2d 464, 471: 'It will not do, in such a case, to say that since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true.' For the credibility of the persons who here made the affidavits is to be tested when they testify at a trial. Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment. Indeed, it has been said that a witness' demeanor is a kind

of 'real evidence,' obviously such 'real evidence' cannot be included in affidavits. In *Sartor v. Arkansas Natural Gas Corp., Kansas Group,* 321 U.S. 620, 628, 64 S.Ct. 724, 729, 88 L. Ed. 967, the Court said that a summary judgment may not be used to 'withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony'; the Court, in that connection, quoted with approval from *Aetna Life Insurance Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724, 35 L. Ed. 371: 'There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony.'" *Colby v. Klune,* 178 F. 2d 872 (2d Cir. 1949).

[7] A careful examination of defendants' affidavits discloses that, even when the affidavit of the defendant Harry Shor and officers of the Corporation are considered, they do not cover all of the facts which would be material to a determination of the controversy and thus would not adequately support the motion. Finally we observe that although unanswered interrogatories will not, in every case, bar the trial court from acting on motion for summary judgment (*Washington v. Cameron,* 411 F. 2d 705 (D.C. Cir. 1969)), doing so prior to the filing of objections or answer to the interrogatories in the present case was improper.

For the reasons discussed, the entry of summary judgment dismissing the actions constituted error and the same is reversed.

Reversed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. CHARLES BLACKSHEAR

No. 7012SC656

(Filed 30 December 1970)

1. **Criminal Law § 161— the brief — numbered exceptions and assignments of error — reference to pages of record**

Appellant's brief does not comply with Rule 28 of the Rules of Practice in the Court of Appeals where it does not contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record.

2. **Criminal Law § 161— assignments of error — necessity for numbered exceptions**

Assignments of error based on pages in the record instead of numbered exceptions are inadequate.

3. **Criminal Law § 92— consolidation of indictments before State passed jury in trial of one indictment**

The trial court did not err in consolidating for trial, before the State passed the jury, an indictment charging felonious conspiracy to break and enter a building with an indictment charging the felonies of breaking and entering the building, larceny of property therefrom, and receiving stolen property.

4. **Constitutional Law § 30— right of State to speedy trial**

The State, as well as a defendant, is entitled to a speedy trial.

5. **Constitutional Law § 31; Criminal Law § 91— time to prepare defense — denial of continuance**

Defendant was afforded ample opportunity to confer with counsel and prepare his defense, and the trial court did not err in the denial of defendant's motion for continuance, where counsel was appointed to represent defendant on 25 May 1970, defendant was released on bail on 1 July 1970, and defendant was tried during the week of 3 August 1970.

6. **Burglary and Unlawful Breakings § 6; Conspiracy § 7; Criminal Law § 168— statement of material fact not shown in evidence — prejudicial error as to one of two charges**

In a prosecution for felonious conspiracy to break and enter a building and for felonious breaking and entering of the building, statement by the trial judge, unsupported by the evidence, that a witness had found that a lock on the front door of a warehouse had been cut off was material and constituted prejudicial error on the breaking and entering charge, but was not related to and was not prejudicial on the conspiracy charge.

7. **Criminal Law § 171— single judgment for two crimes — error relating to one crime — remand for judgment on valid conviction**

Where a single judgment of imprisonment was pronounced on verdicts finding defendant guilty of felonious conspiracy and felonious breaking and entering, and the trial court committed prejudicial error

requiring a new trial on the breaking and entering charge, the cause must be remanded for proper judgment on the verdict in the conspiracy case, since it is presumed that the judgment was based on consideration of guilt on both charges.

APPEAL by defendant from *Cooper, Superior Court Judge,* 3 August 1970 Special Session of Superior Court held in CUMBERLAND County.

Defendant was tried on two bills of indictment. In bill of indictment No. 69CR27685 he was charged with the felony of conspiracy to break and enter a building located at 401 By-Pass, Fayetteville, North Carolina, occupied by Carolina Power and Light Company, Incorporated, a corporation, with intent to commit the crime of larceny therein. In bill of indictment No. 69CR27686 he was charged with three felonies: (1) breaking and entering the building of the Carolina Power and Light Company, Incorporated, with intent to commit the felony of larceny; (2) the felony of larceny of property of the Carolina Power and Light Company, Incorporated; and (3) the felony of receiving stolen property knowing it to have been stolen.

Before the selection of the jury and before the jury was empaneled, the cases were consolidated for trial.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit on all four charges. The court allowed the defendant's motion for judgment of nonsuit on the charges of larceny and receiving stolen property but submitted the case to the jury on the charge of conspiracy and the charge of breaking and entering with felonious intent. The jury returned a verdict of guilty on both counts which were consolidated for punishment. From a judgment of imprisonment of not less than five years nor more than seven years, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Price for the State.

Blackwell, Thompson & Swaringen by Larry A. Thompson for defendant appellant.

MALLARD, Chief Judge.

[1, 2] Appellant's brief does not comply with the provisions of Rule 28 of the Rules of Practice in the Court of Appeals in that it does not contain, properly numbered, the several grounds

of exception and assignment of error with reference to the pages of the record. Moreover, the assignments of error appearing in the record on appeal are inadequate because they are based on pages in the record instead of numbered exceptions. Assignments of error are ineffectual unless they are based on proper exceptions. *Langley v. Langley,* 268 N.C. 415, 150 S.E. 2d 764 (1966); *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158 (1968), *cert. denied,* 274 N.C. 274 (1968). Nevertheless, under the circumstances we deem it proper to look at the merits of the case.

[3] The trial judge did not commit error in consolidating the cases for trial. The consolidation occurred before the State passed the jury. Neither did the trial judge commit error in ruling on the admission of evidence.

[4, 5] True bills of indictment had been returned against the defendant in November 1969. The record does not reveal when the defendant was arrested. On 25 May 1970 counsel was appointed for him. Then on 1 July 1970 he was released on bail, and after moving for a continuance, which was denied, he was tried during the week of 3 August 1970. The defendant had been afforded ample opportunity to confer with his counsel and prepare his defense. If he did not do so, it was his fault. The State, as well as a defendant, is entitled to a speedy trial. A motion for a continuance is ordinarily addressed to the discretion of the trial judge, and under the circumstances here, the trial judge did not abuse his discretion or commit error in refusing to continue the case.

[6] Defendant's assignment of error numbered 6 reads as follows:

> "6. That the court erred in instructing the jury that the evidence tended to show that the witness Hines went to the warehouse on October 15th, and found a lock on the front door of the warehouse had been cut off. (R p 18)"

This assignment of error is not based on a numbered exception, but on page 18 of the record "Exception No. 6" does appear. On that page of the record, the trial judge was recapitulating the evidence and said "[t]hat the witness Hines went to the warehouse on October 15th, 1969, found lock on the front door of the warehouse had been cut off." Perhaps there

was such testimony offered, but in narrating the testimony, it was inadvertently left out. However, we are bound by the record.

The rule with respect to an incorrect statement by the judge in recapitulating the evidence is stated in *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952), as follows:

> "While an inaccurate statement of facts contained in the evidence should be called to the attention of the court during or at the conclusion of the charge in order that the error might be corrected, a statement of a material fact not shown in the evidence constitutes reversible error."

See also *State v. Revis,* 253 N.C. 50, 116 S.E. 2d 171 (1960).

The statement by the judge, unsupported by the evidence, that Hines found a lock on the front door of the warehouse had been cut off was material on the charge of breaking and entering and was therefore prejudicial error on this count.

This misstatement of the evidence on the breaking and entering count was not related to and was not prejudicial on the charge of conspiracy as contained in indictment No. 69CR27685. The bill of indictment on the charge of conspiracy was proper in form, and there was sufficient competent evidence to require submission of the case to the jury. No error in the judge's charge to the jury on the conspiracy count is made to appear.

[7] Where a defendant is tried and convicted on more than one count, there is a distinction made in the decided cases where the counts are consolidated for punishment and where separate sentences are imposed on each count.

In *State v. Walker,* 251 N.C. 465, 112 S.E. 2d 61 (1960), the defendants were charged in three separate bills of indictment with a conspiracy to injure, by dynamite or other high explosives, certain real and personal property. The defendants on one of the bills of indictment challenged the right of the State to put them on trial and filed what they denominated a plea in abatement. Upon conviction on all three counts, they were given separate sentences on each count, the sentences to run concurrently. The Supreme Court said:

> "Even if the court had ruled erroneously on the motion relating to one bill of indictment, such ruling could not avail defendants on this appeal. They have been convicted and

> sentenced on three bills. The sentences are identical and run concurrently. Error would have to appear as to all three to be prejudicial."

See also *Benton v. Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S.Ct. 2056 (1969); *Hirabayashi v. United States,* 320 U.S. 81, 87 L. Ed. 1774 (1943); *State v. Wilson* and *State v. Poole,* 264 N.C. 595, 142 S.E. 2d 180 (1965); *State v. Vines,* 262 N.C. 747, 138 S.E. 2d 630 (1964); *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426 (1959); *Griffin v. United States,* 269 F. 2d 903 (4th Cir. 1959).

In *State v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734 (1955), the rule relating to the consolidation of counts after verdict for the purpose of punishment, as well as separate sentence on different counts, is stated as follows:

> "Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. 'Presumably this (the single judgment) was based upon consideration of guilt on both charges.' *Devin, J.,* later *C.J.,* in *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; also, see *S. v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895. But the rule is otherwise when, as here, separate judgments, each complete within itself, are pronounced on separate indictments or counts. In such case, a valid judgment pronounced on a plea of guilty to a valid count in a bill of indictment will be upheld. *S. v. Thorne, supra; S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9."

See also *State v. Hardison,* 257 N.C. 661, 127 S.E. 2d 244 (1962), and *State v. Barber,* 5 N.C. App. 126, 167 S.E. 2d 883 (1969).

We do not consider it necessary to discuss defendant's other contentions relating to the count of breaking or entering as charged in indictment No. 69CR27686 since as to that count a new trial is awarded.

The judgment of the court on the consolidated cases is vacated, and the cause is remanded for proper judgment on the

verdict in the conspiracy case, indictment No. 69CR27685.

In No. 69CR27686—New trial.

In No. 69CR27685—Error and remanded for proper judgment.

Judges PARKER and GRAHAM concur.

DUNHAM'S MUSIC HOUSE, INC. v. ASHEVILLE THEATRES, INC.

No. 7028SC433

(Filed 30 December 1970)

1. **Uniform Commercial Code § 3— date of application**

The Uniform Commercial Code became effective in this State at midnight 30 June 1967. G.S. 25-10-101.

2. **Uniform Commercial Code § 71; Landlord and Tenant § 2— landlord's lien on personal property**

A lien on personal property granted to a lessor by contract is not excluded from the provisions of the Uniform Commercial Code. G.S. 25-9-104(b); G.S. 42-15.

3. **Uniform Commercial Code § 71; Landlord and Tenant § 6— lease agreement — security interest in favor of lessor — trade fixtures**

Lease agreement between lessor and lessee *is held* to create a security interest in favor of lessor, upon the lessee's default under the lease, in a piano and organ that was acquired by the lessee for use on the premises. G.S. 25-9-204(1).

4. **Uniform Commercial Code § 75— perfection of landlord's security interest — priority over conditional sales contract**

In an action to determine the right of possession to a piano and organ as between a landlord under a lease agreement and a music company under a conditional sales contract, neither party having filed a financing statement, the landlord, who perfected its security interest under the lease by taking possession of the property pursuant to G.S. 25-9-503, has priority over the music company. G.S. 25-9-312(5).

5. **Appeal and Error § 57— findings of fact — nonjury trial — review on appeal**

The findings of fact in a nonjury trial have the force and effect of a jury verdict if supported by the evidence and are conclusive if supported by any competent evidence.

APPEAL by plaintiff from *Grist, Judge,* 6 April 1970 Session of Superior Court of BUNCOMBE County.

On 29 September 1967, Asheville Theatres, Inc. (Theatres), leased certain premises in a building located at 47 Merrimon Avenue in Asheville, North Carolina, to Foreman and Humphries (lessees) who were partners engaged in the conduct of a business known as Donald's Sportsman's Lounge. On 1 October 1967, a "Supplemental Amendment and Addition to Price Lease" for the adjacent premises, 45 Merrimon Avenue, was entered into between the same parties. Neither lease was recorded. The lease of 29 September 1967 contained the following provision:

> "15. REMOVAL OF EQUIPMENT AND FIXTURES. All trade furnishings, fixtures and equipment in the leased premises which are supplied and installed at the sole expense of Lessee shall remain Lessee's property. Lessee may remove these items within ten (10) days after termination of this Lease, provided: (a) Lessee is not in default hereunder at the time of termination; (b) Lessee immediately repairs or reimburses Lessor for the cost of repairing all resulting damages or defacement; and (c) removal of the items can be accomplished without major damage to the leased premises. Lessee may not remove any of the furnishings, fixtures or equipment described in Exhibit A attached hereto nor may Lessee remove any furnishings, fixtures or equipment which Lessee may have supplied or installed to replace such furnishings, fixtures or equipment described in Exhibit A. All items not removed as provided shall become Lessor's property."

This provision was incorporated by reference in the lease of 1 October 1967.

On 19 October 1967, Dunham's Music House, Inc. (Dunham's), sold to lessee one Hammond Organ and one used Steinway Grand Piano. No down payment was made, but a document entitled "Conditional Sales Contract" was entered into under the terms of which lessees were to pay the total purchase price in two equal installments, one on 25 October 1967 and the other on 25 November 1967. This document was not recorded nor was a financing statement filed. The piano and organ were delivered to the leased premises at 47 Merrimon Avenue, but no payment was ever made to Dunham's by lessees. Dunham's,

prior to 31 January 1968, attempted to repossess the piano and organ from the premises, but were not able to gain access to the premises.

On 31 January 1968, Theatres took possession of the premises and of the piano and organ, having, on that date, sent a letter to lessees declaring the lease in default and posted a copy of the letter on the door of the premises.

On 14 February 1968, Dunham's instituted this action to recover possession of the piano and organ, for damages for wrongful detention and, ancillary to the action, instituted claim and delivery proceedings to obtain immediate possession of the piano and organ.

By answer, Theatres claimed a superior right by virtue of section 15 of the lease agreement.

In due course, after proceedings had in the General County Court, the matter came on for trial in the Superior Court. The court affirmed the judgment of the General County Court ruling that the right to possession of Theatres was superior to Dunham's.

Dunham's appealed, assigning errors.

Shuford, Frue and Sluder, by Gary A. Sluder for plaintiff appellant.

McGuire, Baley and Wood, by Richard A. Wood, Jr., for defendant appellee.

MORRIS, Judge.

[1] The first question raised by this appeal is whether the rights of the parties are governed by the provisions of the Uniform Commercial Code. The Code became effective in this State at midnight 30 June 1967. G.S. 25-10-101. This was prior to the date of all transactions involved in this appeal. Unless the transactions are specifically exempted from the operation of the Code, the provisions of the Code are applicable in determining the rights of the parties.

[2] Appellant argues that the Code expressly exempts from its provisions landlord's liens and Theatres has no security interest, so, a *fortiori,* decision should be controlled by pre-Code

law. It is true that G.S. 25-9-104(b) provides that the Code does not apply "to a landlord's lien." It is conceded by the parties that the landlord's right of distress as a security for the payment of rent available under English common law has never existed in North Carolina. The only statutory landlord's lien in this jurisdiction is that provided for by G.S. 42-15. Since the advent of the Uniform Commercial Code in this State, the courts have not been called upon to determine the meaning and application of the exclusionary phrase "landlord's lien." Other courts have, however, dealt with the problem. In *In re King Furniture City, Inc.*, 240 F. Supp. 453 (D.C.E.D. Arkansas) 1965, the phrase was construed to refer to liens created by statute. The reasoning of the Court was:

> "Furthermore a detailed reading of Ark. Stats, § 85-9-104 (the section excluding certain types of transactions from the Code) in its entirety, together with the comments of the National Conference of Commissioners of Uniform State Laws, indicates that all of the other subsections deal with matters thought to be sufficiently covered by a statute of the United States or of the several states or that they deal with special transactions which do not fit easily into general commercial statute and which are adequately covered by existing law. From this viewpoint it also appears that the term 'landlord's lien' as used in the statute must be interpreted as referring to liens created by statute, for the matter of liens on property such as here involved is obviously considered by all of the remainder of the Code as fitting into a general commercial statute."

The property involved in that case was the inventory of a furniture store and the Court had before it the determination of the question whether the lessor of the premises occupied by the furniture store had a prior right to possession of the inventory under a lien created by the lease over the trustee in bankruptcy of the furniture store, lessee. Also holding that the Code exclusion of landlord's liens is not applicable to consensual liens are *In re Leckie Freeburn Coal Co.*, 405 F. 2d 1043 (6th Cir., C.A. Ky.) 1969, and *Universal C.I.T. Credit Corporation v. Congressional Motors*, 228 A. 2d 463 (Md. Ct. Appeals) 1967. We adopt the reasoning of these cases and hold that a lien on personal property granted a lessor by contract is not excluded from the provisions of the Uniform Commercial Code.

[3] Appellant contends that even if this view be adopted, the lease agreement here creates no security interest. We disagree. G.S. 25-9-204(1) provides that "A security interest cannot attach until there is agreement (subsection (3) of § 25-1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place . . . " We are of the opinion that the lease, and particularly section 15 thereof, between Theatres and lessees meets the test.

Holding as we do that Theatres acquired a security interest in the piano and organ, we must now determine whether Theatres or Dunham's effectively perfected its security interest. The methods of perfecting and the priorities of holders of security interests are set out in the Code. G.S. 25-9-302, G.S. 25-9-304, and G.S. 25-9-305 provide for perfection of a security interest by filing a financing statement, by operation of law, and by taking possession.

[4] G.S. 25-9-312 is entitled "Priorities among conflicting security interests in the same collateral." Subsection (5) governs this controversy:

> "(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows:
>
> (a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under § 25-9-204(1) and whether it attached before or after filing;
>
> (b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under § 25-9-204(1) and, in the case of a filed security interest, whether it attached before or after filing; and
>
> (c) in the order of attachment under § 25-9-204(1) so long as neither is perfected."

Since neither Theatres nor Dunham filed a financing agreement, the priorities must be determined in the order of

perfection. Theatres perfected its security interest by taking possession of the property under the provisions of G.S. 25-9-503. It follows that the trial court correctly affirmed the General County Court.

Dunham's could have easily protected itself by filing the required statement. It would have then brought itself under the protection of G.S. 25-9-312(4) providing: "A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter."

[5] Appellant's assignments of error based on exceptions to the findings of fact of the court are overruled. The matter, by stipulation, was heard by the court without a jury, and the findings of fact have the force and effect of a jury verdict if supported by the evidence and are conclusive if supported by any competent evidence, *Stevenson v. Pritchard,* 9 N.C. App. 59, 175 S.E. 2d 367 (1970), even though there is evidence *contra, Equipment Co. v. Equipment Co.,* 263 N.C. 549, 140 S.E. 2d 3 (1965).

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHN MICHAEL BUSH

No. 704SC620

(Filed 30 December 1970)

1. **Criminal Law § 162— assignment of error to exclusion of evidence on voir dire**

   There was no evidence to support defendant's assignment of error that the trial judge on *voir dire* would not allow defendant to cross-examine the State's witness concerning the circumstances surrounding the testimony given to the magistrate by the affiant in obtaining a search warrant, and the assignment of error is overruled.

2. **Criminal Law § 102— argument of U. S. district court case**

   Trial court's refusal to allow defense counsel to cite and argue a U. S. District Court case was not error.

3. **Criminal Law § 165— argument of counsel — exception to ruling of trial court**

It is the final ruling of the judge upon the question of law that should be the subject of exception by defendant, not what argument of counsel the judge allowed or did not allow.

4. **Criminal Law § 161— exception and assignment of error in general — judge's process in arriving at a decision**

The mental process by which a trial judge arrives at his ruling on a question of law is not the subject of exceptions and assignments of error.

5. **Criminal Law § 84— motion to suppress evidence — voir dire procedure**

On motion to suppress the evidence, the trial judge is required to remove the jury from the courtroom and conduct a *voir dire*.

6. **Searches and Seizures § 3— issuance of search warrant — finding of probable cause — narcotics violation**

An affidavit by an S.B.I. agent that the defendant has possession of LSD and other narcotic drugs on his premises, and that the agent has received this information from a confidential informant who has previously given information leading to the arrest and conviction of narcotic violators, *held* sufficient to support a finding of probable cause.

7. **Searches and Seizures § 3— search warrant — applicability of G.S. 15-26**

G.S. 15-26 is applicable to an affidavit and search warrant dated 4 February 1970.

8. **Searches and Seizures § 3— search warrant and affidavit — statutory and constitutional requisites**

A search warrant and affidavit met the requirements of G.S. 15-26, as well as the requirements of the Fourth Amendment to the U. S. Constitution, where (1) the warrant described with reasonable certainty the premises to be searched and the contraband for which the search was to be made, (2) the affidavit indicated the basis for a finding of probable cause, and (3) the warrant was signed by the magistrate and bore the date and hour of its issuance.

APPEAL by defendant from *Copeland, Judge of the Superior Court,* 18 May 1970 Session, ONSLOW Superior Court.

Defendant was charged in a bill of indictment with the felony of possession of a quantity of narcotic drugs, namely, lysergic acid diethylamide, commonly known as LSD.

The State's evidence tended to show the following: City police, sheriff's deputies, and SBI agents, went to defendant's mobile home to search for narcotic drugs under authority of a search warrant. One of the officers knocked upon the door and immediately there was movement inside the trailer, feet moving

up and down the hall. Someone inside called out several times that they would be there in just a minute. A whiff of smoke came out the chimney; it had a "real rank odor." The door to the mobile home was opened some two or three minutes after the officers first knocked, and when they gained admission the stove was open and the flames were leaping out of it; there was a great deal of smoke and bad odor in the home. A "real rank, real sweet" odor was coming from the stove. The officers found two plastic bags containing 115 orange tablets which contained LSD. They also found in the kitchen cabinet two boxes of empty gelatin capsules, a small funnel, and a paper bag containing over six hundred dollars.

Defendant offered no evidence.

From a verdict of guilty and judgment of imprisonment entered thereon, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Wood for the State.

Jerry Paul for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge, on *voir dire,* would not allow defendant to cross-examine State's witness concerning the "circumstances surrounding the testimony given to the magistrate by the affiant in obtaining a search warrant." The record on appeal does not disclose that any question asked the State's witness was not allowed to be answered. True, there was some discussion between defense counsel and the presiding judge concerning the nature of the cross-examination being conducted by defense counsel, and the presiding judge stated to defense counsel: "Mr. Godwin, let's stay within the bounds of reason and law." In response to this request Mr. Godwin answered: "All right, sir." But nowhere in the record on appeal is there any question propounded by defense counsel that was not answered. This assignment of error is overruled.

[2] Defendant next assigns as error that "the trial judge erred in failing to allow the attorney for defendant to cite and argue a United States District Court case."

The following colloquy between the trial judge and defense counsel in the absence of the jury appears in the record on appeal:

"MR. PAUL: Your Honor, in light of your question that you directed to all the attorneys before we went into the question of the search warrant, the question about the word that the informant had been on the premises before and observed Michael Bush using narcotic drugs. I have here your Honor, a case written by Judge McMillan of the United States District Court . . .

"THE COURT: That would not be authoritative to this Court, that is an inferior Court and I do not wish to hear anything from that Court. I am sorry."

[3] We perceive no error in the ruling. The record on appeal does not disclose what question of law defense counsel sought to argue; but, in any event it is the final ruling of the judge upon the question of law that should be the subject of exception by defendant, not what argument of counsel the judge allowed or did not allow. This assignment of error is overruled.

Defendant assigns as error that "the trial court erred in making a ruling that the magistrate could not go beyond the sworn affidavit as a matter of law." The following appears in the record on appeal:

"(At this point Mr. Paul argued the question as applied to search and seizure.)

THE COURT: All she had to do was look at the affidavit, there is no obligation on her to go beyond the sworn affidavit—"

[4] The foregoing was a continuation of argument of defense counsel, in the absence of the jury, upon defendant's motion to suppress the evidence obtained by search. Again we perceive no error in the trial judge making the statement to which defendant assigns error. Argument upon whether the judge's statement is a correct statement of the law is only an exercise in academics. The mental process by which a trial judge arrives at his ruling on a question of law is not the subject of exceptions and assignments of error. The basic question of law before Judge Copeland was a ruling upon defendant's motion to suppress the evidence; and it was his ruling upon this motion which should be the basis for defendant's exception and assignment of error. This assignment of error is overruled.

[5] Defendant next assigns as error that the trial judge denied his motion to suppress the evidence. When the motion was made

the trial judge removed the jury from the courtroom and conducted an extensive *voir dire*. This was the proper procedure to follow. *State v. Basden,* 8 N.C. App. 401, 174 S.E. 2d 613.

[6] The affidavit attached to the search warrant reads as follows:

> "Wade Anders, S.B.I. being duly sworn and examined under oath, says that he John Michael Bush, alias John B. Michael has in his possession and on his premises narcotic drugs, to wit: LSD, Hashish and Marijuana, in violation of the North Carolina law. These illegally possessed narcotic drugs are located on his premises, a mobile home, Lot X, Old Pine Trailer Park, Rt. 1, Jacksonville described as follows: a mobile home, color white and green located on Lot X, Old Pine Tr. Pk., Rt. 1, Jacksonville, N. C. The facts which establish reasonable grounds for issuance of a search warrant are as follows: This agent has received information from a confidential informant, who has in the past given information resulting in the arrest and conviction of Narcotic Cases. The informant advises that he has observed and used Narcotic Drugs at the home of John Michael Bush alias John B. Michael Lot X Old Pine Tr. Pk. Rt. 1, Jacksonville, N. C. The informant advises that a large quantity of Narcotic Drugs will be located at John Michael Bush alias John B. Michael Lot X Old Pine Tr. Pk. Rt. 1, Jacksonville, N. C. The subject John Michael Bush alias John B. Michael is a known Narcotic Dealer and user of Narcotic Drugs. The subject John Michael Bush alias John B. Michael has in the past been arrested and convicted of Narcotic Violations."

[6, 7] The affidavit and search warrant are dated 4 February 1970, therefore G.S. 15-26 is applicable. See concurring opinion by Graham, J., in *State v. Milton,* 7 N.C. App. 425, at 430, 173 S.E. 2d 60, at 63. We hold that the foregoing affidavit sufficiently *indicates the basis* for a finding of probable cause and supports the finding of probable cause made by the magistrate.

[8] In this case the search warrant describes with reasonable certainty the premises to be searched and the contraband for which the search is to be made. G.S. 15-26(a). The affidavit attached to the warrant indicates the basis for a finding of probable cause. G.S. 15-26(b). The warrant is signed by a magistrate and bears the date and hour of its issuance. G.S. 15-26(c). There-

fore the affidavit and warrant meet the statutory requirements. In our opinion they also satisfy the requirements of the Fourth Amendment to the Constitution of the United States. cf. *State v. Milton, supra.* This assignment of error is overruled.

Defendant further assigns as error two portions of the judge's charge to the jury; each relates to the judge's explanation of constructive possession and control. When the charge is read in context, as it must be, we hold that it fairly and accurately presents the case to the jury. These assignments of error are overruled.

No error.

Judges MORRIS and VAUGHN concur.

HERBERT H. DAWSON, ADMINISTRATOR OF THE ESTATE OF STANLEY PARKS v. CLARENCE B. JENNETTE, ORIGINAL DEFENDANT, AND ARTHUR BRIGHT, ADDITIONAL DEFENDANT

No. 708SC587

(Filed 30 December 1970)

Automobiles §§ 19, 57— accident at T-intersection — stop sign for servient street not in place — right-of-way — sufficiency of evidence

In this wrongful death action resulting from a collision between two automobiles at a T-intersection, the rules governing uncontrolled intersections applied to give defendant's driver the right-of-way under G.S. 20-155(a), and plaintiff's evidence was insufficient for the jury, where evidence offered by plaintiff showed that the stop sign for the servient street on which defendant's automobile approached the intersection was not in place but was lying on the ground, there was no evidence that defendant's driver knew or had reason to know that the stop sign had been erected or removed, and plaintiff's evidence showed that defendant's automobile approached the intersection from the right of decedent's automobile and was insufficient for the jury to find that decedent's automobile entered the intersection first and thereby obtained the right-of-way under G.S. 20-155(b).

Judge VAUGHN dissents.

APPEAL from *Bundy, Judge of the Superior Court,* 18 May 1970 Session, LENOIR County Superior Court.

The plaintiff, as administrator of the estate of Stanley Parks, deceased, brought this action to recover damages for the wrongful death of his intestate, caused when his automobile, driven by the additional defendant Bright, collided with an automobile owned by the original defendant Jennette in which Jennette was a passenger, and which was being driven by Jennette's daughter, Mrs. Sandra Dolan.

The original defendant filed an answer in which he denied the material allegations of the complaint, and asserted the contributory negligence of plaintiff's intestate as a bar to plaintiff's action. He further instituted a cross action against the additional defendant Bright for contribution in the event he should be held liable to plaintiff, as well as an independent claim against Bright for his own injuries, and a counterclaim against the plaintiff. The additional defendant Bright asserted a claim for his injuries against the original defendant Jennette.

The plaintiff's evidence tended to show: the collision occurred on the evening of 4 July 1967, at the intersection of Airport Road and Heritage Street Extension, near Kinston, North Carolina; the intersection is a "T" intersection; the decedent's automobile was traveling eastwardly on Airport Road, which forms the cap of the "T," and the original defendant's automobile was traveling northwardly on Heritage Street Extension; it was still daylight at the time of the accident; the stop sign on Heritage Street Extension was not in place, but was lying on the ground; the intersection is visible for a distance of 150 feet south on Heritage Street Extension; from a point on Heritage Street Extension 150 feet south of the intersection, one could see for a distance of 50-60 feet westwardly on Airport Road; the speed of the decedent's automobile was 40-45 miles per hour, and the speed of the original defendant's automobile was approximately 30 miles per hour; neither Mrs. Dolan, the decedent Stanley Parks, nor the additional defendant Bright had been drinking; the original defendant's automobile, driven by Mrs. Dolan, entered the intersection and struck the right side of the decedent's automobile, the additional defendant Bright having swerved to his left in an attempt to avoid the collision; the speed limit on both roads was 55 miles per hour; the decedent's vehicle came to rest on its side, approximately 58 feet from the point of impact; the additional defendant was familiar with the intersection; Mrs. Dolan was not familiar with the route, but she had passed through the intersection earlier the same day, traveling in the opposite direction.

At the close of the plaintiff's evidence, the trial court granted the motions of both the original and additional defendants for directed verdicts, on the plaintiff's claim and the original defendant's claim for contribution, to which the plaintiff excepted and gave notice of appeal. By consent judgment, the claims of both defendants against each other, and the original defendant's counterclaim against the plaintiff, were dismissed.

Beech & Pollock, by H. E. Beech for plaintiff appellant.

Whitaker, Jeffress & Morris, by A. H. Jeffress for defendant appellee.

BROCK, Judge.

It was stipulated: (1) that Stanley Parks died as a result of injuries sustained in the collision; (2) that Sandra Dolan was operating the defendant Jennette's automobile as his agent, with his consent, and within the scope of the agency or master-servant relationship; (3) that the additional defendant, Bright, was operating the decedent's automobile with the owner's permission.

The original defendant's allegation contained in his counterclaim against plaintiff that Bright was operating the decedent's automobile "at the request and with the consent of the said Stanley Parks and under his direction, supervision, and control as his agent and within the scope of said employment, and that the plaintiff's intestate, Stanley Parks, exercised control over the operation of said vehicle . . ." was controverted neither by the pleadings nor by the evidence.

Thus, the issue of the actual and proximate cause of the decedent's death, and the issue of the imputability of any negligence of Bright and Dolan to the decedent and the original defendant, respectively, are judicially admitted, and were not before the court on the motions for directed verdict.

Therefore, the issues on appeal are whether the plaintiff's evidence of negligence imputable to the original defendant Jennette was sufficient to require submission of the case to the jury, and whether the evidence discloses contributory negligence as a matter of law.

We think this case is controlled by our decision in *Douglas v. Booth,* 6 N.C. App. 156, 169 S.E. 2d 492. There is no evidence that Mrs. Dolan knew, or had reason to know, that the stop sign had been erected or removed. Although she had passed through

the intersection earlier in the day, the evidence is silent as to whether the sign was in place at that time. As to her, the rules governing uncontrolled intersections apply. She approached the intersection from the right of the automobile in which the decedent was riding; thus, she could rightfully assume the right-of-way. G.S. 20-155(a). There is no evidence of excessive speed on her part, nor of any other negligence.

Plaintiff attempts to avoid the result of *Douglas v. Booth, supra,* and indeed, to turn it to his favor, by distinguishing it on the ground that it involved a 4-way intersection, whereas the case at bar involves a 3-way or "T" intersection. His contention, apparently, is that a "T" intersection creates a dominant-servient relationship between the intersecting roads, the right-of-way belonging to the motorist on the through highway, or cap of the "T," even if he approaches from the left of the other motorist. We think plaintiff's reliance on *Douglas* is misplaced. While we are not called upon at this time to enumerate the circumstances under which a dominant-servient relationship may arise, and we expressly refrain from so doing, suffice it to say that we find no basis for holding that such a relationship is imposed on the facts of this case.

Plaintiff also contends that the decedent's automobile entered the intersection first and thereby obtained the right-of-way, notwithstanding that he was to Mrs. Dolan's left. However, the evidence is, at best, equivocal. Any inference that the decedent's automobile entered the intersection first would be based on mere conjecture. Since Mrs. Dolan, pursuant to G.S. 20-155(a), was entitled to the right-of-way, it was incumbent upon plaintiff, who had the burden of proof, to establish facts sufficient to bring the case within G.S. 20-155(b). *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147. This he failed to do.

Plaintiff has failed to offer any evidence of actionable negligence on the part of Mrs. Dolan. Directed verdicts were properly granted.

Affirmed.

Judge MORRIS concurs.

Judge VAUGHN dissents.

IRIS BAREFOOT DAVIS, ADMINISTRATRIX OF THE ESTATE OF JOHN ALLEN DAVIS v. REBECCA W. PEACOCK, ADMINISTRATRIX OF THE ESTATE OF JERRY CLARENCE PEACOCK

No. 704SC484

(Filed 30 December 1970)

Automobiles § 66— identity of driver — sufficiency of evidence

Evidence that the administratrix' intestate owned the automobile involved in the accident, that one of the intestate's shoes was wedged under the gas pedal and brake of the automobile, and that the right trouser leg from a pair of pants belonging to another person was torn off and hanging on the door of the passenger's side of the front seat, *held* sufficient to support a jury finding that the intestate was the operator of the vehicle at the time of the accident.

APPEAL by plaintiff from *Godwin, Special Superior Court Judge,* March 1970 Session of Superior Court held in ONSLOW County.

Plaintiff, Iris Barefoot Davis, Administratrix of the Estate of John Allen Davis, seeks to recover damages from the defendant, Rebecca W. Peacock, Administratrix of the Estate of Jerry Clarence Peacock, for the alleged wrongful death of her intestate, John Allen Davis (Davis).

Plaintiff alleged in her complaint that the death of her intestate was proximately caused by the actionable negligence of defendant's intestate, Jerry Clarence Peacock (Peacock), in the operation of Peacock's 1966 Mercury automobile on 7 March 1967.

Defendant denied that her intestate was operating the automobile and denied all of the material allegations of the complaint.

The parties stipulated that on 7 March 1967 Peacock was the owner of the 1966 Mercury automobile (Mercury) described in the pleadings; that Davis "died as a proximate result of injuries sustained by him in the wreck of the 1966 model Mercury automobile owned by the defendant intestate"; that "defendant may at her option amend her Answer to plead an alternate defense of contributory negligence" (the defendant did not exercise this option); and that photographs marked D-1, D-2, P-2, P-3, P-4 and P-5 could be received in evidence without further identification for the purpose of illustrating the testimony of witnesses.

The parties agreed to the constitution of "the case on appeal to the North Carolina Court of Appeals." In this record there appears what is denominated "Statement of Case" in which it is asserted that "[p]laintiff's intestate and defendant's intestate were both killed in the accident."

At the close of the plaintiff's evidence, the defendant made a motion for a "directed verdict" which was allowed. The judgment was as follows:

> "THIS ACTION came on for trial before a Court and a jury, the Honorable A. Pilston Godwin, Jr., Judge Presiding, and on motion of the defendant for a directed verdict pursuant to Rule 50(a) of The Rules of Civil Procedure, made after Plaintiff had rested her case, the Court directed a verdict for Defendant;
>
> IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiff take nothing; that the action be dismissed on the merits; and that the Defendant recover of the Plaintiff her costs in this action."

The plaintiff appealed to the Court of Appeals.

Joseph C. Olschner, and Bailey & Robinson by Edward C. Bailey for plaintiff appellant.

Warlick & Milsted by Alex Warlick, Jr., for defendant appellee.

MALLARD, Chief Judge.

The actual motion for a directed verdict is not contained in the record, and the judgment allowing this motion does not state upon what grounds it was made or allowed. The plaintiff makes no contention that the motion did not state the specific grounds therefor as required by statute; therefore, we assume that the motion complied with Rule 50 of the Rules of Civil Procedure. From the briefs of both parties, we also assume that the motion was made on the grounds that on the facts and the law, the plaintiff failed to show a right to relief. Litigants would be well advised to include in the record the specific grounds stated in the motion for a directed verdict. A failure to do so could result in a dismissal of the appeal.

The evidence and stipulations tended to show that Peacock and Davis both died on 7 March 1967 between 3:30 and 4:00

a.m. as a result of the wreck of the 1966 Mercury automobile owned by Peacock. Peacock and Davis left Davis' home on the night of 6 March 1967 at about 7:30 p.m. in the 1966 Mercury to go to a fish stew at Richlands. Between 3:30 and 4:00 a.m. on the morning of 7 March 1967, the driver of Peacock's Mercury, while traveling North on U. S. Highway #17, was driving at a speed in excess of sixty miles per hour at a point about two miles South of Holly Ridge. The automobile went out of control and while skidding for about two hundred feet, turned over two or three times before coming to rest on its top at a point about twenty to twenty-five feet from the west edge of the highway. Peacock and Davis were thrown out of the automobile and were found on the ground about twenty to thirty feet from the automobile and about the same distance from each other. There was no direct testimony as to who was driving. The right trouser leg of Davis was hanging from the right front passenger door of the automobile. Some four hours after the accident and after the automobile had been turned over and pulled by a wrecker vehicle to Jacksonville, a shoe, identified as Peacock's shoe, was found to be "wedged up under the gas peddle and the brake; it looked like it was mashed down on it." There was also evidence that Peacock customarily wore his shoes with the laces untied. There was ample circumstantial evidence as to the actionable negligence of the driver of the 1966 Mercury at the time of the accident to require submission of the case to the jury. Also, there was evidence tending to show that plaintiff's intestate was earning money in excess of that required for his support. *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968); G.S. 28-174.

The question on which decision turns in this case is whether the evidentiary facts that Peacock owned the vehicle involved, that one of his shoes was wedged under the gas pedal and brake, and that Davis' right trouser leg was torn off and hanging on the door on the passenger's side of the front seat are sufficient to permit the jury to find that Peacock was the operator of the automobile at the time of the accident.

In *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258 (1957), it was held that the ownership of an automobile by an occupant thereof at the time of a wreck does not raise a presumption that the owner was the driver. In 1 Strong, N. C. Index 2d, Automobiles, § 66, the rule is stated as follows:

"The identity of the driver of a vehicle may be established by circumstantial evidence, either alone or in combination with direct evidence. However, the facts and circumstances must establish identity as a logical and reasonable inference and not merely raise a conjecture, guess, or choice of possibilities."

See also *Greene v. Nichols, supra,* and *Crisp v. Medlin,* 264 N.C. 314, 141 S.E. 2d 609 (1965).

Plaintiff has other assignments of error which we do not discuss since they may not recur on a new trial.

The ownership of the automobile by Peacock, the location of Peacock's shoe wedged under the gas pedal and the brake, and the location of the right trouser leg of Davis on the right front passenger door of the automobile all point in the same direction and are sufficient to permit the jury to find as a logical and reasonable inference from these established facts that Peacock was the operator of the automobile at the time of the accident. The judgment of the superior court allowing the motion for a directed verdict and dismissing the action is reversed.

Reversed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. OSSIE SIMMONS

No. 708SC666

(Filed 30 December 1970)

1. **Criminal Law § 84; Intoxicating Liquor § 12; Searches and Seizures § 1— warrantless seizure from car of plastic jugs containing whiskey — lawfulness**

No search warrant was required for the seizure from defendant's car of white plastic jugs containing non-taxpaid whiskey where the jugs were in plain view of the officers from outside the car and no search was necessary for their discovery, and the trial court did not err in the admission of the whiskey and testimony relating to it. G.S. 18-6.

2. **Intoxicating Liquor § 12— plastic jugs used to carry non-taxpaid whiskey — relevancy of testimony**

In this prosecution for possession and transportation of non-taxpaid whiskey wherein defendant contended that officers unlawfully

seized plastic jugs containing non-taxpaid whiskey from his car without a warrant, testimony by officers that the type of jug observed in defendant's car was often used to carry non-taxpaid whiskey was relevant.

APPEAL from *Bundy, Judge,* 26 March 1970 Session of the Criminal Division of Superior Court of LENOIR County.

Defendant was charged with and convicted of possession and transportation of non-tax paid whiskey.

The testimony of the two arresting officers tends to show that Deputy Garris received a phone call at his home and that as a result of this phone call, he called Deputy Harper, met him at the Sheriff's Office, and went to the street where the arrest was made in order to watch for the car being driven by the defendant. Deputy Garris got out of the car to walk down the street and see if the car in question was approaching. While he was gone, Deputy Harper saw the car in question pull in behind an apartment building. Deputy Harper pulled in behind the car being driven by the defendant and told the defendant that he wanted to see him. "At that time, he jumped back into his car, put it in reverse, and backed into the patrol car. He did this several times . . ." Officer Garris then arrived on the scene. Officer Harper then testified that: "Ossie continued trying to get away from us by pulling. We put the handcuffs on him and put him in the back seat of the county car. I advised him of his rights." Officer Harper then testified that during the commotion, he saw a cardboard carton on the back seat of the defendant's car, that he saw two white plastic jugs on the floor of the back seat of defendant's car, and that the area was well lighted. "There were four white plastic jugs in the cardboard carton. I could see the tops of them. The lid was partly up on the cardboard carton and there were four white plastic jugs; and there were two sitting in the foot of the back seat of the same type. I could see these jugs prior to arresting Ossie. I could see them as soon as I got to the car before the arrest." The court then asked the witness if he saw the articles in question while still outside the car and the witness answered that he saw the articles from the sidewalk.

After the defendant was placed under arrest in the county car the deputies removed the jugs, opened them and verified the fact that they contained non-tax paid whiskey.

Officer Harper testified on cross-examination that: "I could not tell what was in the cardboard box other than the

plastic jugs; and I could not—by looking into the car—tell what was in the plastic jugs." On redirect examination the witness testified that: "I have seen plastic jugs like this before. Most of the non-taxpaid whiskey . . . OBJECTION. OBJECTION OVERRULED. DEFENDANT'S EXCEPTION NO. 4. . . . that you get these days is in that type of jug. There were six jugs originally but a hole came in one in the Sheriff's office and it ran out on the floor."

The testimony of Officer Garris corroborated that of Officer Harper.

Attorney General Morgan, by Staff Attorney Lloyd for the State.

Turner and Harrison, by Fred W. Harrison for defendant appellant.

MORRIS, Judge.

[1] By the defendant's first assignment of error, he contends that it was error for the court to allow testimony concerning, and the introduction of, non-tax paid whiskey obtained without a search warrant over the defendant appellant's objection and motion to suppress. In *State v. Ferguson,* 238 N.C. 656, 78 S.E. 2d 911 (1953), two ABC officers stopped a car on a public highway. The officers walked back to the car and, looking in, saw on the floorboard back of the front seat a cardboard box containing 12 half gallon fruit jars of white whiskey, upon which there were no revenue stamps of the state or federal government. The officers testified that they were stopping cars in order to check driver's licenses. The Court said, quoting from G.S. 18-6, "that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage." The Court further stated that the officer "saw and had absolute personal knowledge that there was intoxicating liquor in the automobile," and that it necessarily followed that the defendant's exception based on the court's refusal to suppress the evidence was overruled. "When the incriminating article is in plain view of the officers . . . no search is necessary and the constitutional guaranty does not apply." *State v. Colson,* 1 N.C. App. 339, 161 S.E. 2d 637 (1968). "What the officers saw through the windows of

the car by the aid of a flashlight without opening the doors of the car to search were competent in evidence." *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967). "Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand." *State v. Kinley*, 270 N.C. 296, 154 S.E. 2d 95 (1967).

The non-tax paid whiskey in this case was in plain view in the back seat of the defendant's car. The officers' uncontradicted testimony was that they saw the "white plastic jugs" from outside the car "during the commotion." *State v. Ferguson, supra*, held that seeing half gallon fruit jars through a car window in a cardboard box gave the officers both sight of and absolute personal knowledge of the presence of intoxicating whiskey in the automobile. The fact that such whiskey is now being transported in white plastic jugs rather than half gallon fruit jars does not lessen the impact of *State v. Ferguson, supra.*

The contraband material was in plain sight on the back seat and in the rear floorboard of defendant's car; the fact that it was in plain sight negated any requirement for a search warrant. We find no merit in the defendant's first assignment of error.

[2] Defendant's second assignment of error is that the court erred in admitting testimony of the officers that this type of plastic jug was often used to carry non-tax paid whiskey, because the fact that this type of jug was usually used to transport non-tax paid whiskey was not relevant. In our opinion the relevance of this evidence is too apparent to require discussion.

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES ISAAC HERALD

No. 7025SC658

(Filed 30 December 1970)

1. **Automobiles § 3— notice of license suspension — sufficiency of certification**

Certification by an employee of the Department of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the Department of Motor Vehicles was sufficient to render admissible a copy of the document in a prosecution of defendant for driving while his license was suspended. G.S. 8-35; G.S. 20-48.

2. **Automobiles § 3— driving while license suspended — admissibility of certified driving record**

In this prosecution of defendant for driving while his license was suspended, a properly certified copy of the driver's license record of defendant on file with the Department of Motor Vehicles was admissible as evidence that defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged.

3. **Automobiles § 3— admission of entire driving record — failure to request limitation of contents**

Where defendant failed to request that the contents of his certified driving record be limited to the portions thereof relating to the status of his license on the day he was charged with driving while his license was revoked, he may not now complain that the record indicates that he had been involved in a total of nine accidents.

APPEAL by defendant from *McLean, Superior Court Judge,* 17 August 1970 Session of CALDWELL Superior Court.

Defendant was tried and convicted for violating G.S. 20-28 by driving a motor vehicle on 27 July 1969 while his license had been suspended. From judgment imposing a twelve month jail sentence which was suspended upon certain conditions defendant appealed.

Attorney General Morgan by Assistant Attorney General Banks for the State.

Ted S. Douglas for defendant appellant.

GRAHAM, Judge.

Defendant failed to file his brief in this court within the time prescribed by Rule 28, Rules of Practice in the North Carolina Court of Appeals, and the Attorney General has moved that

his appeal be dismissed. We have elected, however, to review the case on its merits.

Defendant's main contention is that the court erred in allowing State's Exhibits 1 and 2 in evidence over his objection.

[1] Exhibit 1 is a copy of an official order of security requirement or suspension of driving privilege, dated 27 June 1969, and signed by Joe W. Garrett, Commissioner of Motor Vehicles. The document is sufficient to notify defendant that (1) he became subject to G.S. 20-279.5, by failing to show that he had automobile liability insurance in effect at the time of a motor vehicle accident on 7 May 1969; (2) that his driving privileges had been ordered suspended, effective 12 July 1969, if security in the amount of $1,800 was not deposited with the Department of Motor Vehicles by that date; (3) he was directed to mail to the Department, in an envelope provided, all North Carolina driver's license issued to him; (4) various enumerated methods were available to him for clearing the order.

Attached to Exhibit 1 is a certificate, sworn to and signed by an employee of the Department of Motor Vehicles, certifying that the original of the document was mailed to defendant on 27 June 1969 at his address shown on the records of the Department. This certificate provides *prima facie* evidence that it is genuine, that the statements contained therein are true and that the employee signing it was an official employee of the Department of Motor Vehicles. G.S. 8-35. It meets all the requirements of G.S. 20-48 wherein it is provided "[p]roof of the giving of notice . . . [by personal delivery or by mail] may be made by the certificate of any officer or employee of the Department or affidavit of any person over twenty-one years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof." The certificate is in the exact form of the certificate approved by this court in the recent case of *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838 *(cert. denied,* 16 December 1970). We therefore hold that State's Exhibit 1 was clearly admissible in evidence.

[2] State's Exhibit 2 is a Driver's License Record Check for Enforcement Agencies. The search date is indicated as 28 November 1969. This Exhibit reflects that defendant's driving privileges were indefinitely suspended, effective 12 July 1969, and that no reinstatement had been made between that date and 28 November 1969. This Exhibit contains a certificate signed by

Edward H. Wade, Director of Driver License Division of the Department of Motor Vehicles, wherein it is certified "THAT THE FOREGOING IS A TRUE COPY OF THE DRIVER'S LICENSE RECORD OF THE WITHIN NAMED PERSON ON FILE WITH THE N. C. DEPARTMENT OF MOTOR VEHICLES." This properly certified exhibit was clearly admissible as evidence that defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged. *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608.

[3] Defendant complains that Exhibit 2 indicates that he had been involved in a total of nine accidents, and that since he did not go upon the stand and testify or otherwise place his character in issue, this evidence was prejudicial and should not have been admitted against him. The record fails to show that defendant made any request that the contents of his certified driving record be limited to the portion or portions thereof relating to the status of his license on the day he was charged with the offense for which he was being tried. Therefore, he may not now complain that the Exhibit was admitted in evidence in its entirety. *State v. Briley,* 259 N.C. 137, 129 S.E. 2d 892; *State v. Corl, supra; State v. Teasley, supra.*

Defendant has brought forward other assignments of error which have been reviewed and found to be without merit. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FRANK LEE EVANS

No. 7028SC649

(Filed 30 December 1970)

Larceny § 8— larceny of automobile — defense of intoxication — instructions on intent

In a prosecution for the larceny of an automobile, wherein the defendant contended that he was so intoxicated at the time of the alleged offense as to be incapable of forming a criminal intent, the trial court erred in instructing the jury that the intent in a larceny case is inferred from the commission of the act and that the defendant

would not be entitled to acquittal upon his plea of drunkenness if he committed the alleged larceny and had sufficient knowledge to comprehend the nature and consequences of his act, since the instruction precluded the jury from considering the possibility that the defendant might have had sufficient knowledge to comprehend the nature and consequences of his act in driving the automobile and never at any time have formed the intent to deprive the owner of her automobile permanently.

APPEAL by defendant from *Beal, J.*, 20 July 1970 Criminal Session of BUNCOMBE Superior Court.

Defendant was indicted for larceny of an automobile of the value of $700.00. He pleaded not guilty.

The State's evidence, which included testimony of an investigating officer as to statements made to him by the defendant, tended to show: On 26 June 1970 defendant, who lived in Haywood County, was employed on a road construction job near Weaverville in Buncombe County. His method of transportation to and from work was for his wife to bring him from Haywood County to the Enka section in Buncombe County in the morning, and at that point he got a ride with a fellow employee to the job site. At the end of the shift he would ride with the other employee back to Enka, where his wife would pick him up. While on the job on the morning of 26 June 1970, he offered to buy gas if a fellow employee would take him in an automobile to get his check cashed. The automobile involved belonged to his fellow employee's mother. When his fellow employee took him to get his check cashed, defendant went to a beer store and came back with two six-packs of beer. Later in the day, defendant had some difficulty with his supervisor and shortly after lunchtime his employment terminated. Defendant had no transportation home. He walked from the job site to where the car was parked, got in, and sat down. He noticed the keys were in the car, and he turned the switch on and listened to the radio. After a short time he decided to take the car and go get a beer. He drove in the car to several beer joints, and then decided to go on home to Haywood County. On the way, he was involved in a collision near the entrance to the American Enka Corporation plant. He went with the driver of the other vehicle to a gas station across the road and called the State Highway Patrol. Before a patrolman arrived, defendant drove the car away toward his home in Haywood County. Near Canton he ran off an embankment, wrecking the car and receiving injuries for which he was hospitalized. No one had given him permission to take the car.

Defendant testified that his fellow employee had agreed to take him home at quitting time and had given him permission to go get another half case of beer; that he had been drinking heavily; that he drove to a drive-in, where he drank six or eight more beers and got a six-pack to go, and that was the last thing he remembered until he woke up in the hospital four days later.

The jury found defendant guilty as charged, and from judgment imposing prison sentence for a term of three years, defendant appealed.

Attorney General Robert Morgan, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

Dennis J. Winner for defendant appellant.

PARKER, Judge.

In the course of the charge to the jury, the trial court instructed the jury concerning defendant's contention that he was so intoxicated as to be incapable of forming a criminal intent. The charge then contains the following instruction, to which defendant excepts:

> "The Court further charges you, however, that in a case such as this the intent is inferred from the commission of the act; therefore, if the defendant in the instant case committed the crime charged in the bill of indictment and had sufficient knowledge to comprehend the nature and consequences of his act, he would not be entitled to acquittal upon this plea of drunkenness."

Defendant's exception is well taken. The only act involved was defendant's act in driving the automobile, as to which no question was raised. His intent in performing that act was all important and was the only real question for the jury to determine. He may well have had "sufficient knowledge to comprehend the nature and consequences of his act" in driving the automobile and yet never at any time have formed the felonious intent to deprive the owner of her property permanently. Such an intent was an essential element of the crime with which he was charged. While in other portions of the charge the court correctly instructed the jury as to the essential elements of the crime, the jury may have understood from the portion of the charge excepted to that felonious intent must be inferred un-

less they should find defendant was so drunk that he did not have "sufficient knowledge to comprehend the nature and consequences of his act" in driving. Because the jury may have been misled in determining the crucial question in this case, defendant is entitled to a new trial.

The case is remanded for a new trial. We observe, however, that the evidence in this case more strongly suggests that defendant may have been guilty of the misdemeanor described in G.S. 20-105, rather than of felonious larceny.

New trial.

Chief Judge MALLARD and Judge GRAHAM concur.

WALTER C. LATHAM v. WYATT TAYLOR AND WIFE, LILLIAN P. TAYLOR; BAPTIST CHILDREN'S HOMES OF NORTH CAROLINA, INC.; CORNELIUS VAN SCHAAK ROOSEVELT, SINGLE; THEODORE ROOSEVELT III, AND WIFE, ANNE BABCOCK ROOSEVELT; GRACE ROOSEVELT McMILLAN AND HUSBAND, WILLIAM McMILLAN; FRANCES WEBB ROOSEVELT, WIDOW; BY AND THROUGH THEIR LEGALLY CONSTITUTED ATTORNEY IN FACT, GEORGE H. McNEILL

No. 703SC663

(Filed 30 December 1970)

Deeds § 19— validity of restrictive covenant

A restrictive covenant which provided that the property "shall not be used for any manufacturing, industrial or apartment house purposes, its use being restricted to residential and/or recreational and educational purposes for children and adults to be carried on in connection with and as a part of a camp for children or adults operated as a business enterprise," *held* not void for vagueness.

APPEAL by plaintiff from *James, Superior Court Judge,* 12 August 1970 Session of Superior Court held in CARTERET County.

On 31 October 1952 the defendants Cornelius Van Schaak Roosevelt; Theodore Roosevelt III, and wife, Anne Babcock Roosevelt; Grace Roosevelt McMillan and husband, William McMillan; and Frances Webb Roosevelt (hereinafter referred to as Roosevelts), together with Theodore Roosevelt, Trustee, conveyed a tract of land located on the Atlantic Ocean in Carteret County to Wyatt Taylor and wife, Lillian Taylor (hereinafter

referred to as Taylors). The deed from the Roosevelts to the Taylors is recorded in the Carteret County Registry in Book 142, page 368. This deed contains certain restrictions and reservations as to the use of the land. The pertinent portions read:

> "This property shall not be used for any manufacturing, industrial or apartment house purposes, its use being restricted to residential and/or recreational and educational purposes for children and adults to be carried on in connection with and as a part of a camp for children or adults operated as a business enterprise. This restriction shall remain in effect until the first day of the year 2000 A.D."

By deed dated 8 July 1965, the Taylors conveyed a portion of the lands described in the deed to them from the Roosevelts to the Baptist Children's Homes of North Carolina, Inc., and made the conveyance subject to the same reservations and restrictions contained in the deed recorded in Book 142, page 368, of the Carteret County Registry.

By deed dated 7 January 1966, the Taylors conveyed another portion of the lands described in the deed to them from the Roosevelts to the plaintiff, Walter C. Latham; and, by admission in the pleadings, this conveyance was made subject to the same reservations and restrictions contained in the deed recorded in Book 142, page 368, of the Carteret County Registry.

This action was brought under the provisions of the Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.* The plaintiff alleges that the restrictions as to use is vague, uncertain and not in furtherance of any general plan or scheme to develop said property on an orderly basis and seeks to have that portion of the restrictions hereinabove set forth declared void for vagueness and uncertainty.

Jury trial was waived. Upon the admissions in the pleadings and stipulations of the parties, the court made findings of fact, conclusions of law, and adjudged "that the restrictive covenants, which are subject of this proceeding, are not void for vagueness, uncertainty or indefiniteness * * * ."

To the signing of the judgment, the plaintiff appealed to the Court of Appeals.

Thomas S. Bennett for plaintiff appellant.

Poyner, Geraghty, Hartsfield & Townsend by Marshall B. Hartsfield for defendants Taylor.

George H. McNeill for defendants Roosevelt.

Blackwell, Blackwell, Canady, Eller & Jones by Walter R. Jones, Jr., for Baptist Children's Homes of North Carolina, Inc.

MALLARD, Chief Judge.

The question for decision is whether the restrictive covenant hereinabove set forth is void for vagueness, uncertainty and indefiniteness.

The general rule with respect to restrictive covenants is set forth in 3 Strong, N.C. Index 2d, Deeds, § 19, as follows:

> "Covenants restricting the use of land are not impolitic, and the owner of land may insert any restrictive covenants that he deems fit, so long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated. However, such covenants impose servitudes in derogation of the usual right to the free and unfettered use of land by the owner, and are to be strictly construed against limitation on use."

Applying the above general rule to the restrictions involved here, we are of the opinion and so hold that the trial judge correctly ruled that they are not void for vagueness, uncertainty or indefiniteness.

Affirmed.

Judges PARKER and GRAHAM concur.

FIRST NATIONAL BANK OF EASTERN NORTH CAROLINA v. L. D. BLACK AND WIFE, ELMA B. BLACK

No. 7011DC446

(Filed 30 December 1970)

Guaranty; Bills and Notes § 20— action against guarantors — terms of the guaranty — dismissal of action

In a bank's action against guarantors who promised the payment of such portion of a loan as the debtor "is unable to pay at maturity,"

the guarantors are entitled to a dismissal of the action upon the failure of the bank to prove what portion of the loan the debtor was unable to pay at maturity. G.S. 1A-1, Rule 41(b).

APPEAL by defendants from *Lyon, District Court Judge,* 9 March 1970 Session, HARNETT County District Court.

On 2 November 1965 Elwood B. Barefoot (Barefoot), husband of male defendant's sister, executed to the Bank of Lillington, with a chattel mortgage as security, a note in the sum of $3,861.16 due on 1 November 1966. The Bank of Lillington later merged with plaintiff bank.

The Barefoot note was not paid at maturity and on 31 March 1967 defendants executed a paper writing as follows:

"March 31, 1967

Time Payment Department
Bank of Lillington
Lillington, N. C.

In consideration of your agreeing to withdraw your demand for payment in full on your T/P Loan #5828, from the maker—Elwood B. Barefoot—until the maturity date of November 1, 1967, at which time the balance of $2,800. will be due, we guarantee the payment of such portion of this loan as Mr. Elwood Barefoot is unable to pay at maturity.

Witness our hands and seals, this the day and date above written.

/s/ L. D. Black (SEAL)
/s/ Elma B. Black (SEAL)"

Again on 1 November 1967 the Barefoot note was not paid. Mr. Black, one of defendants, requested and received permission from plaintiff to sell the car included in the chattel mortgage for the purpose of applying the proceeds on the Barefoot note. The car was accordingly sold and the proceeds applied on the note. On 8 July 1968 plaintiff instituted a civil action against Barefoot on the note and secured a judgment on 17 April 1969 for the sum of $2,083.77, plus interest and costs.

Mr. Black was in possession of a tractor and equipment which was included in the Barefoot chattel mortgage to plaintiff. This tractor and equipment was sold for $850.00 and the proceeds applied on the judgment against Barefoot. Thereafter

execution was issued on the judgment against Barefoot, but it was returned unsatisfied.

Plaintiff made demand upon defendants for payment of the balance due on the note, but defendants failed to pay. Plaintiff instituted this action against defendants to recover judgment for the balance of said Barefoot note.

The case was tried in the District Court before Judge Lyon without a jury. Judge Lyon made findings of fact and entered judgment in favor of plaintiffs and against defendants for the sum of $1,333.77, plus interest from 19 May 1969, and for the costs. Defendants appealed.

Edgar R. Bain for plaintiff.

Woodall, McCormick & Arnold, by Edward H. McCormick for defendants.

BROCK, Judge.

The crux of defendants' appeal is the interpretation of the agreement allegedly signed by defendants. It is defendants' contention that the terms of the agreement only call upon them to pay such portion of the loan as Barefoot *is unable to pay at maturity.* They contend, therefore, that the burden was upon plaintiff to prove what portion of the loan Barefoot was unable to pay on 1 November 1967; and upon plaintiff's failure to offer evidence on this question, defendants were entitled to a judgment of dismissal at the close of plaintiff's evidence.

The only evidence of Barefoot's ability to pay the indebtedness is plaintiff's evidence that at sometime after 17 April 1969 execution was issued and returned unsatisfied; this was at least seventeen months after maturity of the note. The record on appeal is absolutely devoid of evidence of Barefoot's ability to pay on 1 November 1967, the date of maturity. In our opinion defendants' motion to dismiss at the close of plaintiff's evidence should have been allowed.

It is interesting to note that during oral argument counsel for plaintiff and counsel for defendants stated that an official of the bank drafted the guaranty agreement.

The judgment appealed from is reversed and this cause is remanded to the District Court of Harnett County for entry of judgment of dismissal under G.S. 1A-1, Rule 41(b).

Reversed and remanded.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. JERRY CHEEK

No. 7019SC644

(Filed 30 December 1970)

Constitutional Law § 32; Criminal Law § 158— denial of counsel — validity of order — conclusiveness of record

Where the record on appeal was completely silent as to any evidence upon which the trial court based its order denying counsel to defendant, the Court of Appeals will assume that the order was correct and was based upon sufficient evidence to support the finding that defendant was not indigent.

APPEAL by defendant from *Godwin, Special Judge,* 27 April 1970 Criminal Session, Superior Court of RANDOLPH County.

Defendant was charged in separate warrants with two counts of assault with a deadly weapon and entered a plea of not guilty to each charge. The cases were consolidated for trial. He was not represented by counsel. It appears that defendant's case was called for trial 27 April 1970. Judge Godwin inquired of defendant whether he wanted counsel. Defendant replied that he did but had no money. He stated that he had tried to obtain counsel some two weeks prior to trial but both lawyers to whom he had talked wanted "cash, money on the barrelhead." Further questioning revealed that on previous appearances for trial on these charges he had said he could not employ counsel, and at the next preceding session of court on 3 April 1970, Judge Beal had, upon inquiry, determined that he was not indigent and directed that he be ready for trial, with or without counsel, at the next session of court. Whereupon Judge Godwin found him not to be indigent, denied the request for appointment of counsel, and proceeded with the trial.

The jury returned a verdict of guilty to each charge. From judgment entered on each verdict, the defendant appealed. On

appeal the defendant is represented by privately retained counsel.

Attorney General Morgan, by Assistant Attorney General Rich for the State.

Sammie Chess, Jr., for defendant appellant.

MORRIS, Judge.

Defendant brings forward two assignments of error. The first is to the ruling of the court that defendant was not entitled to counsel and the second is to the failure of the court to inquire into defendant's financial condition as of the date the case was called for trial.

Defendant's assignments of error are based on exceptions Nos. 1 and 2. Both these exceptions are to the order of Judge Beal entered on 3 April 1970 as follows:

> "It appearing to the undersigned Judge from the affirmations made by the applicant and after due inquiry made, that the applicant is financially able to provide the necessary expenses of legal representation, it is, therefore,
>
> ORDERED AND ADJUDGED that he is not an indigent, and his request is hereby denied."

Defendant, in his brief, does not argue that Judge Beal's order is not based on sufficient evidence, but rather the entire brief is directed to the proceedings at trial 24 days later conducted by Judge Godwin. No exception is taken to these proceedings which resulted in a finding that defendant was not indigent. Since the only exceptions appearing in the record before us are not set out in defendant's brief and no reason or argument is stated and no authority cited with respect thereto, Rule 28, Rules of Practice in the Court of Appeals of North Carolina, would ordinarily require that the exceptions be deemed abandoned. It appears, however, that the record is completely silent as to any evidence upon which Judge Beal's order denying counsel was based. We, therefore, assume that the order was correct and based upon evidence sufficient to support the finding the defendant was not indigent. The exceptions are overruled.

The Attorney General has filed a motion asking that the appeal be dismissed for failure to docket on time. It does appear that defendant obtained an extension of time within which to

docket the record on appeal in this Court but failed to docket it within the time allowed by the order granting the extension of time. However, in view of the disposition of the appeal, the motion is denied.

Affirmed.

Judges BROCK and VAUGHN concur.

ELMER WILLIAMS v. MAXIE HAYES AND RABON TRANSFER COMPANY

No. 7020SC556

(Filed 30 December 1970)

1. **Damages § 3; Trial § 52— refusal to set aside verdict as excessive**

The trial court did not abuse its discretion in refusing to set aside as excessive verdict of $5,000 for injuries received by plaintiff when his car was struck by defendants' tractor-trailer, the evidence having tended to show that plaintiff had sustained some permanent disability of his left hand and arm as a result of the accident.

2. **Damages §§ 3, 16— instructions — permanent injury**

The trial court did not err in charging the jury on permanent injury as an element of damages where plaintiff testified that at the time of the trial he continued to suffer pain in his left hand and arm and that he had a loss of feeling in his arm, and defendants' medical expert testified that plaintiff has some permanent disability of his left arm but that it is minimal.

APPEAL by defendants from *McConnell, Superior Court Judge,* April 1970 Session of Superior Court held in ANSON County.

Plaintiff alleged that he suffered permanent injuries as a proximate result of the actionable negligence of the defendants when a car he was driving was struck by a tractor-trailer being operated by defendant Hayes as agent of defendant Rabon Transfer Company.

When the case was called for trial, the defendants admitted negligence and liability. The only issue submitted to the jury was the amount of damages. The jury answered the issue in the

sum of $5,000, and from the judgment entered on the verdict, the defendants appealed to the Court of Appeals.

Henry T. Drake for plaintiff appellee.

F. O'Neil Jones for defendant appellants.

MALLARD, Chief Judge.

[1] Defendants moved that the verdict be set aside for the asserted reason that the verdict was excessive. The rule with respect to such motions is set forth in 7 Strong, N. C. Index 2d, Trial, § 52, as follows:

> "A motion to set aside the verdict and for a new trial for inadequacy or excessiveness of the award of damages is addressed to the discretion of the trial court, and its ruling thereon is not reviewable in the absence of an abuse of discretion."

The evidence of the plaintiff tended to show that he had sustained some permanent impairment of his left hand and arm as a result of the injuries. Defendants' witness, Dr. Cecil Milton, testified as to plaintiff's injuries:

> "It is my feeling that these injuries had gone on to a good level of recovery and permanent disability would be minimal and in the range of less than five percent for the left arm."

We hold that the trial judge did not abuse his discretion in refusing to set aside the verdict.

[2] Defendants also contend that the trial judge committed error in charging the jury as to permanent injuries on the issue of damages. The general rule with respect to the construction of the judge's charge is set forth in 7 Strong, N. C. Index 2d, Trial, § 33:

> "A charge will be construed contextually as a whole, and when, so construed, it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, and exception thereto will not be sustained, even though the instruction might have been more aptly given in different form."

In the case of *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40 (1964), the rule with respect to when the judge should charge on permanent injury is stated:

"Where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should charge the jury so as to permit its inclusion in an award of damages."

There were only two witnesses in this case, the plaintiff and the defendants' witness, Dr. Cecil J. Milton. The parties stipulated that Dr. Milton was an expert medical witness. Dr. Milton's testimony quoted above indicates that plaintiff has some permanent disability but that it is minimal. Plaintiff testified, among other things, that at the time of the trial he continued to suffer pain in his hand and arm and that he had a loss of feeling in his arm.

In this case there was some evidence from which the conclusion of some permanent injury to plaintiff could properly be drawn. The court did not commit error in charging the jury on permanent injury. When the charge in this case is construed as a whole, no prejudicial error is made to appear.

In the trial we find no error.

No error.

Judges PARKER and GRAHAM concur.

JAMES A. TAYLOR AND WIFE, FRANKIE G. TAYLOR v. TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION

No. 708DC641

(Filed 30 December 1970)

Trespass to Try Title § 4— issue of plaintiff's ownership — sufficiency of evidence

In plaintiff's action to recover damages resulting from defendant's wrongfully entering his land and destroying trees, plants and boundary stakes in order to string electric power wires, plaintiff's evidence was insufficient to establish his ownership of the land, the defendant having denied plaintiff's title, where plaintiff introduced his deed in evidence, pointed to a sketch of his property on a blackboard, and identified the iron stakes that set off the boundary of the property.

APPEAL by plaintiffs from *Hardy, District Judge,* June 1970 Session WAYNE County District Court.

Plaintiffs' complaint alleges that they are the owners of a certain parcel of land "situated in Indian Springs Township on S.R. 1932, which parcel of land is fully described in a deed recorded in the office of the Register of Deeds of Wayne County, North Carolina, in Book of Deeds No. 717 at page 318"; that on or about the first part of July 1969, defendant, through its agents and employees, entered upon the lands and premises of plaintiffs and destroyed trees, plants and boundary stakes, and dug holes and inserted therein poles over which they strung wires; that defendant left limbs and other debris on plaintiffs' land; that the cutting of the trees injured and damaged plaintiffs' land; that the poles and wires burden plaintiffs' land, are unsightly and greatly damaged the land; that the defendant wrongfully entered the land and will continue to trespass thereon and cause irreparable injury unless restrained; that defendant should pay damages in the amount of $500; they asked for damages in the sum of $500; for an order requiring defendant to remove the poles, wires and debris and restraining defendant from entering plaintiffs' land; for costs and attorneys' fees.

Defendant answered denying all the allegations of the complaint.

At the close of plaintiffs' evidence, defendant moved for a directed verdict "for that the plaintiff has failed to prove that the description in the deed offered in evidence covers the land on which the power line of the defendant is located." The motion was allowed and plaintiffs appealed.

Dees, Dees, Smith and Powell, by William L. Powell, Jr., for plaintiff appellants.

Herbert B. Hulse and George F. Taylor for defendant appellee.

MORRIS, Judge.

Plaintiff James A. Taylor presented the only evidence offered for plaintiffs. He identified plaintiffs' exhibit No. 1 as the deed to his property and testified that "it accurately describes my property." He then testified that he knew the boundaries, that an iron stake at each corner marks the boundaries. He pointed to a drawing on the blackboard and testified: "I made the marks that are on the blackboard now. This is Carraway

Creek. This here is State Road #1832. There's an iron stake at this point, this point, this point, and this point, and also this corner. At the time I bought my property in July, 1969, iron stakes were at this point, this point, this point, this point, this point, and at this point right here. My property was 220 feet wide on the road side. The depth of my property on the northern line was 700 feet." The witness later testified that he bought the property in July 1968. A copy of the deed sent up as an exhibit is dated 15 July 1968, so we assume that 1968 is the correct date.

Defendant contends this is not sufficient. We agree. In *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786 (1955), an action for damages for trespass and cutting timber, Bobbitt, J. (now C.J.), speaking for the Court, said:

> "It seems appropriate to call attention to certain well-established rules. Their allegations as to title having been denied, it was incumbent upon plaintiffs to establish both ownership and trespass. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593, and cases cited. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface. G.S. 8-39; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Parsons v. Lumber Co.,* 214 N.C. 459, 199 S.E. 626. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. *Carswell v. Morganton,* 236 N.C. 375, 72 S.E. 2d 748."

Here also defendant denied plaintiffs' title. Applying the well-established rules set out in *Andrews v. Bruton, supra,* it is obvious that plaintiffs' evidence is insufficient.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES ROBERT BENTON

No. 705SC469

(Filed 30 December 1970)

1. **Burglary and Unlawful Breakings § 5; Indictment and Warrant § 17— variance between indictment and proof — description of premises**

There was a fatal variance between pleading and proof in a felonious breaking and entering prosecution, where the indictment alleged the breaking and entering of a building located at "2024 Wrightsville Ave., Wilmington, N. C., known as the Eakins Grocery Store, William Eakins, owner/possessor," but the evidence related to a store, the nature of which was not disclosed, located at 2040 Wrightsville Avenue in the City of Wilmington, and owned and operated by William Adkins.

2. **Indictment and Warrant § 17— variance between pleading and proof — motion for nonsuit**

Question of fatal variance between indictment and proof was properly presented by defendant's motion for nonsuit on the ground that the evidence was insufficient to connect defendant with the alleged crime.

APPEAL by defendant from *Cowper, J.*, 4 March 1970 Session of NEW HANOVER Superior Court.

Defendant was indicted for felonious breaking and entering "the building located 2024 Wrightsville Ave., Wilmington, N. C., known as the Eakins Grocery Store, William Eakins, owner/possessor. . . . " He pleaded not guilty. At the close of the State's evidence the court allowed defendant's motion for a directed verdict of not guilty as to felonious breaking and entering, and denied a similar motion as to non-felonious breaking and entering. At the close of all the evidence, defendant again moved for a directed verdict of not guilty on the charge of non-felonious breaking and entering. The motion was again denied and the case was submitted to the jury on the issue of defendant's guilt or innocence of the misdemeanor of wrongful breaking or entering. The jury returned a verdict of guilty and prison sentence for a term of eighteen months was imposed. Defendant appealed.

Attorney General Robert Morgan by Staff Attorney Rafford E. Jones for the State.

Goldberg & Scott, by Herbert P. Scott for defendant appellant.

PARKER, Judge.

[1] Defendant assigns as error the refusal of the court to grant his motion for a directed verdict at the close of all the evidence on the ground that the evidence was insufficient to carry the case to the jury. Defendant was tried on an indictment charging him with breaking and entering "the building located 2024 Wrightsville Ave., Wilmington, N. C., known as the Eakins Grocery Store, William Eakins, owner/possessor." All of the evidence, however, related to a store, the nature of which was not disclosed, located at 2040 Wrightsville Avenue in the City of Wilmington, owned and operated by William Adkins. Thus, the record discloses a fatal variance between the indictment and the proof. *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413. Defendant must be convicted, if convicted at all, of the particular offense or a lesser degree thereof charged in the bill of indictment. The allegation and proof must correspond. *State v. Watson,* 272 N.C. 526, 158, S.E. 2d 334.

[2] In his brief on this appeal, appellant made no mention of the variance noted but contended his motion should have been allowed for that the evidence was insufficient to connect defendant with the breaking and entering and raised no more than a conjecture as to his guilt. "Even so, the question presented by defendant's assignment of error is whether the evidence was sufficient rather than whether defendant's particular contention is valid." *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266.

The solicitor may, if so advised, present another bill of indictment correctly alleging the premises which were broken and entered. *State v. Watson, supra.* For the fatal variance between the indictment and proof, the judgment in the present case is

Reversed.

Chief Judge MALLARD and Judge GRAHAM concur.

CECELIA G. WHITLEY v. WILLIAM EARL HARDING

No. 702SC456

(Filed 30 December 1970)

Automobiles § 79— intersection accident — contributory negligence

In this action for damages resulting from an intersection collision, plaintiff's evidence disclosed her contributory negligence as a matter of law where it tended to show that she approached the intersection on a servient street, stopped beside the stop sign, pulled forward to a point where she could see up and down the dominant street, looked in both directions and saw nothing coming, then started through the intersection and was struck in the left side by defendant's automobile, plaintiff having failed to see what she should have seen.

APPEAL by plaintiff from *James, Judge of the Superior Court,* 4 May 1970 Session, BEAUFORT Superior Court.

This is a civil action, arising out of an intersection collision, to recover damages for personal injury alleged to have been suffered as a proximate result of negligence of defendant in the operation of his motor vehicle. At the close of plaintiff's evidence, upon motion of defendant, the trial judge directed a verdict for defendant upon the grounds that plaintiff's evidence disclosed her contributory negligence as a matter of law.

Plaintiff's evidence tended to show the following: On 13 January 1968 at about 11:15 a.m., plaintiff was driving south on Washington Street and defendant was driving west on Fifth Street in the town of Washington, North Carolina. Washington Street is an unpaved street, and traffic traveling south on Washington Street is controlled by a stop sign at its intersection with Fifth Street. Fifth Street is also highway 33, and is a paved sixty foot wide street. Plaintiff approached the intersection and stopped beside the stop sign. She then pulled forward to a point from which she could see up and down Fifth Street. She looked in both directions on Fifth Street and saw nothing coming. She started through the intersection and was struck in her left side by defendant.

From the directed verdict for defendant, plaintiff appealed.

LeRoy Scott for plaintiff.

James, Speight, Watson & Brewer, by W. W. Speight for defendant.

BROCK, Judge.

On direct examination plaintiff testified as follows: "I came out to where the cars were sitting and looked down Fifth Street both ways. I didn't see anything coming so I attempted to go across the street. I started and I attempted to go across Washington and Fifth Streets, and when I got in the center, that is when the car hit me." Still on direct examination, she testified: "I was already out in the center of Fifth Street, all the way out there, when I first saw the defendant approaching. Yes, I saw him coming for some little distance before he got to me, he was running fast." And again on direct examination she testified: "I say I saw the car at least half a block away. I would estimate it was about half a block I saw it but I was already out then."

Apparently when plaintiff "came out to where the cars were sitting" she could see up and down Fifth Street. She said she looked both directions on Fifth Street and saw nothing coming. There is no evidence to indicate that her view up and down Fifth Street was limited after she moved out "to where the cars were sitting." All of her evidence shows that defendant was in fact approaching the intersection on Washington Street, and the reasonable inference is that plaintiff failed to see what she should have seen before she undertook to traverse the intersection.

We think plaintiff's conduct falls within the rule of *Clayton v. Rimmer*, 262 N.C. 302, 136 S.E. 2d 562. Here also we think plaintiff failed to see that which she should have seen, and in so failing she was contributorily negligent.

The directed verdict for defendant is

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES HUBERT WYATT

No. 7023SC612

(Filed 30 December 1970)

Criminal Law § 76— voluntariness of confession — necessity for findings of fact

Where the evidence relating to the voluntariness of defendant's confession was conflicting, the admission of the confession without factual findings from which the appellate court could determine whether the trial court committed legal error is erroneous and entitles defendant to a new trial.

Judge VAUGHN dissents.

APPEAL by defendant from *Copeland, Special Judge,* June 1970 Regular Mixed Session of WILKES Superior Court.

Defendant was charged with and convicted of malicious damage to real property. The malicious damage consisted of the breaking of two large windows in the front of the North Wilkesboro Goodwill Outlet Store. The principal evidence for the State consisted of defendant's confession. The arresting officer also testified for the State that he arrested the defendant on the night of the occurrence near the scene and that defendant had a fresh bandage on his hand.

Attorney General Morgan, by Staff Attorney Covington for the State.

Jerry D. Moore for defendant appellant.

MORRIS, Judge.

Defendant assigns as error the court's admitting into evidence the confession of defendant. Defendant was not represented by counsel at trial, the court having found that he was not indigent, but when his confession was offered, the court, in accordance with the rules reiterated in *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969), properly sent the jury out and conducted a *voir dire* examination into the voluntariness of the confession. The defendant testified, and the evidence was conflicting. Upon the conclusion of the evidence the following was entered in the record:

"The Court finds the facts to be as follows: (1) That on the occasion in question before the defendant was ques-

tioned in any way he was advised of all of his rights as contained in Miranda and that he stated that he understood his rights and did not request a lawyer; (2) The court finds as a fact that on the occasion in question the defendant was in his right mind and knew what he was doing and did not request a lawyer; (3) On the occasion in question the defendant was not threatened in any way and neither was he promised anything if he would make a statement to the officer; (4) That the defendant on November 24, 1969, came into the Mayor's Court for the City of North Wilkesboro and pleaded guilty as charged. Thereupon the court concludes as a matter of law that the defendant knowingly and intelligently waived the right of counsel on that occasion and what confession he made was freely and voluntarily made on his part without compulsion or fear of compulsion of any kind and without reward or hope of reward of any kind."

Defendant's assignment of error is well taken. We cannot distinguish this from *State v. Moore, supra,* nor *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569 (1966). The findings here are strikingly similar to those in *State v. Griffin,* 10 N.C. App. 134, 177 S.E. 2d 760, and the language of Brock, Judge, in that opinion is appropriate:

"From this ruling by the trial court it is impossible to determine upon what set of facts the conclusions of voluntariness are based. The evidence was such that varied fact situations could be found, depending upon the weight and credit given the testimony by the trial judge. Therefore we cannot tell whether the trial court's conclusions are supported by the facts. The admission of defendant's confession without factual findings from which we can determine whether legal error was committed by the trial court was erroneous and entitles defendant to a new trial. (citations omitted.)"

New trial.

Judge BROCK concurs.

Judge VAUGHN dissents.

JAMES GARNER v. BEULAH B. GARNER

No. 708DC517

(Filed 30 December 1970)

Divorce and Alimony § 16— counterclaim for alimony — sufficiency of evidence

The trial court erred in the allowance of plaintiff husband's motion for a directed verdict dismissing defendant wife's counterclaim for alimony where there was substantial evidence to permit the jury to find (1) that plaintiff is a "supporting spouse" and defendant is a "dependent spouse" as defined in G.S. 50-16.1, and (2) that plaintiff has abandoned defendant and has wilfully failed to provide her with necessary subsistence according to his means and condition so as to render her condition intolerable and her life burdensome. G.S. 50-16.2.

APPEAL by defendant from *Hardy, District Judge,* April 1970 Session of WAYNE District Court.

Plaintiff husband filed complaint seeking an absolute divorce on the grounds of one year's separation. Defendant wife filed answer denying the separation, and in a further answer and counterclaim alleged that plaintiff had abandoned her and was living in adultery, that he earned a substantial income but failed and refused to furnish her with adequate support, and that she was unable to work because of illness. She prayed for alimony, alimony *pendente lite,* and counsel fees. An order was entered awarding defendant alimony *pendente lite* and counsel fees.

At the conclusion of all of the evidence, plaintiff's motion for a directed verdict dismissing defendant's counterclaim was allowed. The jury answered issues finding that plaintiff and defendant had not lived continuously separate and apart from each other for one year next preceding filing of the complaint. Judgment was entered dismissing plaintiff's action for divorce and defendant's counterclaim for alimony and vacating the order for alimony *pendente lite.* Defendant appealed.

No counsel for plaintiff appellee.

Dees, Dees, Smith & Powell by Tommy W. Jarrett for defendant appellant.

PARKER, Judge.

Appellant's sole assignment of error is directed to the allowance of plaintiff's motion for a directed verdict dismissing her counterclaim for alimony. The assignment is well taken. Review of the record reveals there was sufficient substantial evidence to permit a jury to find (1) that plaintiff is a "supporting spouse" and defendant is a "dependent spouse" as defined in G.S. 50-16.1, and (2) that plaintiff has abandoned defendant and has willfully failed to provide her with necessary subsistence according to his means and condition so as to render her condition intolerable and her life burdensome. These permissible findings would support an award of alimony. G.S. 50-16.2. The result is that the judgment dismissing plaintiff's action for divorce is affirmed; and the judgment dismissing defendant's counterclaim is

Reversed.

Chief Judge MALLARD and Judge GRAHAM concur.

JOHN IRVING SLADE BY HIS NEXT FRIEND, IRVING W. SLADE v. NEW HANOVER COUNTY BOARD OF EDUCATION

No. 705IC558

(Filed 13 January 1971)

1. **Automobiles § 132— passing stopped school bus — purpose of statute**

The statute making it unlawful for an approaching motorist to pass a stopped school bus that has its mechanical stop signal displayed is designed for the protection of life, limb and property.

2. **State § 8; Schools § 11— liability of school bus driver — injury to student crossing highway**

In a tort claim action to recover for injuries received by a six-year-old student who was hit by a truck on a busy highway shortly after getting off a school bus, the Industrial Commission correctly held that the responsibility of the school bus driver to the student was not limited to the mere discharge of the student in a place of immediate safety, where (1) the student was riding the bus only for the third time, (2) the student was forced to cross the highway in order to reach his home, and (3) the act of the bus driver in withdrawing the mechanical stop sign and moving forward prior to the student's crossing the road increased the danger to the student by releasing the stopped traffic.

3. Schools § 11; State § 8— operation of school bus — standard of care of the driver

The care which a school bus driver must exercise toward a school bus passenger is proportionate to the degree of danger inherent in the passenger's youth and inexperience.

4. Negligence § 10— insulating negligence — availabilty of defense

The defense of insulating negligence is not available where the negligence of the first party continues to be a proximate cause up to the moment of injury.

5. Negligence § 10— intervening negligence — foreseeability of negligent act

If the intervening act and resultant injury could have been reasonably foreseen, it cannot insulate prior negligence.

6. Negligence § 36; Schools § 11; State § 8— liability of school bus driver — injury to student crossing highway — insulating negligence

In an action to recover for injuries received by a six-year-old student who, shortly after getting off a school bus, was hit by a truck as he attempted to cross a busy highway, findings of negligent conduct on the part of the truck driver would not have insulated the bus driver's negligence in failing to see that the student was in a place of safety.

7. Schools § 11; State § 8; Evidence § 29— liability of school bus driver — injury to student crossing highway — admissibility of driver handbook

A publication entitled *A Handbook for School Bus Drivers of North Carolina* was properly admitted in evidence, over the objection of defendant board of education, in a tort claims action to recover for injuries to a six-year-old student who was hit by a truck shortly after getting off a school bus, where the publication was used by the board of education to instruct its drivers on the care of bus passengers.

8. Evidence § 29— admissibility of safety codes or rules

Although safety codes or rules not having the force of law are ordinarily inadmissible in evidence, they are admissible as some evidence that a reasonably prudent person would adhere to their requirements when it appears that they have been voluntarily adopted as a guide for the protection of the public.

9. State § 10— tort claim proceeding — findings of fact by Industrial Commission — appeal

Findings of fact by the Industrial Commission are conclusive if there is any competent evidence to support them. G.S. 143-293.

APPEAL by defendant from order of the North Carolina Industrial Commission, filed 19 May 1970.

This claim under the State Tort Claims Act (G.S. 143-291 *et seq.*) is for personal injuries sustained by the minor plaintiff

shortly after he alighted from a school bus in New Hanover County on 6 September 1968.

The claim was originally heard by Deputy Commissioner Leake. His decision and order, filed 4 March 1970, denied recovery. Plaintiff appealed to the Full Commission and on 19 May 1970 the Commission filed its decision and order unanimously holding that the minor plaintiff's injuries were caused by the actionable negligence of defendant's school bus driver while acting within the scope of her employment. Damages were ordered paid in the sum of $15,000, the maximum amount allowed by the Act.

Evidence before the Commission tended to show the following:

On 6 September 1968 the minor plaintiff, a six-year-old first grader in his first year of school, was a passenger on a school bus operated by Mrs. Doris S. Grady. Mrs. Grady stopped the bus on the east side of U. S. Highway 117 where it is intersected from the east by Jamaica Drive. Children who lived in the vicinity of the intersection were told to disembark. Approximately six children, including the minor plaintiff, got off the bus. Mrs. Grady kept the bus in a stationary position for an interval of time in which she observed all the children that she could see start down Jamaica Drive. She did not count the children and did not ascertain the whereabouts of the minor plaintiff. In order to get home it was necessary for the minor plaintiff to cross the highway and go north about fifty feet to Seitter Drive where his home was located. Mrs. Grady, after observing certain of the children proceeding east along Jamaica Drive, put the bus in motion and proceeded north for about 94 yards at which time she looked in her rear view mirror and saw the minor plaintiff standing on the east side of the highway. She remarked "Don't tell me he has to cross the road." Upon traveling a short distance further, Mrs. Grady observed that traffic behind her had stopped. She immediately stopped and returned to Jamaica Drive where she found the minor plaintiff lying on the highway at a point near the west side of the pavement.

Gordon Rivenbark testified that he was following the school bus and stopped behind it. He recalled that one car was between him and the bus. Rivenbark testified that as the bus moved off he saw a little boy standing on the side of the road. Rivenbark

started forward and the child started across the highway in front of him, causing him to stop. The child then returned to the east shoulder of the highway. Rivenbark again started north and immediately after his vehicle passed the point where the child was standing, the child ran across the east lane of the highway, passing behind Rivenbark's car and into the path of a pickup truck traveling in the southbound lane. The truck struck the child as he neared the westerly edge of the pavement inflicting substantial permanent injuries.

The evidence indicated that the minor plaintiff's mother carried him to school on each of the four days he had attended and went for him on the afternoon of 3 September. On the afternoon of 4 September the child boarded a wrong school bus which returned him to the school. On the afternoons of the 4th, 5th and 6th the child rode home on the school bus operated by Mrs. Grady. On the first two days the bus proceeded in a southerly direction along U. S. Highway 117 and stopped on the west side of the highway at Seitter Drive. On these occasions the minor plaintiff got off the bus and walked directly to his home on Seitter Drive. However, on the afternoon of 6 September, the direction of the bus route was changed and the bus proceeded along Highway 117 in a northerly direction and stopped on the opposite side of the road approximately 50 feet south of Seitter Drive, making it necessary for the first time that the minor plaintiff cross the road in order to reach his home.

The experience of getting on the wrong bus had upset the minor plaintiff and he refused to board the bus on the afternoon of the accident until his teacher had explained to the bus driver where he lived and where he was to get off the bus. He wore an identifying name tag. The driver recalled this conversation with the teacher. She knew that it was necessary for students who lived on Seitter Drive to cross to the west of the highway. She recalled also that no one crossed the highway in front of the bus before she withdrew the stop sign and started the bus forward.

In its decision and order the Commission made thorough findings consistent with the evidence presented and concluded that the school bus driver was negligent in that she failed to see that the minor plaintiff was in a place of safety before the school bus was put in motion. Defendant excepted to the Commission's order and appealed.

Marshall, Williams & Gorham by Lonnie B. Williams and Addison Hewlett, Jr., for plaintiff appellee.

Attorney General Morgan by Staff Attorney Sauls for defendent appellant.

GRAHAM, Judge.

In concluding that the minor plaintiff's injuries resulted from the actionable negligence of the school bus driver, the Commission applied the standard of care set forth by the Supreme Court in *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129, wherein it is stated as follows:

> "This duty to exercise a high degree of caution in order to meet the standard of care required of a motorist, *Rea v. Simowitz,* 225 N. C. 575, 35 S.E. 2d 871, when he sees or by the exercise of ordinary care should see children on a highway applies with peculiar emphasis to the operator of a school bus transporting children to their homes after school. His passengers are in his care and he knows that many of them must cross the road after they alight from the bus. It is his duty to see that those who do alight are in places of safety before he again puts his vehicle in motion."

Defendant contends that the Commission erred in applying this standard of care to the facts of this case, pointing out that in the *Greene* case, the school bus itself caused the death of plaintiff's intestate, whereas here, the injuries complained of were caused by another vehicle. In our opinion this furnishes no sound basis for distinguishing the cases. The element of negligence present in *Greene* was not the failure of the driver to exercise caution in the operation of his bus, but his failure to ascertain that his discharged passenger was in a place of safety before starting the bus forward. The following language from the opinion makes this point clear: "Negligence here does not rest on the fact the bus driver, by the exercise of ordinary care, could have seen the child in a position of peril in time to stop and avoid colliding with her. It lies in the fact that he, having discharged the children from the bus, failed to exercise proper care to ascertain that they and each of them 'had crossed the highway in safety' or were 'otherwise out of danger.' "

[1] It is a violation of the law for any motorist approaching a school bus from any direction to fail to stop while such bus

is stopped and engaged in receiving or discharging passengers, or at any time while such bus is displaying its mechanical stop signal; or to fail to remain stopped until such mechanical stop signal of the bus has been withdrawn or until such bus has moved on. G.S. 20-217. This statute is designed for the protection of life, limb and property. *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883.

When the stop signal on a school bus is released and the bus moves forward other motorists are in effect notified that they may proceed. Release of the traffic in this manner is particularly perilous under circumstances such as were present here. The minor plaintiff, a child of extremely tender years, was obviously inexperienced and likely confused and frightened by the experience he had in boarding the wrong bus only two days previously. The only two times in his entire life that he had gotten off a school bus, it had been stopped immediately in front of the street where he lived and on the side of the highway where his home was located. On the day of his injury, he was let out on the opposite side of the highway, at a point some fifty feet south of the street where he lived. Once the school bus moved on, there was nothing to signal motorists to stop or to remain stopped so that the child could cross the highway safely. He was left alone to attempt to maneuver through the traffic of a busy U. S. highway. The danger he faced was not limited to the movement of the school bus. Indeed, the flow of traffic, released by the bus's movement forward, constituted a graver danger.

[2] Defendant contends that the evidence does not support the Commission's finding and conclusion that the bus driver failed to see that the plaintiff was in a place of safety before putting the bus in motion. It is the apparent position of defendant that the bus driver's duty to the child terminated when she determined that he was safely off the bus and not in a place of immediate danger. The case of *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295, is cited in support of this position. In that case plaintiff's intestate (an adult) was ejected from a bus owned by defendant transit line for being drunk and disorderly. After the bus moved away he was struck by an automobile and killed. The Supreme Court held that the bus driver was under no duty to pilot deceased home—only to afford him a safe landing. We refuse to hold that a six-year-old child, riding a school bus for

only the third time in his life, is entitled to no more attention when discharged from the bus than an adult evicted from a common carrier under the circumstances of the *Shaw* case.

The case of *White v. Chappell,* 219 N.C. 652, 14 S.E. 2d 843 is more supportive of defendant's position. There, an eight-year-old boy, traveling with his mother on defendant's bus, alighted from the bus and was killed when he ran into the path of a car from the rear of the bus. A majority of the members of the Supreme Court held that defendant's duty to the passenger ended when he alighted at a place of safety. Three justices dissented saying that the defendant failed to perform its full duty in putting off an inexperienced child, beside the road, at an unusual place, without warning him of the known danger from an approaching automobile. In the majority opinion it was noted that "the plaintiff insists that the duty owed by defendant Bus Corporation to his intestate continued until he was safely across the highway, and for support he relies upon these cases in other jurisdictions: (citations omitted).

An examination reveals that each of these cases relates to the duty owed by the operator of a school bus in transporting children from their homes to school and from school to their homes—and are clearly distinguishable from the case in hand."

One of the cases which the court found distinguishable was *Taylor v. Patterson's Adm'r.,* 272 Ky. 415, 114 S.W. 2d 488. The facts of that case are close to those in the case before us. There, a jitney driver, under contract to transport school children, discharged a seven-year-old boy at a place where it was necessary for him to cross the street to reach his home. The driver testified that "[g]enerally, I stayed there and saw the child go across, but he got out and stopped like he was looking at something else and didn't go straight on. I backed out and drove on down the street then." The child was struck by a truck while attempting to cross the street. The court held that the driver's duty did not end when the child passenger alighted upon the sidewalk, but required that he exercise the highest degree of care for the boy's safety until he was safely across the street and out of danger from the passing traffic.

In *Hunter v. Boyd, et al,* 203 S.C. 518, 28 S.E. 2d 412, the plaintiff sought recovery for the death of his intestate, a school student killed while attempting to cross the street after alight-

ing from a school bus. The complaint alleged that the student was discharged from the bus 167 yards from his home and on the opposite side of the highway from his home. He ran from behind the bus into the path of a car traveling in the same direction of the bus. Cars were approaching in both directions and it was alleged that the bus driver did not care for and protect the child and see that he got safely across the highway, but on the contrary left him in a highly dangerous situation. The South Carolina Supreme Court held that the complaint sufficiently alleged negligence as to the bus driver. The court stated:

> "[W]hile we would lay down no hard and fast rule applicable to every case, we think it may justly be said that circumstances indicating danger might require the driver of a school bus to unload his passenger pupil or pupils on the side of the highway next to their homes; or if this be not reasonably practicable under existing conditions the bus should at least remain stopped for a sufficient length of time to allow the pupil or pupils alighting therefrom to cross the highway to the side thereof on which their homes are located.
>
> . . . [T]he moving of the school bus was a signal indicating to other cars approaching from both directions that they might proceed."

In *Gazaway v. Nicholson,* 61 Ga. App. 3, 5 S.E. 2d 391, the question involved was whether a seven-year-old boy had been discharged from a schol bus in a place of safety. The court stated:

> "The passenger in question was a boy about seven years of age, and even if it could be said that the place where he was deposited was safe for an adult, it does not necessarily follow that it was safe for a young child. . . . [I]f one leaves a young child at the same spot, and in its immaturity it wanders into the street and is run over and injured by the street car, could it then be reasonably said that the child had been put in a place of safety? These considerations impel us to the conclusion that it would be too narrow a construction to say that the safety of a place must be determined solely by whether or not one would be safe if he remained in it."

See also *Trust Co. v. Board of Education,* 251 N.C. 603, 111 S.E. 2d 844; *Davidson v. Horne,* 86 Ga. App. 220, 71 S.E. 2d

464; *Porter v. Bakersfield & Kern Elec. Ry. Co.*, 36 Cal. 2d 582, 225 P. 2d 223; *School Board v. Thomas*, 201 Va. 608, 112 S.E. 2d 877; Annot., 34 A.L.R. 3d 1210 (1970); Annot., 86 A.L.R. 2d 489, at p. 590 (1962).

[2, 3] What constitutes a place of safety depends upon the age, experience and ability of the passenger. A place of safety for an eighteen-year-old high school senior of ordinary experience and intelligence might be a place of peril for an inexperienced six-year-old first grader. The care which a school bus driver must exercise toward a school bus passenger is proportionate to the degree of danger inherent in the passenger's youth and inexperience. We hold that under the circumstances of this case the Commission correctly refused to limit the responsibility of the school bus driver to the mere discharge of the minor plaintiff in a place where he would be safe so long as he remained.

[4-6] Defendant next contends that any negligence on the part of the bus driver was insulated by negligence on the part of the driver of the pickup truck which struck the minor plaintiff. This contention is without merit. The evidence presented at the hearing would not support findings of negligent conduct on the part of the driver of the pickup truck (compare *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488). Moreover, the defense of insulating negligence is not available where the negligence of the first party continues to be a proximate cause up to the moment of injury. *Cox v. Gallamore*, 267 N.C. 537, 148 S.E. 2d 616; *Wise v. Vincent* and *Stronach v. Vincent*, 265 N.C. 647, 144 S.E. 2d 877. Also, if the intervening act and resultant injury could have been reasonably foreseen, it cannot insulate the prior negligence. *Davis v. Jessup* and *Carroll v. Jessup*, 257 N.C. 215, 125 S.E. 2d 440; *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1. Findings of negligent conduct on the part of the pickup driver would therefore not have compelled a conclusion that the bus driver's negligence in failing to see that the minor plaintiff was in a place of safety was insulated.

[7] Finally, defendant argues that the Commission erred in receiving into evidence plaintiff's Exhibit 1 entitled *A Handbook For School Bus Drivers of North Carolina.* J. Frank Jameson who was in charge of school bus transportation for defendant testified that the book was used to train school bus drivers. Also, that it was referred to from time to time if problems arose.

The Director of Driver Education and Accident Records Division of the North Carolina Department of Motor Vehicles testified that the book was published by that division and used in the training of school bus drivers. Mrs. Grady, the school bus driver in the instant case, testified that she had studied the book and tried to be thoroughly familiar with it. She recalled the provision in the book which instructed drivers to count the children as they leave the bus and again on both sides of the road.

We think the handbook was properly received in evidence. In *Trust Co. v. Board of Education, supra,* the parties stipulated before the Industrial Commission that the County Board of Education had adopted certain rules and regulations governing the operation of its school buses. In reversing an order of the Commission dismissing the action the Supreme Court stated: "The plaintiff was not permitted to introduce any evidence, not even the rules about which the parties stipulated. In our opinion, in an informal proceeding like that provided in our Tort Claims Act, the plaintiff is entitled to have its evidence heard, and the evidence, together with the informal pleadings, considered by the hearing commissioner in making his findings of fact and conclusions of law."

[8] Defendant cites the general proposition that safety codes or rules not having the force of law are not admissible in evidence. *Sloan v. Light Co.,* 248 N.C. 125, 102 S.E. 2d 822; *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333; Annot., 75 A.L.R. 2d 778 (1961). However, where it appears that defendant has voluntarily adopted the rules or safety standards as a guide for the protection of the public, they are admissible as some evidence that a reasonably prudent person would adhere to their requirements. *Wilson v. Hardware, Inc.,* 259 N.C. 660, 131 S.E. 2d 501; *Stone v. Proctor,* 259 N.C. 633, 131 S.E. 2d 297. The exhibit complained of was published for use by defendant and was relied upon by defendant in the instruction of school bus drivers. The book obviously set forth the rules and standards of conduct which defendant instructed its drivers to follow in order to protect passengers and the public. They are defendant's rules and standards. It is universally held that a defendant may not complain about the introduction in evidence of its own relevant rules of conduct. See for instance *Bilodeau v. Fitchburg & L. St. Ry. Co.,* 236 Mass. 526, 128 N.E. 872 (Rules for operation of railroad cars); *Hurley v. Conn. Co.,*

118 Conn. 276, 172 A. 86 (defendant trolley company's rules for the conduct of motormen); *Reed v. Missouri-Kansas-Texas Ry.*, 362 Mo. 1, 239 S.W. 2d 328 (Rules for loading commodities, published by the Association of American Railroads of which defendant was a member).

[9] Findings of fact by the Industrial Commission are conclusive if there is any competent evidence to support them. G.S. 143-293; *Mitchell v. Board of Education,* 1 N.C. App. 373, 161 S.E. 2d 645. We hold that the thorough and explicit findings by the Commission are supported by the evidence. The findings, in the light of the applicable principles of law, are sufficient to support the action taken.

The order of the Industrial Commission is affirmed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

MABEL DAVIS PETERSON v. LARRY DEAN TAYLOR, ALBERT LEE TAYLOR, AND ANNIE LEE TAYLOR

No. 7026SC514

(Filed 13 January 1971)

1. **Appeal and Error § 49— record fails to show what excluded testimony would have been**

The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been.

2. **Automobiles § 46; Evidence § 41— parking lot collision — opinion testimony as to reasonable speed — province of jury**

In this action for personal injuries arising out of an automobile collision in a shopping center parking lot, the trial court did not err in the exclusion of testimony by plaintiff's witness as to whether in his opinion a car could be operated in safety at 25 miles an hour in the traffic lane in which defendant was traveling in the parking lot, since it was ultimately for the jury, not the witness, to determine what speed would have been reasonable and prudent under the conditions involved in this case. G.S. 20-141(a).

3. **Appeal and Error § 51; Automobiles § 45; Damages §§ 3, 10— reference to insurance — remark by court — nonresponsive answer by plaintiff**

In this action for personal injuries wherein plaintiff was asked on recross-examination if her employer had paid her any money while

she was out of work because of her injuries, statement by the trial court that "It isn't a question of any insurance or anything like that, but if they actually paid her any wages," and response to the question by plaintiff that "I have insurance," *held* not to constitute grounds for awarding plaintiff a new trial, the trial court's reference to insurance not being prejudicial, and plaintiff not being entitled to a new trial because of prejudice, if any, resulting from her own nonresponsive answer which placed the existence of insurance into evidence.

4. Automobiles §§ 72, 90— parking lot collision — applicability of sudden emergency doctrine

In this action for personal injuries received in an automobile collision in a shopping center parking lot at the intersection of the lot's entranceway and first traffic aisle, the trial court properly charged the jury on the doctrine of sudden emergency where the evidence, viewed in the light most favorable to defendants, would support a jury finding that defendant driver was operating his automobile in the parking lot aisle at a reasonable speed, and that plaintiff, without warning, suddenly drove her automobile on the entranceway directly into the path of defendants' automobile and stopped.

APPEAL by plaintiff from *McLean, J.*, 2 February 1970 Special Civil Session of MECKLENBURG Superior Court.

This civil action arises out of an automobile collision which occurred on Saturday afternoon, 23 September 1967, on the shopping center parking lot of Winn-Dixie Supermarket and Shamrock Drug Store located on the west side of The Plaza Road, Charlotte, N. C. The Plaza Road runs north and south. There is a two-lane entranceway, which runs east and west, leading into the parking lot at a right angle from the west side of The Plaza Road. Traffic at the intersection of the entranceway and The Plaza Road is controlled by traffic signal lights. In the parking lot there are two traffic aisles, each running north and south parallel to The Plaza Road. Spaces are marked for diagonal parking on each side of each of these aisles. On the aisle closest to The Plaza Road the parking spaces on each side are designed to be entered at a diagonal by automobiles moving in the aisle from south to north. The entranceway from The Plaza Road crosses the first aisle at a right angle and then proceeds on into the second aisle. At the time of the collision the parking lot was full.

Plaintiff drove her Chevrolet automobile south on The Plaza Road, stopped at a red traffic light at the entranceway to the parking lot, and when the light changed to green made a right-hand turn into the parking lot. The collision occurred on

the parking lot in the intersection formed by the entranceway crossing the first traffic aisle. The left front side of plaintiff's Chevrolet was struck by the right front of a Ford Mustang which was being driven north in the first traffic aisle by the minor defendant, Larry Dean Taylor, and which was owned by his parents, the adult defendants, as a family-purpose car. Plaintiff alleged in her complaint that the collision and her resulting injuries were proximately caused by the negligence of the minor defendant in failing to keep his vehicle under control, in driving at a speed greater than reasonable and prudent under the circumstances in violation of G.S. 20-141, in failing to keep a proper lookout, and in failing to turn, stop, or otherwise operate his car after he saw the Chevrolet in order to avoid collision. Plaintiff asked for compensatory damages for personal injuries suffered by her as a result of the collision.

Defendants answered, denying negligence on the part of the driver of the Ford Mustang and alleging that plaintiff was negligent in driving her automobile from a public street onto a parking lot without first ascertaining she could do so in safety, in failing to keep a proper lookout, in failing to keep her automobile under proper control, and in driving her automobile directly into the path of defendant's oncoming vehicle and stopping suddenly without warning. Defendants pleaded plaintiff's contributory negligence as a defense, and the adult defendants counterclaimed for damages to the Ford Mustang.

The jury answered the first and fourth issues as follows:

"1. Was the plaintiff injured by the negligence of Larry Dean Taylor, as alleged in the complaint?

"ANSWER: No

* * * * *

"4. Was the automobile of the defendants, Albert Lee Taylor and Annie Lee Taylor, damaged by the negligence of the plaintiff, as alleged in the answer?

"ANSWER: No"

From judgment that plaintiff recover nothing of the defendants and that the adult defendants recover nothing of the plaintiff on their counterclaim, plaintiff appealed.

Henderson, Henderson & Shuford, by Charles J. Henderson and William O. Austin for plaintiff appellant.

Sanders, Walker & London, by J. Robert Rankin and James E. Walker for defendant appellees.

PARKER, Judge.

[1] Appellant's first assignment of error, based on her exceptions 1 through 8, is directed to rulings of the trial court sustaining defendants' objections to certain questions asked by plaintiff's counsel concerning the opinion of two witnesses as to maximum safe speeds and customary speeds and practices for vehicles moving on the parking lot. As to the court's rulings to which appellant's exception No. 1 and exceptions Nos. 3 through 8 were taken, the record does not disclose what the witnesses' answers would have been had they been permitted 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. *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207.

[2] Appellant's exception No. 2 is directed to the trial court's sustaining defendants' objection to a question asked by plaintiff's counsel of one of plaintiff's witnesses, who was the police officer who investigated the collision and who had been present on the parking lot at the time of the collision but who did not see it. The officer testified that Larry Dean Taylor, driver of the Mustang, had told him at the time of the accident "that he was coming down the parking lane in a northerly direction at approximately 25 miles per hour." (Larry Dean Taylor later testified and admitted having made this statement to the officer, but testified that in his opinion he was traveling between 15 and 20 miles per hour as he approached the point where the accident occurred.) Plaintiff then asked this witness whether in his opinion "you could operate your car at 25 miles an hour in safety in a northwardly direction in that lane?" Defendants' objection to this question was sustained, and the witness answered for the record in the absence of the jury that in his opinion "a reasonable speed would not be in excess of ten miles per hour." We find no prejudicial error in sustaining defendants' objection to the question. G.S. 20-141(a) provides that no person shall drive a vehicle on any parking lot, etc., "at a speed greater than

is reasonable and prudent under the conditions then existing." It was ultimately for the jury, not for the witness, to determine what speed would have been "reasonable and prudent under the conditions" which existed at the time and place of the collision involved in this case. We note that the recollection of the witness concerning the width of traffic lanes, signs, and other physical characteristics of the parking lot differed in material respects from the recollection of other witnesses. From this conflicting testimony the jury was required to determine what conditions existed at the time and place of the collision. Having made such a determination, the jurors were as capable as the witness to make the further determination as to what speed was reasonable and prudent under the circumstances. We find no prejudicial error in the exclusion of the witness' testimony.

[3] Appellant's second assignment of error relates to the reference to insurance which was made during the course of the trial. This occurred in the following manner: On direct examination plaintiff testified that for many years prior to the accident she had worked continuously for Union Carbide, that after the accident she had been out of work because of her injuries for certain periods, and that she had lost wages in a total of $1,918.97 during such times. On recross-examination of plaintiff, defendants' counsel sought to ask her "if she wasn't paid some money during that time." Objection to this question was at first sustained, after which the record shows the following occurred:

"COURT: You want to ask her if the company paid her any money?

"MR. WALKER: Yes sir.

"COURT: Ask her that.

"Q. Mrs. Peterson, during the time you were out did the company pay you some money?

"MR. HENDERSON: Objection because the question of paying could go to many things.

"COURT: It isn't a question of any insurance or anything like that, but if they actually paid her any wages.

"Q. Coming from the company, if the company paid you any money. That is what I am asking you.

"COURT: All right.

"A. I have insurance.

"Q. I am not asking you what some policy, but did the company supplement whatever you had and pay you some amount yourself?

"MR. HENDERSON: If the court please, I don't know what he is driving at.

"COURT: Members of the jury, you step out to your room a minute."

The record indicates no further reference to insurance made during the course of the trial.

From the foregoing it is apparent that the mention of insurance became involved at the trial of this case only incidentally and while defendants' counsel was cross-examining plaintiff on an entirely different subject. He was attempting to ascertain whether plaintiff had received payments from her employer during the periods of her disability. Presumably his purpose was to use any such payments in mitigation of plaintiff's damages. We need not now decide whether he would have been entitled to do so (see Annotation, 7 A.L.R. 3d 516), since no such payments by plaintiff's employer were shown. Our Supreme Court has held that a defendant in a personal injury tort action is not entitled to have any damages which plaintiff might otherwise be entitled to recover against him reduced by the fact that plaintiff may have been wholly or partly indemnified by insurance to the procurement of which defendant did not contribute. *Young v. R. R.*, 266 N.C. 458, 146 S.E. 2d 441. In undertaking to assure compliance with this rule, the trial judge in the present case inadvertently made a passing reference to the subject of insurance. In the context of this case, such reference by the trial judge did not in our opinion constitute prejudicial error. It is apparent that the trial judge was attempting to keep out of evidence any testimony concerning insurance. That insurance of any type actually existed came into evidence solely by plaintiff's own nonresponsive answer. If any prejudice to plaintiff resulted, it was because of her own act. Her counsel made no motion to strike. Under the circumstances, plaintiff should not be entitled to have the verdict and judgment set aside and to subject defendants to a new trial for error, if any existed, which

was largely of plaintiff's own making. Cases finding prejudicial error when the matter of liability insurance has been injected into a personal injury action (Stansbury, N. C. Evidence 2d, § 88) are not applicable, since it is apparent that the insurance which was briefly referred to in this case was not of that nature. We find no merit in appellant's second assignment of error.

[4] Appellant assigns as error that the court instructed the jury with respect to the doctrine of sudden emergency. In this connection appellant does not contend that the court's instruction as to the law was incorrect, but does contend that the doctrine did not arise on the evidence and therefore it was error in this case to charge on the doctrine at all. We do not agree. On the record before us it is our opinion that the doctrine did arise and that it was proper for the court to instruct the jury with respect to it. Plaintiff herself alleged, and offered evidence tending to prove, that "[t]he minor defendant failed to turn, stop or otherwise operate the said Ford automobile after he saw the Chevrolet automobile in order to avoid collision, but proceeded onward to collide with the helpless and halted car occupied by plaintiff." Plaintiff herself testified that "[t]here was room enough for Mr. Taylor to go around my car if he cut to the left as he approached me on the collision course." In turn, defendants alleged and offered evidence tending to prove that plaintiff "[d]rove her automobile directly and immediately into the path of defendant's on-coming automobile and stopped the same suddenly without warning when she knew or, in the exercise of due care, should have known that, by her actions, the collision between the two vehicles, would be inevitable." The evidence as to the speed at which the defendant driver was moving prior to the time plaintiff drove her car into the traffic lane in front of him is sharply conflicting. Viewed in the light most favorable to defendants, defendant driver was confronted with a sudden emergency which was not the result of any prior negligent conduct on his part. Viewed in the light most favorable to plaintiff, the situation was otherwise. The conflict was for the jury to resolve. The court's instruction left them free to do so. In instructing on the doctrine of sudden emergency, the trial court did properly "declare and explain the law arising on the evidence given in the case." G.S. 1A-1, Rule 51(a). Appellant's assignment of error with respect thereto is overruled.

Appellant assigns as error the overruling of her motion for a directed verdict on defendant's counterclaim. In our opinion the evidence was such as to require submission of issues on the counterclaim to the jury. In any event the jury answered the fourth issue, which related to the counterclaim, in appellant's favor.

We have carefully reviewed all of appellant's remaining assignments of error, and find no prejudicial error.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

MRS. NANCY S. GOODWIN v. FRANK W. SNEPP, JR.

No. 7026SC580

(Filed 13 January 1971)

1. **Husband and Wife § 11— construction of separation agreement**

The cardinal rule for construing a separation agreement is to ascertain the intention of the parties as expressed in the language of their agreement, taking into consideration the subject matter, the end in view, and the situation of the parties at the time the agreement was made.

2. **Husband and Wife § 11— action on separation agreement — terms of the agreement — reduction in payments — findings of fact**

In the wife's action to recover payments under a separation agreement which provided, in part, (1) that the husband was to pay the wife the sum of $500 monthly and (2) that the payments were to be modified upon a substantial reduction in the husband's income and after consideration of the circumstances of both parties, the trial judge committed error in reducing the amount of monthly payments proportionately with the reduction in the husband's income without first making findings of fact with respect to the existing circumstances of both parties; the trial judge also committed error in ordering automatic revisions in future payments upon changes in the husband's income, since such revisions will necessarily preclude the consideration of the parties' circumstances at the time of the revisions.

3. **Husband and Wife § 11— action on separation agreement — husband's unilateral action in reducing payments — findings of fact**

In the wife's action to recover payments under a separation agreement which provided that (1) the husband's payments to the wife were to be modified upon a substantial reduction in the husband's

income and after consideration of the circumstances of both parties and (2) if a modification could not be reached by negotiation the matter was to be submitted to a superior court judge for determination, the trial judge committed error in failing to consider and make a ruling on the husband's unilateral action in reducing the monthly payments from $500 to $250.

APPEAL by plaintiff from *Bryson, J.*, 1 June 1970 Schedule "B" Session of MECKLENBURG Superior Court.

On 9 September 1965 plaintiff and defendant, who were then married to each other, entered into a separation agreement which, among other provisions, contained the following:

"6. ALIMONY. (a) Husband agrees to pay to wife, as alimony the sum of $500.00 per month, payable on the first of each month.

* * * * *

"(c) Said payments shall continue until Wife dies or remarries, or Husband dies, and shall continue notwithstanding any decree of divorce.

"(d) Wife agrees that if Husband becomes disabled from practicing his profession, or if his income is substantially reduced below its present level, the amount of alimony payable hereunder may be renegotiated in light of the then existing circumstances of the parties, and that in the event an agreement cannot be reached the matter shall be submitted to the Superior Court of Mecklenburg County, North Carolina, for determination by a judge thereof.

"(e) Except as is set out in this agreement, Husband shall have no obligation to support Wife."

On 16 March 1966 the parties were granted an absolute divorce. The present action was commenced on 13 November 1969 when plaintiff (the former wife) filed complaint in which in substance she alleged: Defendant had paid her $500.00 each month through May 1968. Since that time he has paid her $250.00 each month, despite her insistence on her right to receive monthly payments of $500.00. She is unable to support herself. Since May 1968 she has attempted in good faith to renegotiate the amount due her in the light of the existing circumstances of the parties, but could not reach an agreement with defendant. She asked the court to order defendant to pay her $500.00 month-

ly hereafter; to pay her $250.00, with interest, on account of each month from June 1968 until the date of judgment; and to grant a reasonable fee to her attorney.

Defendant answered, admitting execution of the separation agreement and that since May 1968 he had paid plaintiff $250.00 each month. In a further answer he alleged that when the agreement was entered into he was a partner in a law firm and the alimony payments were set in accordance with the income he was then receiving; that in January 1967 he began to practice as a sole practitioner and his income began to decrease; and that in July 1967 he became a judge of superior court and his income is substantially less than the income he received at the time the separation agreement was entered into. Paragraphs 5 and 6 of defendant's further answer are as follows:

> "5. Because of the defendant's substantially reduced earnings and because of the plaintiff's unwillingness to enter into negotiations to reduce the alimony payments, the defendant has unilaterally reduced the payments in accordance with the provisions of Paragraph 6, Subsection (d), of the separation agreement.
>
> "6. The defendant alleges and contends that his present earnings are approximately one-half of what they were at the time the separation agreement was executed."

Defendant prayed that plaintiff recover nothing and that her action be dismissed.

The matter was heard by Judge Bryson in Chambers. Plaintiff testified concerning her health, income, and living expenses. Insofar as pertinent to this appeal, her evidence in substance tended to show: Since the separation she has worked as a medical illustrator and has done some free-lance art work. She has also held jobs in stores over the Christmas holidays and has done some baby-sitting. She makes very little from her own labors, has no capital assets, and has had to sell some of her family furniture. She developed a slipped disc in her neck, which causes pain in her right hand, and cannot work for very long periods at a time. Her monthly budget comes to approximately $298.00, which does not include anything for doctors or emergencies or hospitalization. She couldn't get a regular job because of her arm and hand and has had to borrow money.

Defendant testified, his evidence in substance tending to show: At the time of the separation agreement in 1965 his annual income was approximately $54,000.00, and was approximately $56,000.00 in 1966. It dropped to approximately $28,500.00 in 1967 and rose to $43,000.00 in 1968. He was appointed a superior court judge in July of 1967 and was a judge for the full year of 1968. The increase in income in 1968 was due to receipt by him in that year of legal fees earned by him prior to becoming a judge. In 1969 he earned a total, including travel allowance, of approximately $25,000.00, adjusted to approximately $20,500.00 after deduction of business expenses.

At the conclusion of the hearing, Judge Bryson entered an order as follows:

> "THIS CAUSE coming on to be and being heard before the undersigned Superior Court Judge; the plaintiff being present and represented by counsel and the defendant likewise being present and represented by counsel.
>
> "The Court after hearing evidence presented by both parties, the record as filed and statements of counsel, finds the following facts:
>
> "That plaintiff and defendant were formerly husband and wife and divorced March 26, 1966; that on the 9th day of September, 1965 they, plaintiff and defendant, entered into a separation agreement which provided, among other things:
>
> " '6.(d) Wife agrees that if Husband becomes disabled from practicing his profession, or if his income is substantially reduced below its present level, the amount of alimony payable hereunder may be renegotiated in light of the then existing circumstances of the parties, and that in the event an agreement cannot be reached the matter shall be submitted to the Superior Court of Mecklenburg County, North Carolina, for determination by a judge thereof.'
>
> "This the Court construes as a contract.
>
> "The Court finds as a fact that the defendant's income has reduced by at least fifty (50%) percent and that Defendant pays plaintiff the sum of One Hundred ($100.00)

Dollars cash four weeks for the support of the two minor children of plaintiff and defendant while they are in the custody of Plaintiff.

"These findings are the pertinent ones to be considered and upon such findings it is ordered that the defendant pay the plaintiff the sum of Two Hundred and Fifty ($250.00) Dollars per month, said payment to be made upon the first day of each month and increased or decreased proportionately as salary or other income from the defendant's present salary and/or income may increase or decrease. It is likewise ordered that the defendant pay plaintiff the sum of Twenty-five ($25.00) Dollars per week during such time as the minor children of plaintiff and defendant are in the custody of plaintiff.

"It is further ordered that the defendant pay the costs of this action.

"This Order only construes the agreement as herein set out and modifies Paragraph Six (6) as stated.

"The request for attorney's fees on the part of plaintiff is denied.

"This the 9th day of June, 1970.

"s/ T. D. BRYSON, JR.
"Judge Presiding"

To the entry of this order plaintiff excepted and appealed.

George S. Daly, Jr., for plaintiff appellant.

Sanders, Walker & London, by Arnold M. Stone and James E. Walker for defendant appellee.

PARKER, Judge.

[1, 2] The cardinal rule for construing a separation agreement, as for construing contracts generally, is to ascertain the intention of the parties as expressed in the language of their agreement, taking into consideration the subject matter, the end in view, and the situation of the parties at the time the agreement was made. *Bowles v. Bowles*, 237 N.C. 462, 75 S.E. 2d 413; 24 Am. Jur. 2d, Divorce and Separation, § 904, p. 1026. In the present case the agreement expressly provided that the husband pay the wife, as

"alimony," the sum of $500.00 on the first of each month. Such payments are to continue until the wife dies or remarries or until the husband dies, none of which events has occurred, and are to continue notwithstanding any decree of divorce. The only language in the agreement relating to any change in the amount of the monthly payments is contained in paragraph 6(d), which is as follows:

> "(d) Wife agrees that if Husband becomes disabled from practicing his profession, or if his income is substantially reduced below its present level, the amount of alimony payable hereunder may be renegotiated in light of the then existing circumstances of the parties, and that in the event an agreement cannot be reached the matter shall be submitted to the Superior Court of Mecklenburg County, North Carolina, for determination by a judge thereof."

This language contemplates a modification in the amount of the monthly payments if the husband's income is substantially reduced, but then only after consideration of the circumstances of *both* of the parties. In such event, if agreement cannot be reached by renegotiation, the matter is to be submitted to a judge of Superior Court of Meckenburg County for determination.

From an examination of the order appealed from, it would appear that the trial judge reduced the amount of the monthly payments proportionately with the reduction he found in defendant's income and in so doing failed to make findings with respect to the existing circumstances of both parties. This was one of the facts at issue. The trial court also committed error in making the provision in the order calling for future revisions proportionate to changes in the salary or other income of the defendant, since necessarily such automatic revisions will fail to take into account the circumstances of both parties at the time the revisions occur.

[3] The trial judge also failed to consider and make a ruling on the effect of the unilateral reduction in payments from $500.00 per month to $250.00 per month by the defendant. This unilateral reduction began 1 June 1968 and continued up to the time of the hearing. The separation agreement provided the machinery for modification of the amount payable. While it appears that the defendant attempted to negotiate the amount

under the terms of the agreement, once it became obvious that the attempt at negotiation would be unsuccessful the defendant took it upon himself to modify the agreement rather than submit it to a judge of the Mecklenburg Superior Court as the agreement provides. Nothing in the separation agreement gives either party the right to make changes by unilateral action without the consent of the other. The trial judge must consider and decide this claim of the plaintiff for the balance of the amount due under the agreement from 1 June 1968 until the time of the hearing.

For the reasons stated, the order appealed from is reversed and this case is remanded for reconsideration in the light of this opinion.

Reversed and remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

C. O. GORE, TRADING AS GORE GREENHOUSES v. GEORGE J. BALL, INC.

No. 7013SC369

(Filed 13 January 1971)

1. **Agriculture §§ 9.5, 10— sale of mislabeled tomato seeds — alleged violations of seed law — negligence — exemption from statute**

In this action to recover lost profits allegedly sustained by reason of defendant's having supplied plaintiff with a grade of tomato seeds inferior to the grade ordered by plaintiff, it was unnecessary for the appellate court to decide whether alleged violations of the North Carolina Seed Law, G.S. Ch. 106, Art. 31, constituted negligence *per se*, where plaintiff's evidence discloses that defendant is within the exemption provided by G.S. 106-277.10(e).

2. **Agriculture § 9.5; Negligence § 6— sale of mislabeled tomato seeds — res ipsa loquitur**

Doctrine of *res ipsa loquitur* was inapplicable in an action to recover lost profits allegedly sustained by reason of defendant's having supplied plaintiff with a grade of tomato seeds inferior to the grade ordered by plaintiff, where the seeds were under the control of defendant's supplier part of the time, and it was not shown that mislabeling had not already occurred when defendant received the seeds.

3. **Agriculture § 9.5— delivery of mislabeled, inferior grade tomato seeds — failure of seller to notify buyer — negligence**

Failure of defendant seed company to notify plaintiff, after receiving complaints from other customers, that tomato seeds delivered to plaintiff were mislabeled and an inferior grade to that ordered by plaintiff did not constitute negligence where the evidence discloses that defendant keeps no records of the particular source of seed used to fill a given order, there being no duty to maintain such records and defendant being unable to notify plaintiff in the absence of such data.

4. **Agriculture § 9.5; Negligence § 5; Sales § 22— sale of mislabeled tomato seeds — strict liability**

The doctrine of strict liability in tort, irrespective of negligence, does not apply to the sale of mislabeled tomato seeds.

5. **Uniform Commercial Code § 3— nonapplicability to January 1966 sale**

Uniform Commercial Code has no bearing upon action based upon sale of tomato seeds which occurred in January 1966.

6. **Agriculture § 9.5; Contracts § 27— delivery of inferior grade tomato seeds — breach of contract — sufficiency of evidence**

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's breach of contract in supplying plaintiff with a grade of tomato seeds inferior to the grade ordered by plaintiff.

7. **Contracts § 29— breach of contract — nominal damages**

If a breach of contract is established, the plaintiff would be entitled to nominal damages at least.

APPEAL by plaintiff from *Tillery, Judge of the Superior Court,* 5 January 1970 Session, COLUMBUS Superior Court.

Plaintiff instituted this civil action on 3 January 1968 to recover damages, consisting mainly of lost profits, allegedly sustained by reason of the defendant's having supplied plaintiff with a grade of tomato seeds inferior to the grade which plaintiff ordered. Plaintiff's claim for relief was grounded on theories of negligence, strict liability, and "complete failure of consideration and a breach of the contractual relationship between the parties." There followed a series of motions by defendant to dismiss for lack of personal jurisdiction, which were denied, and with which we are not concerned on this appeal by plaintiff. Defendant then filed an answer in which it admitted that on or about 1 January 1966 plaintiff mailed his order for seeds of a table variety known as "Heinz #1350," as described in defendant's catalogue, with his payment, and that the order was filled on 4 January 1966, as alleged in the complaint. All other material allegations were denied. In addition, the defendant asserted a

"Limitation of Warranty" which it alleged was printed in its catalogue, on the invoice, and on the seed packets, and which reads as follows:

" 'LIMITATION OF WARRANTY

'Geo. J. Ball, Inc. warrants to the extent of the purchase price, that seeds, plants, bulbs, Growers' supplies and other materials and equipment sold are as described on the container within recognized tolerances. We give no other or further warranty, express or implied.' "

Plaintiff's evidence tended to show: Plaintiff's order was placed and filled, as alleged in the complaint and admitted in the answer; plaintiff planted the seeds in his greenhouses early in the year 1967; in April, 1967, plaintiff transplanted two acres of the plants to his field (hereinafter called the "first crop"); in May, 1967, plaintiff transplanted an additional two acres (hereinafter called the "second crop"); when young tomatoes appeared on the vines, plaintiff became concerned at their unusual shape; plaintiff contacted agents of defendant and requested them to inspect his crop, which they declined to do; the tomatoes on plaintiff's vines were identified, by a member of the faculty of the Department of Horticulture, North Carolina State University, as a "paste-type" tomato, which is suitable only for the manufacture of catsup and like products, and not for table use; plaintiff allowed the first crop to mature and sold part of them; plaintiff destroyed the second crop and replaced them with plants obtained from a local nursery; plaintiff's intention in 1967 was to raise six acres of tomatoes from the seed purchased from defendant, and he had prepared six acres of land; various varieties of tomato seeds are indistinguishable by physical inspection; defendant obtained the seed from Ferry Morse Seed Company, a west coast producer, in a five-pound lot; defendant received an invoice from Ferry Morse Seed Company showing the origin, kind and variety of the lot of seed as "Heinz 1350"; in August, 1966, defendant received several complaints from other customers that the seed in the lot were not "Heinz 1350"; upon receiving the complaints, defendant grew a "greenhouse test" and thereby verified that the tomatoes produced from the lot of seed in question were of the paste type; defendant keeps no record as to which lot of seed each particular customer's order is taken from; defendant's label was based upon the tag which Ferry Morse Company attached to the lot of seed and

which identified them as "Heinz 1350"; defendant's packaging and labeling procedure involves "five checks between the label that Ferry Morse has on the bag and the label that we put on the packet as it goes to the customer."

At the close of plaintiff's evidence, the trial court granted defendant's motion for a directed verdict, on the ground that the plaintiff had failed to offer evidence of negligence, or of total failure of consideration.

Powell, Lee & Lee, by J. B. Lee for plaintiff-appellant.

Marshall, Williams & Gorham, by Lonnie B. Williams for defendant-appellee.

BROCK, Judge.

Plaintiff's exception No. 21 is to the granting of defendant's motion for a directed verdict.

Plaintiff's evidence does not disclose any negligence on the part of defendant in its handling, packaging, or labeling of the seed.

[1] Plaintiff contends that defendant has, in certain respects, violated G.S. Chap. 106, Article 31, entitled "North Carolina Seed Law," and that said violations constitute negligence *per se.* Our cases which hold that the violation of a statute constitutes negligence *per se* deal with statutes designed for the protection of the health or safety of persons or property. See Byrd, *Proof of Negligence in North Carolina,* 48 N.C.L. Rev. 731 (1970). While certain provisions of Article 31 are concerned with the treatment of seed with poisonous chemicals, plaintiff does not seek a remedy for a violation of those provisions. In any event, it is not necessary for us to decide whether a violation of the statute, in the respects alleged by plaintiff, constitutes negligence *per se,* because plaintiff's evidence discloses that defendant is within the exemption provided by G.S. 106-277.10(e).

[2] Plaintiff contends that the doctrine of *res ipsa loquitur* required submission of the case to the jury. For the doctrine of *res ipsa loquitur* to apply, three elements must coalesce: (1) there must be an injury; (2) the occurrence causing the injury must be one which ordinarily does not happen without negligence on the part of someone; and (3) the instrumentality which

caused the injury must have been under the exclusive control and management of the defendant. *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540. Plaintiff's proof fails in respect to the third element. The seed was under the control of Ferry Morse Seed Company part of the time, and it is not shown that the mislabeling had not already occurred when defendant received the lot of seed.

[3] Plaintiff contends that defendant's failure to notify him, after receiving complaints from other quarters that the seeds were mislabeled, constitutes negligence. The evidence discloses that defendant keeps no records of the particular source of the seed used to fill a given order. We cannot say that there is a duty to maintain such records, at least as to such a harmless product as tomato seed. Defendant could not be expected, in the absence of such data, to notify plaintiff some seven months after the sale.

[4] Plaintiff contends that liability should be imposed upon defendant under a theory of strict liability in tort, irrespective of negligence. We find no basis in the law of this jurisdiction for predicating liability on such a theory, on the facts of this case. We think the language of the court in *Wilson v. Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501, is appropriate: "A producer is not an insurer. His obligation to those who use his product is tested by the law of negligence. He must operate with that degree of care which a reasonably prudent person would use in similar circumstances."

We hold that the trial judge was correct in directing a verdict for the defendant in each of the plaintiff's causes of action grounded in tort.

[5] Plaintiff contends that if he is not entitled to have the case submitted to the jury upon the questions of tort liability, nevertheless his evidence was sufficient to require submission of the case to the jury upon the theory of breach of contract. The transaction occurred in January 1966; therefore the Uniform Commercial Code has no bearing upon this case. G.S. 25-10-101.

[6, 7] In our opinion the plaintiff's evidence, when taken in the light most favorable to him, would justify the jury in finding a breach of contract. If a breach of contract is established

the plaintiff would be entitled to nominal damages at least. 2 Strong N. C. Index 2d, Contracts, § 29, p. 339.

Insofar as the judgment entered directs a verdict in favor of the defendant upon plaintiff's cause of action for breach of contract the same is reversed and this cause is remanded to the Superior Court of Columbus County for trial upon plaintiff's allegations of breach of contract.

Error and remanded.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DONALD HOWARD LEDFORD

No. 7024SC570

(Filed 13 January 1971)

1. **Automobiles § 113— homicide arising out of automobile accident — motion for nonsuit — question presented**

In a homicide prosecution arising out of a collision between a pedestrian and an automobile operated by defendant, the question presented by defendant's motion for nonsuit is whether all the evidence, when considered in the light most favorable to the State, gives rise to an inference of culpable negligence by defendant in the operation of his automobile which proximately caused the collision.

2. **Automobiles § 113— homicide arising out of automobile collision — sufficiency of evidence**

In a prosecution for involuntary manslaughter arising out of a collision between an 81-year-old pedestrian and an automobile operated by the defendant, the State's evidence that the defendant was driving his automobile at a speed of 40 to 50 mph at a distance of three-fourths to three-tenths of a mile from the scene of the collision, that the collision took place on a narrow, winding and unpaved mountain road, and that the defendant's automobile ran or skidded off the road prior to hitting the pedestrian, *held* insufficient to withstand defendant's motion for nonsuit.

APPEAL by defendant from *McLean, J.*, 25 March 1970, MADISON Superior Court.

This is a criminal action wherein the defendant Donald Howard Ledford was charged in a bill of indictment, proper in form, with involuntary manslaughter arising out of a collision

between an automobile operated by the defendant and a pedestrian.

The evidence tends to show that on 12 May 1969, Wade Shook, eighty-one years old, lived in Madison County on the left side of Smith Creek Road as one travels from U. S. Highway 23 toward Bald Mountain. Smith Creek Road is a narrow, winding, mountain road covered with gravel. The Shook home is set back approximately sixteen feet from the road. A grainery or crib was located across the road from the house. A path ran along the side of the road to a barn on the same side of the road as the house.

At approximately 7:00 p.m. on 12 May 1969, Wade Shook went out the front door of his house, and shortly thereafter his wife heard a noise. Looking from the front porch, Mrs. Shook saw the body of her husband lying in the middle of the road. The defendant's automobile was located eighteen feet farther along the road toward Bald Mountain.

Witnesses for the State testified that they saw the defendant operating his automobile along Smith Creek Road three-fourths to three-tenths of a mile from the Shook residence at 40 to 50 miles per hour. A highway patrolman testified that the speed limit was 55 miles per hour.

With the exception of the evidence offered by the defendant, there was no testimony as to how the accident happened or as to the manner in which the defendant was operating his automobile nearer than three-tenths of a mile from the Shook residence.

The defendant testified that as he drove his automobile along Smith Creek Road toward the Wade Shook home he came around a curve while driving 30 to 35 miles per hour and saw the deceased crossing the road from a crib on the right toward the barn on the left. The defendant applied the brakes and his automobile skidded off the left side of the road into the ditch and traveled along the ditch toward the point where Mr. Shook was crossing the road. The defendant turned the automobile to his right across the road in an effort to pass behind Mr. Shook who then turned and stepped back in front of the automobile. The defendant stated that if Mr. Shook had not stepped back the automobile would never have struck him.

Wade Shook died as a result of injuries sustained by being struck by the defendant's automobile.

The defendant's motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence was denied. The jury found the defendant guilty as charged. From a judgment of imprisonment of five to seven years, suspended on specific conditions, the defendant appealed to the North Carolina Court of Appeals.

Robert Morgan, Attorney General, and Walter E. Ricks III, Staff Attorney, for the State.

Mashburn and Huff, by Joseph B. Huff, for defendant appellant.

HEDRICK, Judge.

The defendant's assignment of error number 10, based on exception number 26, presents for review the question of the sufficiency of all the evidence to go to the jury on the charge of involuntary manslaughter.

The principles of law upon which criminal responsibility is determined in automobile accident cases were aptly stated by Stacy, C.J., in *State v. Cope,* 204 N.C. 28, 167 S.E. 456 (1933):

"4. Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. (Citations omitted)

"5. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. (Citations omitted)

* * *

"6. An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. (Citations omitted)

"7. 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 previson, is not such negligence as imports criminal responsibility. (Citations omitted)."

[1] The question thus presented is whether all the evidence, when considered in the light most favorable to the State, gives rise to an inference of culpable negligence upon the part of the defendant in the operation of his automobile which proximately caused the accident resulting in the death of Wade Shook. We think not.

In *State v. Massey,* 271 N.C. 555, 157 S.E. 2d 150 (1967), it is stated:

"The mere fact that a pedestrian (child or adult) is killed when run over by an automobile in a public street does not make out a *prima facie* case of civil negligence. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661. A *fortiori,* it does not give rise to an inference of culpable negligence. *State v. Reddish,* 269 N.C. 246, 152 S.E. 2d 89."

[2] The mere fact that the defendant's automobile ran off or skidded off the road without other evidence of dangerous operation does not necessarily raise an inference of negligence upon the part of the driver. *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251 (1949). There is no evidence in this record of dangerous speed or perilous operation causing the defendant's vehicle to run off the road.

Unaccompanied by evidence of dangerous or perilous operation at the time and place of the accident, evidence that the defendant was driving his automobile 40 to 50 miles per hour three-fourths to three-tenths of a mile from the scene has no force to prove the culpable negligence of the defendant at the time and place of the accident resulting in the death of Wade Shook.

The evidence, while revealing a tragic occurrence on a narrow, mountain road, does not sustain a charge of culpable negligence. At most it would indicate civil negligence in driving at a speed greater than is reasonable and prudent under the conditions then existing. The defendant obviously endeavored to avoid the deceased who was in the road. The motion for judgment as of nonsuit should have been sustained.

Reversed.

Judges CAMPBELL and BRITT concur.

J. G. READING AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM L. BALTHIS, DECEASED v. BEN F. DIXON III, MARY ANNE DIXON HOGUE AND WRIGHT T. DIXON, JR., CHILDREN OF THE LATE WRIGHT TRACY DIXON, SR.; EVELYN B. CORDES, ELIZABETH R. HIGGINS, MARION B. CODY, ANNE BALTHIS LYON, LEWIS H. BALTHIS, JR., FRANCES M. BALTHIS, MARGRET B. WILLIAMS, WILLIAM L. BALTHIS III, MARY B. FRIDAY, CHILDREN OF THE LATE LEWIS H. BALTHIS, AND GEORGE R. POSTON, LUCILE R. DAWSON, PLATO DURHAM, JOSEPH G. READING AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, TRUSTEES OF THE PEARL DIXON BALTHIS FOUNDATION.

No. 7027SC565

(Filed 13 January 1971)

Wills § 67— ademption — theft of testator's silverware — legatee's right to insurance proceeds

The theft of testator's silverware prior to his death was not an ademption of the bequest of the silverware to legatees named in the will, and the legatees were entitled to the insurance proceeds that were paid to testator's estate for the theft of the silverware.

APPEAL by defendants George R. Poston, *et al.*, Trustees of the Pearl Dixon Balthis Foundation, from *Ervin, J.*, 23 June 1970 Civil Session of GASTON Superior Court.

This is a civil action brought by the executors of the estate of William L. Balthis under the North Carolina Declaratory Judgment Act, G.S. 1-253 *et seq.*, for instructions in the administration of the said estate.

From the pleadings and stipulations of the parties, the court made findings of fact which are summarized as follows: (1) William L. Balthis died on 12 September 1968 leaving a last will and testament which was duly probated in Gaston County, North Carolina; (2) that under the provisions of Subsection 7, Item IV, of the Will, the flat and hollow silverware engraved either with the letter "D" or with the letters "PDB" was bequeathed to the living children of Wright Tracy Dixon, Sr., who, at the time of death of William L. Balthis, were Ben F. Dixon III, Mary Anne Dixon Hogue, and Wright Tracy Dixon, Jr.; (3) that under the provisions of Subsection 8, Item IV, of the Will, all the rest and remainder of the decedent's silverware was bequeathed to the living children of Lewis H. Balthis who, at the death of William L. Balthis, were Evelyn B. Cordes, Eliza-

beth B. Higgins, Marion B. Cody, Anne Balthis Lyon, Lewis H. Balthis, Jr., Frances M. Balthis, Margret B. Williams, William L. Balthis III, and Mary B. Friday; (4) that on 8 August 1968, while William L. Balthis was visiting at or near Lake Kanuga, North Carolina, most of the silverware was stolen from his residence in Gastonia, North Carolina, and has never been recovered; (5) on 27 August 1968, a claim was filed for insurance benefits for the theft of the silverware; (6) that on or about 5 September 1968, William L. Balthis, then 89 years of age, fell in his home as a result of a cerebral vascular accident and suffered a broken hip, and as a result he was hospitalized and incapacitated, both mentally and physically, until his death to such a degree that he was unable to transact business, to execute another will or to effect a codicil to his existing will; (7) on 20 June 1969, $7,250.00 was paid to the plantiffs by the insurance company for the loss of the silverware which amount was deposited on interest pending a determination of the questions involved in this case; (8) that the will contained a residuary clause whereby all of the rest, residue, and remainder of his property was devised and bequeathed to the Trustees of the Pearl Dixon Balthis Foundation.

On 23 June 1970, based on its findings of fact, the court made conclusions of law and entered judgment, in pertinent part, as follows:

> "1. The children of Wright Tracy Dixon, Sr., deceased, and the children of Lewis H. Balthis, deceased, who were living at the time of the death of William L. Balthis are declared to be entitled to the sum of $7,250.00 in lieu of the stolen silverware, and the Executors are instructed to pay over to them such sum of money, together with any interest earned thereon prior to distribution.
>
> "2. The specific bequests to the children of Wright Tracy Dixon, Sr., and to the children of Lewis H. Balthis described in Item IV of the Will of William L. Balthis were not adeemed when such silverware was stolen and as a consequence the sum of $7,250.00 does not become a part of the residuary estate."

The defendants George R. Poston, *et al.*, Trustees of the Pearl Dixon Balthis Foundation, excepted to the court's conclusions of law and entry of judgment, and appealed to the North Carolina Court of Appeals.

Garland, Alala, Bradley & Gray, by James B. Garland for plaintiff appellees.

Hollowell, Stott & Hollowell, by Grady B. Stott, for Mary Anne Dixon Hogue, et al., defendant appellees.

Whitener & Mitchem, by Basil L. Whitener and Anne M. Lamm, for Evelyn B. Cordes, et al., defendant appellees.

Joseph B. Roberts III, for defendant appellants.

HEDRICK, Judge.

The exceptions present the question of whether the facts found or admitted support the conclusions of law and the judgment entered. Appellants contend that the specific bequests in Item IV of the Will were adeemed by the theft of the silverware on 8 August 1968, and that the insurance benefits should pass to them by virtue of the residuary clause in the will.

The principle of ademption in North Carolina has been defined as ". . . the destruction, revocation or cancellation of a legacy in accordance with the intention of the testator and results either from express revocation or is implied from acts done by the testator in his lifetime, evincing an intention to revoke or cancel the legacy." *King v. Sellers,* 194 N.C. 533, 140 S.E. 91 (1927).

Applying the facts of the instant case to this definition of ademption, it is obvious that the theft of the silverware was not an act of the testator evincing an intention to revoke or cancel the bequest.

In *Rue v. Connell,* 148 N.C. 302, 62 S.E. 306 (1908), Brown, J., stated, "If the change on the form of the property is brought about by the act of another, it will not effect an ademption of the legacy if the property in its new form is in the possession of the testator at his death."

The theft of the silverware was the "act of another," and effected a change in the form of the property. Following the theft, the property, in its changed form, was embodied in a claim for insurance benefits which was in the possession of the testator prior to his having the stroke which resulted in his death.

It is our opinion, and we so hold, that the facts found support the conclusions of law, and the judgment entered thereon is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1971

SEABOARD INDUSTRIES, INC. v. JERRY BLAIR

No. 7118SC17

(Filed 3 February 1971)

1. **Appeal and Error § 6— appeal from interlocutory injunction — covenant not to compete**

Appeal by defendant from an interlocutory injunction restraining him from violating provisions of a covenant not to compete in an employment contract is not premature, since a substantial right of defendant would be adversely affected by continuance of the injunction in effect pending final determination of the case. G.S. 1-277.

2. **Contracts § 12; Courts § 21— contract entered in another state— construction and validity — what law governs**

Law of Georgia applies in construing and determining validity of covenant not to compete contained in an employment contract which was executed in Georgia and which provides that the rights and liabilities of the parties shall be construed under the laws of that state.

3. **Contracts § 7; Master and Servant § 11— covenant not to compete — prerequisites to validity**

A covenant in a contract of employment providing that, upon termination of the employment, the employee will not engage in competition with the employer will be held valid if it is (1) founded on a valuable consideration, (2) reasonably necessary to protect the legitimate interest of the employer, and (3) reasonable as to time and territory.

4. **Contracts § 7; Master and Servant § 11— covenant not to compete — employment contract — consideration**

Covenants by an employee not to compete with his employer were supported by valuable consideration where they were part of the origi-

nal contract of employment between the parties, and the fact the written contract may not have been formally executed until several weeks after the employee started work is of no significance.

5. Contracts § 7; Master and Servant § 11— covenant not to compete — reasonable necessity to protect employer's interest

Defendant's covenant not to compete with plaintiff corporation for a period of five years after termination of his employment by doing business with any customer, broker, supplier or sales representative of plaintiff in 13 specified states, agreed to by defendant in a contract employing him for five years as manager of one of two petroleum refining and reprocessing companies purchased in the formation of plaintiff corporation, *held* reasonably necessary to protect plaintiff's interest, where defendant had managed such company since its organization in 1964 until purchased by plaintiff in 1968, defendant was familiar with the company's customers, suppliers and brokers and had secured many of the company's customers through his own efforts, and it is obvious that the company would have been worth less than the substantial amount invested by plaintiff if its experienced manager had been free to terminate his contract and compete with the acquiring corporation.

6. Contracts § 7; Master and Servant § 11— covenant not to compete — reasonableness as to time and territory

Covenant by the manager of a division of a petroleum refining and reprocessing company not to compete with his employer for a period of five years after termination of his employment by doing business with any customer, broker, supplier or sales representative of the employer in any of 13 specified states in which the employer did business, *held* reasonable as to time and territory.

7. Contracts § 7; Master and Servant § 11— covenants not to compete — vagueness and ambiguity

Three covenants not to compete contained in the employment contract of the manager of a division of a petroleum refining and reprocessing company, which covenants relate to competition during the manager's employment and competition for a period of five years after termination of his employment if he breaches his employment agreement or refuses to renew it or his employment terminates by reason of his disability, *held* not void for vagueness and ambiguity.

8. Contracts § 7; Master and Servant § 11— covenants not to compete — severability

Where severable, a reasonable covenant not to compete may be enforced even though another separate covenant may be unreasonable and therefore unenforceable.

9. Contracts § 7; Master and Servant § 11— covenant not to compete — activities prohibited

Covenant by employee not to compete with his employer within 13 specified states by doing business therein with any of employer's customers, brokers, suppliers or sales representatives "with respect to the same type of business as that business conducted by" employer would not prohibit defendant from activities such as purchasing a

tank of gas, a quart of oil or a railway ticket from companies which are customers of employer.

APPEAL by defendant from *Johnston, Superior Court Judge,* 18 May 1970 Civil Session of GUILFORD County Superior Court.

This appeal is from an order continuing in effect an order restraining defendant from violating the provisions of a covenant not to compete in an employment contract, pending trial of the cause on its merits.

On 5 May 1970 Judge Collier entered an original order, restraining and enjoining defendant from certain acts and ordering him to appear on 14 May 1970 and show cause why the order should not be continued pending final determination of the action in a trial on its merits. The matter was thereafter continued and the case came on for hearing before Judge Johnston on 18 May 1970. Judge Johnston heard and reviewed extensive evidence offered by both parties and in an order, dated 19 May 1970, found facts which we set forth in substance, except where quoted:

1. Plaintiff, a Georgia corporation, is authorized to do business in North Carolina and has a place of business in Greensboro, known as South Oil Division, Seaboard Industries, Inc.

2. Plaintiff was incorporated 1 April 1968 for the purpose of purchasing the assets of Seaboard Oil Company, a Georgia corporation, and its wholly owned North Carolina subsidiary, South Oil Company. Both companies were engaged in the business of distributing, refining, reprocessing and selling petroleum and petroleum products in an area comprising thirteen enumerated eastern and southeastern states.

3. Defendant was manager of South Oil Company at the time of its purchase by plaintiff. In this capacity he had direct connection with the company's suppliers and customers.

4. With the exception of Jack Blase, President of plaintiff, the owners and subscribers of plaintiff's stock were unfamiliar with the type business engaged in by the companies and were interested in the purchase primarily for investment purposes. The plan of acquisition was for the Greensboro operation to thereafter operate as South Oil Division, a division of

plaintiff. Defendant was to be employed as manager for five years and it was contemplated that he would succeed Jack Blase as president when he retired.

5. Because of the inexperience of the incorporators and stock subscribers, except for Jack Blase, with the oil business, and because of their investment of over $1,600,000 in purchasing the two businesses, it was their wish to assure the continuity of trained management and to preclude such management from leaving the plaintiff company and competing with it by doing business with its customers, brokers and sources of supply, in the area where those companies did business.

6. In accordance with the company's plan and for the reason set forth herein, defendant was advised that before going through with the purchase, and before employing defendant, he would be required to enter a five-year employment contract with covenants not to compete against plaintiff in the area where it did business in the event his employment was terminated. Defendant agreed to enter such a contract. It was further agreed that defendant's salary would be $15,000 a year, an increase of $5,000 over his base salary with South Oil Company, and that he would receive an annual bonus of 10% of net profits before taxes of South Oil Division. Defendant was also to receive certain stock options. The matter of the options and the terms and methods of acquiring and paying for the stock continued to be discussed by the parties.

7. Two other employees who were employed full time in the management of the business, including Jack Blase, President, entered agreements containing non-competitive covenants similar to those agreed to by defendant.

8. The stock option agreement, which was more favorable to defendant than the one originally proposed, was worked out and incorporated into a final revised employment contract, containing the other terms previously agreed upon, and was signed by the parties, approved, ratified and confirmed by plaintiff's Board of Directors on 5 June 1968, the agreement being attached to plaintiff's verified complaint. Paragraph 1 of the agreement provides in part:

> "Employee hereby agrees with Seaboard that through the term of this Agreement, hereinafter set forth, he will faith-

fully serve and act as Manager of South Oil Division of Seaboard, its successors and/or assigns, subject to the directions of and policies established by the Board of Directors of Seaboard, its successors and/or assigns and will devote his time thereto on a full-time basis as reasonably required. . . "

Paragraph 4 of the Agreement provides:

"It is understood and agreed that Employee will be entitled to two (2) weeks vacation with pay during each calendar year of the term of his employment with Seaboard. However, Employee is to select said vacation time at a time when it is reasonably calculated not to severely and adversely affect the corporate business activities."

Paragraph 5 of the Agreement provides:

"Employee hereby agrees that in the exercise of his authority and the performance of his duties hereunder he will consult and cooperate with the officers of Seaboard."

Paragraph 9 of the Agreement provides:

"As separate and independent covenants for which valuable considerations have been paid, the receipt and sufficiency of which is acknowledged by Blair, and to induce Seaboard to enter into this Employment Agreement, Blair covenants and agrees as follows:

"a. That during the term of his employment with Seaboard, Blair will not be a stockholder, investor, lender, director or employee of any other competitive business, or have any interest, financial or otherwise, direct or indirect in such, nor will Blair directly or indirectly aid or abet any such competitive business during the term of his employment with Seaboard.

"b. That for a period of Sixty (60) months following the termination of Blair's employment with Seaboard, if said termination is because of (1) a breach of this Agreement by Blair, or (2) an election by Blair not to continue in the employ of Seaboard after the term of this Agreement on substantially the same terms as contained in this Agreement but without the stock option, Blair will not directly or indirectly in any manner compete with Seaboard nor engage in the same type of business as that business con-

ducted by Seaboard for himself or others in any capacity.

"c. That during the time Blair is employed by Seaboard and for a period of Sixty (60) months following such employment, if said employment is terminated because of: (1) a breach of this Agreement by Blair, (2) an election by Blair not to continue in the employ of Seaboard after the term of this Agreement on substantially the same terms as contained in this Agreement but without the stock option, or (3) actions taken under the provisions of Paragraph 7 of this Agreement, Blair will not directly or indirectly do business with, solicit business from or engage in business for himself or others with any person, firm, or entity who was a customer, broker or sales representative for Seaboard, or a source of supply of Seaboard, with respect to the same type of business as that business conducted by Seaboard.

"For the purposes of this Agreement, 'competitive business' and 'the same business as that business conducted by Seaboard' shall mean and be defined as the purchase, sale or refining of petroleum and petroleum products or by-products in the States of Florida, Georgia, Tennessee, Alabama, North Carolina, South Carolina, Virginia, Kentucky, West Virginia, Mississippi, Maryland, Pennsylvania and Ohio.

"Each of the aforesaid three covenants contained in this Paragraph numbered 9 is an independent Covenant, which may be availed of or relied upon by Seaboard in any court of competent jurisdiction, and shall form the basis of injunctive relief and damages, including expenses of litigation suffered by Seaboard arising out of any breach thereof by Blair. In the event of any breach of this Employment Agreement by Seaboard or in the event Blair contends that such a breach has occurred, such breach or contended breach shall not vitiate any of the independent covenants set out in this Paragraph numbered 9, each of which shall nevertheless remain in full force and effect."

9. Defendant assumed his position as manager of the company and at the end of the first fiscal year received a bonus in excess of $10,000 in addition to his annual salary of $15,000. Defendant, who had also been elected a member of the plaintiff's Board of Directors attended board meetings, participated in its

deliberations and decisions, and received all financial information of the company and other information otherwise unavailable to him.

10. Mr. Blase worked closely with the defendant and acquainted him with the plaintiff's marketing procedures, prices and sources of supply. In his position as manager of South Oil Division and as the contemplated successor to Mr. Blase, defendant had contact with plaintiff's suppliers and customers and established himself in the oil re-refining business and the oil distributing business in the area where plaintiff conducts its business.

11. Sometime after defendant began his employment he became insubordinate to the president of the company, started resisting reasonable and proper decisions, and advised other directors and officers that he would not continue working under the president. The company took steps to placate defendant but his belligerent and uncooperative attitude toward higher officers of the company and he failed to perform his duties with the company in various enumerated matters.

12. Defendant was absent without authority from his employment for more days than permitted under his contract and in January, 1970, went to Florida for the purpose of assisting a competitive company in litigation with plaintiff.

13. In late 1968 defendant began conferring with other company personnel concerning their terminating employment with plaintiff and entering a competing oil business with a competitive company. Defendant actually entered negotiations to purchase a Greensboro company competing with plaintiff during this period and continued the negotiations into the summer of 1969. On numerous occasions defendant threatened to go into the oil business, and on 18 May 1970, testified that he intended to compete with plaintiff.

14. Plaintiff terminated defendant's employment on 5 May 1970 because of the acts set out above and instituted this action on the same date seeking injunctive relief against him.

The court concluded, based upon the findings set out above, that plaintiff was entitled to the relief sought pending final determination of the case by a jury and ordered as follows:

"NOW, THEREFORE, in the discretion of the Court, the defendant is enjoined and restrained, pending the trial of this action on its merits, from directly or indirectly doing business with, soliciting business from, or engaging in business for himself or others, with any person, firm, or entity who on or before May 5, 1970, was:

(a) a customer of plaintiff; or

(b) a broker for plaintiff; or

(c) a supplier of plaintiff; or

(d) a sales representative of plaintiff;

and who purchases, sells or refines petroleum and petroleum products or by-products in the States of Florida, Georgia, Tennessee, Alabama, North Carolina, South Carolina, Virginia, Kentucky, West Virginia, Mississippi, Maryland, Pennsylvania and Ohio. The business which defendant is restrained and enjoined from doing, soliciting or engaging in for himself or others, with the persons, firms and entitles [*sic*] identified in (a), (b), (c) and (d) above, is only such business as constitutes the purchase, sale or refining of petroleum and petroleum products or by-products in the States of Florida, Georgia, Tennessee, Alabama, North Carolina, South Carolina, Virginia, Kentucky, West Virginia, Mississippi, Maryland, Pennsylvania and Ohio. The plaintiff is required to give security in the amount of $25,000.00 for the payment of such costs and damages as may be incurred or suffered by the defendant as a result of this Order, if he is found to be wrongfully enjoined or restrained."

Other restrictions imposed by Judge Collier in relating to defendant's personal conduct with plaintiff and its property were also continued in effect. Defendant filed numerous exceptions to the order and appealed.

Smith, Moore, Smith, Schell and Hunter by Richmond G. Bernhardt, Jr. for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey & Hill by Welch Jordan and William L. Stocks and Falk, Carruthers & Roth by Herbert S. Falk, Jr. and Walter Rand III for defendant appellant.

GRAHAM, Judge.

[1] The order appealed from is interlocutory. However, appeal from such an order will not be considered premature if a substantial right of appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. G.S. 1-277; *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545; *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619; *Cablevision v. Winston-Salem,* 3 N.C. App. 252, 164 S.E. 2d 737. A substantial right of defendant is affected by the order restraining him from engaging in business in the manner set forth, and we therefore consider his appeal.

[2] The parties agree that the contract involved was executed in Atlanta, Georgia. "It is settled that 'Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made.' " *Cannady v. R.R.,* 143 N.C. 439, 442, 55 S.E. 836, 837. Further, paragraph 12 of the contract expressly provides that "[t]his Agreement, and the rights and liabilities of the parties hereto, shall be construed under the laws of the State of Georgia." We therefore look to the law of Georgia in considering this appeal.

The leading case in Georgia on the subject of restrictive covenants is *Rakestraw v. Lanier,* 104 Ga. 188, 30 S.E. 735 (1898), wherein it is stated:

> "In determining whether such restriction is reasonable, the court will look alone to the time when the contract was entered into. . . .
>
> "It is, however, satisfactorily established that, as a matter of law, such a contract is to be upheld if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. . . ."

[3] These general principles are identical to those which prevail in this State. "[T]he Georgia rule—as well as that of North Carolina and most other jurisdictions—is that a restraint on trade in the form of a restrictive covenant will be countenanced when, under all circumstances it is a reasonable one." *Budget*

Rent-A-Car Corporation of America v. Fein, 342 F. 2d 509 (5th Cir. 1965). To determine the validity of a covenant in a contract of employment providing that, upon termination of the employment, the employee will not engage in competition with the employer, it is necessary to apply these tests: (1) Is it founded on a valuable consideration? *Fox v. Avis Rent-A-Car Systems, Inc.,* 223 Ga. 571, 156 S.E. 2d 910; *Ogle v. Wright, et al.,* 187 Ga. 749, 2 S.E. 2d 72; *Buick Co. v. Motors Corp.,* 254 N.C. 117, 118 S.E. 2d 559; *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d 431. (2) Is it reasonably necessary to protect the legitimate interest of the employer? *Orkin Exterminating Co., Inc. of South Georgia v. Dewberry,* 204 Ga. 794, 51 S.E. 2d 669; *Rakestraw v. Lanier, supra; Noe v. McDevitt,* 228 N.C. 242, 45 S.E. 2d 121; *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543. (3) Is the limitation or restriction reasonable as to time, *Day Companies v. Patat,* 403 F. 2d 792 (5th Cir. 1968); *Shirk v. Loftis Brothers and Company,* 148 Ga. 500, 97 S.E. 66; *Engineering Associates v. Pankow,* 268 N.C. 137, 150 S.E. 2d 56, and as to territory, *J. C. Pirkle Machinery Company, Inc. v. Walters,* 205 Ga. 167, 52 S.E. 2d 853; *Orkin Exterminating Co., Inc. of South Georgia v. Dewberry, supra; Jewel Box Stores v. Morrow,* 272 N.C. 659, 158 S.E. 2d 840; *Buick Co. v. Motors Corp., supra?*

Defendant argues that the covenant enforced by the trial court in the instant case fails to meet any of the tests enumerated above.

[4] We consider first the question concerning consideration. Defendant relies upon *Greene Co. v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166, and *Chemical Corp. v. Freeman,* 261 N.C. 780, 136 S.E. 2d 118. Both of these cases involved new contracts, entered after employment, which were not based upon any new or additional consideration. The covenants involved here were a part of an original contract of employment between the parties and were therefore founded upon a valuable consideration. The fact that the written contract may not have been formally executed until several weeks after defendant started work is of no significance under the circumstances presented. Moreover, under the Georgia statute of frauds an agreement not to be performed within one year must be in writing. Georgia Code Annotated, Chapter 20-4. Therefore, before the written agreement came into being, defendant had no enforceable five-year contract of

employment. Also, the occasion for delay, if any, in the actual execution of the contract (which incidentally is dated 1 April 1968, the date defendant first assumed his employment responsibilities) was to arrive at a stock option plan more favorable to defendant than the one first set forth in the written agreement. The more favorable stock option plan is a part of the agreement signed. Thus, the trial judge's conclusion that the covenants were based upon valuable consideration is supported by any one of several available theories which arise on his findings and the evidence.

[5] The covenant enforced, in our opinion, was clearly reasonably necessary to protect the interest of plaintiff. Greater latitude is generally allowed in those covenants given by the seller in connection with the sale of a business than in covenants ancillary to an employment contract. *Orkin Exterminating Co., Inc. of South Georgia v. Dewberry, supra.* (For a review of the North Carolina cases enforcing covenants given in connection with the sale of a business see *Jewel Box Stores v. Morrow, supra.)* Among reasons often given for the greater acceptability of "sale of business covenants" are that covenants not to compete enable the seller of a business to sell his good-will and thereby receive a higher price; and they also furnish a material inducement to the purchaser who purchases a business with the hope of retaining its customers. On the other hand, covenants restricting an employee's right to engage in an occupation of his choice after termination of his current employment may tend to produce hardships for the employee and to deprive the public of the service of men in the area where they are most experienced. *Budget Rent-A-Car Corporation of America v. Fein, supra; Orkin Exterminating Co., Inc. of South Georgia v. Dewberry, supra; Hood v. Legg,* 160 Ga. 620, 128 S.E. 891.

It may well be, as defendant argues, that plaintiff is not entitled to have the covenants contained in the employment contract now before us interpreted with the latitude afforded those related to the sale of a business, in that defendant was not the seller, and owned none of the stock of either company purchased by plaintiff.

We nevertheless find the circumstances surrounding the purchase of the companies by plaintiff particularly pertinent to the question of whether the covenant agreed to by defendant

in paragraph 9(c) of the contract was reasonably necessary to protect plaintiff's interest. Although defendant never owned any interest in South Oil Company, he had participated in its organization. The two owners were his uncles. Defendant managed the company from the time it came into being in 1964 until purchased by plaintiff. He testified that hundreds of customers were secured for the company primarily through his efforts. He was familiar with the company's customers, suppliers and brokers, and was well experienced in the oil business. The chairman of plaintiff's Board of Directors testified:

> "I have told the Court that one of the purposes in discussing with Mr. Blair and in securing from him an employment contract and covenant not to compete was to preserve the management of this company. And as to whether there was any consideration in securing the covenant not to compete concerning customers of Seaboard Oil Company or South Oil Company, customers, source of supply. As to what considerations we gave for that, well, we gave considerable consideration because without customers and without a source of supply, you couldn't stay in business. As to whether Mr. Blair occupied a unique position concerning the customers, yes, he knew the customers; he attended the directors' meetings when he was a director and information was exchanged between Jack Blase and Mr. Blair in their daily operations, . . .
>
> "As to what consideration I gave about his connection with the customers of the company and the sources of supply of the company, well, we gave serious consideration. That's why it was part of the restrictive covenant that he would not compete, because he would have knowledge of the customers and source of supply and all other things pertaining to this business, and people were putting their life savings into the investment, such as Mr. Byron Cohen and others, and we wanted to protect them, to protect the company, and here he had a contract as chief executive officer at the division, and he had the knowledge there and all the information, and he was Mr. Blase's nephew, and if he walked off and left us, we'd have no business, and this was a very important consideration in the restricted covenant in making an investment of this type—one of the principal considerations. . . . "

The concern expressed by plaintiff's board chairman was a legitimate concern. South Oil Company would obviously have been worth less than the substantial amount invested by plaintiff if its experienced manager had been free to terminate his contract and compete with the acquiring company by dealing with its customers, brokers, suppliers, and others, many of whom he had undoubtedly personally developed. To preclude this possibility, as well as to obtain his service, the plaintiff's investor group was willing to employ defendant in the same capacity he had been employed by South Oil Company, increase his salary substantially, and grant him options to purchase stock in the company. We cannot say that this was unreasonable, or that it imposed an illegal burden upon defendant or society.

[6] Nor can we say that the covenant's provisions as to time and territory were, under these circumstances, unnecessary to protect the legitimate interest of plaintiff, or that they imposed an unreasonable hardship upon defendant. Indeed, five years' duration has been held reasonable under circumstances less compelling than those present here. See *Day Companies v. Patat, supra; Welcome Wagon, Inc. v. Pender,* 255 N.C. 244, 120 S.E. 2d 739. In cases where the covenants not to compete accompanied the sale of a trade or business, time limitations of ten, fifteen and twenty years, as well as limitations for the life of one of the parties, have been upheld by the Supreme Court of North Carolina. *Jewel Box Stores v. Morrow, supra,* and cases therein cited.

The court found that plaintiff did business in all of the states included in the covenant. This finding is supported by competent evidence and supports the court's conclusion that the covenant enforced is reasonable as to the area covered. "Reasonableness as to territory depends not so much on the geographical size of the territory, as on the reasonableness of the territorial restriction in view of the facts and circumstances of the case." *Thomas v. Coastal Industrial Services, Inc.,* 214 Ga. 832, 108 S.E. 2d 328. "A contract, for instance, for a valid consideration not to engage in the manufacture and sale of firearms in general use would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton." *Shute v. Heath,* 131 N.C. 281, 282, 42 S.E. 704, 704. The dollar volume of sales of plaintiff's South Oil Company division was $876,110 for the

year 1968-1969. Customers included companies such as Southern Railway Company, White Oil Company, Hi Fy Oil Company, McCoy Oil Company, Sun Oil Company, C. & O. and B. & O. Railroads, and Hudson Oil Company, which use plaintiff's products in various states. Thus, the nature of plaintiff's business is quite different from that of businesses where customers, with whom the covenanting employee has contact, are confined within a single city or rather limited areas. Compare *Orkin Exterminating Co., Inc. of South Georgia v. Dewberry, supra; Wake Broadcasters, Inc. v. Crawford,* 215 Ga. 862, 114 S.E. 2d 26, with *Turner v. Robinson,* 214 Ga. 729, 107 S.E. 2d 648 and *Enterprises, Inc. v. Heim,* 276 N.C. 475, 173 S.E. 2d 316.

It should also be noted that the injunction, based upon paragraph 9(c) of the agreement, merely restricts defendant from competing with plaintiff by doing business, within the states listed, with any person, firm or entity who on or before 5 May 1970 was a customer, broker, supplier or sales representative of plaintiff. The result is that the territorial limitation is even more limited, and therefore more reasonable, than if the restriction had forbidden any competitive activity within the restricted area. *Kirshbaum v. Jones,* 206 Ga. 192, 56 S.E. 2d 484.

[7] Defendant strenuously contends that all three covenants contained in paragraph 9 of the agreement are void because they are too vague and ambiguous. While the covenants do not represent models of good draftsmanship, we do find them sufficiently definite to withstand this attack. We interpret the covenants as follows: In paragraph 9(a), defendant agrees not to compete with plaintiff during his actual employment. In 9(b), when read in conjunction with an explanation of terms set out in 9(c), defendant agrees that in the event he breaches the agreement, or elects not to continue under a similar agreement at the end of his term of employment, he will not compete with plaintiff for a period of sixty months by engaging in the same type of business as that conducted by plaintiff within any of the listed states. The covenant contained in 9(c) is that in the event of either of the two contingencies set out in 9(b) or in the event of action taken under paragraph 7, which relates to the termination of the agreement in the event of defendant's disability, defendant is not to compete with plaintiff within the specified states for a period of 60 months by doing business therein with any customer, broker, supplier or sales representative of plaintiff. The latter covenant, which is the one on which

injunctive relief is based, is obviously less restrictive than the one set forth in 9(b).

[8] Defendant also argues that the covenants are unseverable; that the covenant contained in 9(b) is too broad to be enforceable; and that consequently, none of the covenants may be enforced. We reject this argument without inquiring into the enforceability of 9(b). The covenants, in our opinion, are clearly severable. Where severable, a reasonable covenant may be enforced even though another separate covenant may not be reasonable and therefore not enforceable. *Aladdin, Inc. v. Krasnoff,* 214 Ga. 519, 105 S.E. 2d 730. The cases cited by defendant in support of his position are inapplicable. They involve situations where a court refused to employ the "blue pencil" rule, in order to trim an excessively broad territorial restriction down to a reasonable area. See 5 Williston on Contracts, Revised Edition, § 1659. We agree that a court may not exercise its own initiative in such a manner, for to do so would be to draft a new contract for the parties. See dissenting opinion of Bobbitt, Justice (now Chief Justice), in *Welcome Wagon, Inc. v. Pender, supra,* at 250, 120 S.E. 2d at 743. However, this situation is not present here. The contract specifically provides that each of the covenants contained in paragraph 9 is an independent covenant, which may alone form the basis of injunctive relief. Moreover, the nature of the covenants dictate that they be considered separately. The covenant contained in 9(a) is applicable only while defendant is employed by plaintiff. The covenant contained in 9(b) is applicable only if defendant breaches his employment agreement or refuses to renew it. 9(c) may be applied in the event the defendant's employment terminates for either reason set forth in 9(b) or by reason of his disability. The trial judge, in his discretion, based the injunction upon the less restrictive covenant contained in 9(c). This inured to defendant's benefit and affords him no grounds for complaint.

[9] Finally, defendant contends that the covenant unreasonably prohibits his activities. For instance, he argues that the effect of the injunction is to prohibit him from purchasing a tank of gas or a quart of oil from Sun Oil Company, or a railway ticket from Southern Railway Company, since both companies were customers of plaintiff. However, paragraph 9(c) contains the qualifying phrase, "with respect to the same type of business as that business conducted by Seaboard." Suffice to say, we cannot

envision any such far reaching interpretations of the injunction as are suggested by defendant.

For the reasons set forth, the order is affirmed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

WALTER W. HENDRIX, JR. v. JAMES RICHARD ALSOP; CHARLES PFIZER CO., INC.; AND J. B. ROERIG AND CO., A DIVISION OF CHARLES PFIZER CO., INC.

No. 7018SC421

(Filed 3 February 1971)

1. **Actions §§ 10, 12— pendency of action — two-year delay in filing complaint**

Where plaintiff instituted an action against the individual defendant on 5 May 1967 and obtained an extension of time to file complaint, and thereafter plaintiff filed a complaint in August 1969 against the individual defendant and against two corporate defendants, the action was still pending against the original defendant in August 1969, since (1) the original defendant had not moved to dismiss the action, (2) the plaintiff had not taken a voluntary nonsuit, (3) there had been no discontinuance of the action for failure to perfect service of summons, and (4) the action had not been otherwise determined by final judgment; consequently, the clerk of superior court erred in dismissing the complaint as to the individual defendant.

2. **Rules of Civil Procedure § 1— date of applicability**

The Rules of Civil Procedure are inapplicable where all of the proceedings in issue transpired before 1 January 1970.

3. **Process § 3; Actions § 10— issuance of summons — date of issuance — prima facie evidence**

Prior to 1 January 1970 the usual procedure to commence a civil action was by issuance of summons, and the date of the summons was prima facie evidence of the date of issuance. G.S. 1-88; G.S. 1-88.1.

4. **Actions § 10— pendency of action**

Prior to 1 January 1970, an action was deemed to be pending from the time it was commenced until its final determination; the final determination was by final judgment, except where a discontinuance of a civil action occurred under G.S. 1-96 for failure to perfect service of summons.

5. Limitation of Actions § 12— computation of period of limitation — extension of time to file answer

Where plaintiff fails to comply with the statutory provisions relating to extension of time to file complaint, the date the complaint was filed must be used in determining whether the statute of limitations is applicable.

6. Pleadings § 1— filing of complaint more than two years after institution of action — necessity for court order

As to action which was instituted in May 1967, it was not a prerequisite to filing the complaint on 1 August 1969 that there be a court order granting an extension of time, where no effort had been previously made to dismiss the action.

7. Parties § 1— necessary parties — necessity for order authorizing joinder of additional defendants

Where plaintiff instituted an action against an individual defendant on 5 May 1967 and obtained an extension of time to file complaint, and thereafter plaintiff filed a complaint in August 1969 against the individual defendant *and* against two corporate defendants, the clerk of court correctly dismissed the action as to the two corporate defendants, since the plaintiff had obtained no order authorizing him to make the corporations additional parties defendants in the 1967 action.

8. Parties § 1— absence of necessary parties

If necessary parties are absent, they may be brought in by a motion, order, and service of process.

Judge GRAHAM concurring in part and dissenting in part.

ON *certiorari* to review three orders dated 6 January 1970 entered in this cause by *Gambill, Judge of the Superior Court,* 5 January 1970 Session, GUILFORD Superior Court.

On appropriate application by plaintiff we have considered the Record on Appeal as a petition for writ of *certiorari,* we have issued the writ, and we now consider the appeal upon its merits.

This is a civil action seeking to recover damages for alleged conspiracy, assault, libel, trespass, false arrest, malicious prosecution, and abuse of process.

Summons was issued 5 May 1967, in an action entitled *"Walter W. Hendrix, Jr. v. James R. Alsop"* and at the same time the Clerk entered an order for an adverse examination of Alsop along with an order extending time to file complaint to twenty days following report of the adverse examination. Alsop appealed to the Judge from the Clerk's order for an adverse

examination, and from an unfavorable ruling by the Judge, Alsop further appealed to this Court.

By opinion reported in 1 N.C. App. 422, 161 S.E. 2d 772, this Court ruled that plaintiff had failed to show necessity for adversely examining Alsop and remanded the case to the Superior Court of Guilford County for entry of an order consistent with the opinion. The opinion of this Court was certified to the Superior Court of Guilford County on 1 July 1968, and thereafter, on 20 August 1968, Judge Collier entered an order vacating the orders for adverse examination of Alsop and adjudged that plaintiff's request for such examination be denied.

On 1 August 1969 plaintiff filed a complaint which was entitled *"Walter W. Hendrix, Jr. v. James Richard Alsop; Charles Pfizer Co., Inc.; and J. B. Roerig and Co., a Division of Charles Pfizer Co., Inc."* On this same date plaintiff caused the Clerk to issue summons to defendant Alsop, and also secured from the Clerk an order directing service of the complaint on defendant Alsop. An alias summons, an order for service of complaint, and the complaint were served on defendant Alsop on 18 September 1968.

Also on 1 August 1969 summons was issued to Charles Pfizer Company, Inc. and to J. B. Roerig and Company. Summons and copy of the complaints were served on these two defendants on 4 August 1969.

On 27 August 1969 defendant Alsop filed a motion with the Clerk to strike out and set aside the complaint filed on 1 August 1969; to vacate and set aside the order of 1 August 1969 directing service of the complaint; and that the action be dismissed. This motion was made upon the grounds that plaintiff had failed to file complaint within 20 days after the certification of the opinion of this Court or within 20 days after the order of Judge Collier entered in conformity with the opinion of this Court; and that the Clerk had no authority to extend the time for filing complaint beyond that time.

On 27 August 1969 Pfizer and Roerig filed a motion with the Clerk to vacate and quash the summons; to strike out and set aside the complaint; and to dismiss the action. The grounds for this motion was that no order had been entered allowing plaintiff to make them additional parties in the action instituted 5 May 1967.

The motion by Alsop was allowed by order of the Clerk dated 16 September 1969. The motions by Pfizer and Roerig were allowed by order of the Clerk dated 22 September 1969. From the entry of these orders dismissing plaintiff's action as to Alsop, and as to Pfizer and Roerig, plaintiff appealed to the Judge of Superior Court.

Plaintiff filed a motion before the Judge for additional time within which to file his complaint; and also filed a motion before the Judge to vacate the order entered by Judge Collier on 20 August 1968.

Judge Gambill conducted a hearing upon plaintiff's appeals from the Clerk, and upon plaintiff's two motions which were filed before the Judge. At the conclusion of the hearing Judge Gambill entered the following three orders dated 6 January 1970: (1) an order denying plaintiff's motion for an extension of time within which to file his complaint; affirming the Clerk's order striking the complaint and order for service thereof, and dismissing the action as to defendant Alsop; (2) an order affirming the Clerk's order striking the complaint and summons, and dismissing the action as to defendants Pfizer and Roerig; and (3) an order denying plaintiff's motion to vacate the order of Judge Collier dated 20 August 1968. These three orders by Judge Gambill dated 6 January 1970 are the orders that plaintiff seeks to have reviewed.

Max D. Ballinger for the plaintiff.

J. B. Winecoff and Harry Rockwell for the defendants.

BROCK, Judge.

Because of the plaintiff's action on 1 August 1969 of causing a summons to be issued and served upon the defendant Alsop under a caption different from that used upon the summons issued to Alsop in 1967; and because on 1 August 1969 plaintiff caused separate summons to be issued to the defendants Pfizer and Roerig; and because the record before us did not disclose whether a new action was instituted on 1 August 1969, we requested additional argument, upon briefs only, on the following question: "Did the issuance of summons on 1 August 1969 to defendant Alsop and the two corporate defendants constitute the commencement of an action on 1

August 1969 against the three defendants?" Also we secured additional information concerning the record from the Clerk of Superior Court. In their supplemental briefs counsel for plaintiff and counsel for defendants insist that no new action was instituted on 1 August 1969 but that the complaint was filed and the summonses issued in the 1967 action. The Clerk's records bear out that this was the intention of all parties because the 1967 case file has been brought forward at all times to contain the complaint, summonses, motions, and orders filed in 1969. Further plaintiff's motion for additional time to file the complaint in the 1967 action and plaintiff's motion to vacate Judge Collier's 1968 order clearly show that it was plaintiff's intention that this complaint be filed in, and that these summonses be issued in, the 1967 action.

[1] The orders of the Clerk of Superior Court of Guilford County, dated 16 September 1969 and 22 September 1969, allowing defendants' motions to dismiss plaintiff's action, and Judge Gambill's orders of 6 January 1970 affirming the orders of the Clerk are based upon theories to the following effect:

> As to defendant Alsop:
>
> That the extension of time to file complaint allowed by the Clerk in May 1967 had expired before 1 August 1969, and the Clerk had no authority to further extend the time. Therefore, the filing of the complaint on 1 August 1969 was without authority and the complaint, along with the order for service thereof, should be stricken.
>
> As to defendants Pfizer and Roerig:
>
> That plaintiff obtained no order allowing him to make Pfizer and Roerig parties defendant in the May 1967 action, and plaintiff's unilateral act of causing summons and complaint to be served upon them was ineffective to make them parties, and the summons and complaint should be stricken as to each of them.

[2] All of the proceedings in this case, with the exception of the orders from which this appeal is taken, the procedural propriety of which are not in issue, transpired before the effective date of the Rules of Civil Procedure, N.C. G.S. Chap. 1A; therefore, the disposition of this appeal is governed by the rules of practice as they existed before 1 January 1970.

[1] This appeal can be considered as though the following situation exists: Plaintiff caused summons to be issued and obtained an order from the Clerk extending time within which to file his complaint. The time designated within which plaintiff might file his complaint expired without complaint being filed. No further action was taken by plaintiff or defendant until a considerable time elapsed, and thereafter the chronology of the events is as follows: Plaintiff filed a complaint naming the original defendant as a defendant, and also naming two additional parties as defendants. At the time of filing the complaint plaintiff secured an order from the Clerk for service of the complaint on the original defendant, and caused summons to be issued for the two additional defendants. The order and complaint were served on the original defendant, and the summons and complaint were served on the two additional defendants. Each defendant then moved to dismiss upon the theories summarized above, and their motions were allowed.

[3, 4] Prior to 1 January 1970 the usual procedure to commence a civil action was by issuance of summons, G.S. 1-88, and the date of the summons was *prima facie* evidence of the date of issuance. G.S. 1-88.1. Therefore, it is clear that plaintiff instituted an action against defendant Alsop on 5 May 1967, and service of summons on defendant Alsop was completed on 12 May 1967. An action is deemed to be pending from the time it is commenced until its final determination. *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833. Except where a discontinuance of a civil action occurs under G.S. 1-96 for failure to perfect service of summons, *Morrison v. Lewis,* 197 N.C. 79, 147 S.E. 729, the final determination is by final judgment. *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860.

[1] At the time plaintiff filed the complaint on 1 August 1969, original defendant Alsop had not moved to dismiss the action, plaintiff had not taken a voluntary nonsuit, there had been no discontinuance of the action under G.S. 1-96 for failure to perfect service of summons, and the action had not been otherwise determined by final judgment; therefore, the action was pending against original defendant Alsop in the Superior Court of Guilford County when plaintiff filed his complaint and caused it to be served on original defendant Alsop.

[5] Although the question of the application of statutes of limitation are not raised by this appeal, there was reference to such

application in oral argument and in defendants' brief; and it is obvious that such questions will become involved as this case goes back to the trial division. Therefore, we feel it appropriate to make the following observation. Our holding that the action against original defendant Alsop was pending from 5 May 1967 until 1 August 1969 without complaint having been filed should not be considered as an indication that 5 May 1967 is the date to be used in determining whether plaintiff's actions are barred by the statutes of limitation. The case of *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870, is controlling on the question of the application of the statute of limitation. In *Congleton* Judge Morris held: "Where plaintiff fails to comply with the statutory provisions relating to such extensions, the date the complaint was filed must be used in determining whether the statute of limitations is applicable."

[6] An order of court further extending the time to file complaint to and including 1 August 1969 was not a prerequisite to filing the complaint on that date where no effort had been previously made to dismiss the action. *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424.

[1] The theory upon which the Clerk allowed the motion of original defendant Alsop to strike the order for service of complaint and the complaint, and the theory upon which the Judge affirmed the Clerk's order is in error. The motion of original defendant Alsop should have been denied, and the orders of the Clerk and the Judge to the contrary must be reversed.

[7, 8] When plaintiff filed his complaint on 1 August 1969 he caused summons to be issued and served, with copy of the complaint, on each of two new defendants (Pfizer and Roerig). "If necessary parties are absent, they may be brought in by a motion, order, and the service of process." *Short v. Realty Co.,* 262 N.C. 576, 138 S.E. 2d 210. However, plaintiff made no motion, and no order was entered authorizing the additional parties. "From the time of service of the summons, in a civil action, . . . the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings." G.S. 1-101. Summons in the 1967 action was served 12 May 1967 and from that date the court had control of the action for purposes of determining whether new parties were to be added. Plaintiff's

action of causing summons and complaint to be served on Pfizer and Roerig was without authority, and the order of Judge Gambill affirming the Clerk's order striking the service of summons and complaint and dismissing the action as to Pfizer and Roerig must be affirmed.

We are not ruling upon the sufficiency of plaintiff's allegations, nor the merits of his claims against Alsop; we are merely ruling that plaintiff was entitled to file his complaint.

The record on appeal in this case covers 149 mimeographed pages. This appears to have been caused primarily because of the inability of counsel to agree upon anything. As can be seen the questions presented on this appeal are relatively concise when all of the irrelevant matter is brushed aside. It seems to us that, if a more cooperative spirit had prevailed between counsel, considerable time and energy on their part and the part of this Court could have been saved. The record and the briefs also contain vilifying remarks of counsel concerning each other. This type of conduct adds nothing to the dignity of the profession and offers no assistance to the cause of their clients.

The order of Judge Gambill entered on 6 January 1970 affirming the order of the Clerk dismissing the action as to Alsop is reversed and this cause is remanded to the Superior Court of Guilford County with directions that the Clerk's order of 16 September 1969 dismissing the action as to defendant Alsop be vacated, and that defendant Alsop be granted time within which to file answer or otherwise plead. That portion of Judge Gambill's order which denies plaintiff's motion for additional time to file complaint is of no effect because the complaint had already been filed.

The order of Judge Gambill entered on 6 January 1970 affirming the order of the Clerk entered 22 September 1969 dismissing this action as to defendants Pfizer and Roerig is affirmed.

We affirm the order entered by Judge Gambill on 6 January 1970 denying plaintiff's motion to vacate the order of Judge Collier which was entered on 20 August 1968.

Affirmed in part.

Reversed and remanded in part.

Judge MORRIS concurs.

Judge GRAHAM concurs in part, and dissents in part.

Judge GRAHAM concurring in part and dissenting in part:

I agree with the opinion of the majority affirming the dismissal of this action as to defendants Pfizer and Roerig and affirming the denial of plaintiff's motion to vacate Judge Collier's order of 20 August 1968. I think the order dismissing the action against Alsop should also be affirmed.

G.S. 1A-1, Rule 3, provides that "[i]f the complaint is not filed within the period specified in the clerk's order, the action shall abate." This rule, effective 1 January 1970, was not in effect at the time the complaint was filed, and I agree with the conclusion of the majority that the action was still pending against Alsop when plaintiff filed his complaint on 1 August 1969. However, the essential question, in my opinion, is not whether the action was still pending at the time the complaint was filed, but whether the trial judge had the authority to allow defendant's motion to strike the complaint on the ground that it had not been filed within the time allowed by law. An amended complaint is subject to being stricken unless filed within the time allowed. *Strickland v. Jackson,* 260 N.C. 190, 132 S.E. 2d 338. Certainly the same rule applies with respect to an original complaint.

It might be suggested that the situation here is parallel to a situation where answer is filed after the expiration of the time allowed. When answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919. However, in that case it is stated: "If it [answer] were not filed within the meaning of the law plaintiffs, upon motion so to do, might have had the answer stricken from the record, and, if such motion were allowed, to move then for judgment by default final. This was not done."

Here the motion to strike the complaint was made and was allowed. While the trial judge unquestionably had the discretionary authority to deny defendant's motion to strike the complaint and to extend the time for filing complaint, *Deanes v. Clark,* 261 N.C. 467, 135 S.E. 2d 6, he was not required as a

matter of law to do so. On 16 September 1969, plaintiff moved for an enlargement of the time within which the complaint might be filed up to and including 1 August 1969, and for an order declaring that the complaint filed on 1 August 1969 was filed in apt time. The court, in its discretion, denied this motion and no abuse of discretion has been shown. Likewise, no abuse of discretion has been shown with respect to the court's action in striking the complaint and dismissing the action against Alsop.

THOMAS E. BLACKWELL v. HENRY T. BUTTS, GUARDIAN AD LITEM OF LARRY WAYNE BUTTS

No. 7117SC1

(Filed 3 February 1971)

1. **Appeal and Error § 57— findings of fact — nonjury trial — appellate review**

The findings of fact by the trial court in a nonjury trial are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed.

2. **Automobiles § 18— entering highway from private driveway — right of way**

A motorist preparing to enter a public highway from a private driveway has the duty to yield the right of way to all vehicles approaching on the public highway. G.S. 20-156(a).

3. **Automobiles § 18— entering highway from private driveway — exercise of due care**

The fact that a motorist emerging from a private driveway stopped before entering the highway does not relieve the motorist from further responsibility with respect to the exercise of due care.

4. **Automobiles § 18— entering highway from private driveway — curve in road — duty of motorist to maintain constant lookout**

A motorist who was emerging from a private driveway could not see more than 200 feet to her right because of a sharp curve in the highway. The motorist looked first to the left and then to the right, and, without further looking to the right, the motorist drove diagonally across the highway to the westbound lane where the motorist was struck by defendant's automobile that was coming around the curve in the westbound lane. *Held:* The mere fact that the motorist reached the westbound lane a second or two before being struck by defendant's automobile did not give her the right of way, and the motorist had the duty to look again to the right prior to entering the westbound traffic lane.

Judge BRITT dissenting.

APPEAL by defendant from *Long, Superior Court Judge,* April 1970 Civil Session of ROCKINGHAM County Superior Court.

Plaintiff instituted this action December 14, 1967 in the Reidsville Recorder's Court, to recover for damages to an automobile which was being driven by his wife, Betty Mimms Blackwell, and which was damaged in a collision with an automobile being driven by the defendant Larry Wayne Butts on 23 June 1967. The defendant filed a counterclaim for damages to his automobile. From a judgment in the Recorder's Court denying recovery to either party, an appeal was taken to the Superior Court where it was heard without a jury.

The trial judge in the Superior Court found as a fact (summarized except where quoted, with changes made in the directions as the parties stipulated that the road in the vicinity of the accident ran in an east-west direction rather than a north-south direction) that the collision occurred on June 23, 1967, at approximately 2:50 p.m. on North Carolina Highway 150. The highway was paved to a width of 22 feet for two lanes of travel. The roadway was dry and the weather was clear. Plaintiff's vehicle was a 1965 Ford Mustang, and the defendant's vehicle was a 1959 Chevrolet automobile. Immediately preceding the accident, plaintiff's Mustang was parked in a private drive on the south side of the highway preparing to enter the highway. Approximately 200 feet east of the driveway, the highway curved sharply towards the south.

> "4. That while the plaintiff's wife was stopped preparing to enter N. C. Highway 150, she looked both to the [west] and then to the [east] and, ascertaining that there were not approaching vehicles to be seen, she started off in first gear, then made a left turn onto the highway, proceeding in the [westbound] lane, and thereafter shifted into second gear and obtained a speed of approximately 20 miles per hour in a [westerly] direction down N. C. Highway 150;
>
> 5. That, at or about the same time that the plaintiff's motor vehicle entered N. C. Highway #150 from a private drive, the defendant's motor vehicle operated by the defendant Larry Wayne Butts rounded the sharp curve in N. C.

Highway #150 and thereafter proceeded [west] in the [west] lane of travel and crashed into the rear of the plaintiff's vehicle and knocked the plaintiff's vehicle down the roadway and into a ditch along the [north] side of said highway causing the plaintiff's motor vehicle to overturn and the damages as alleged in the Complaint;

6. That the sole proximate cause of the collision complained of and the damages to the plaintiff's automobile was the negligence of the defendant in failing to keep a proper lookout and in failing to keep his Chevrolet automobile under proper control; and, further, the Court finds that the plaintiff is entitled to a Judgment for the damages to the plaintiff's automobile."

The trial judge then proceeded to answer issues of negligence, contributory negligence and damages in favor of the plaintiff and awarded $1,360.00.

The defendant excepted to Finding of Fact No. 6 for that it was not supported by the evidence and also assigned as error the signing and entry of the judgment.

Bethea, Robinson and Moore by Norwood E. Robinson for defendant appellant.

McMichael, Griffin and Post by Albert J. Post and W. Edward Deaton for plaintiff appellee.

CAMPBELL, Judge.

[1] A jury trial having been waived, the findings of fact by the trial court are conclusive if supported by any competent evidence and a judgment supported by such findings will be affirmed. *Piping, Inc. v. Indemnity Co.*, 9 N.C. App. 561, 176 S.E. 2d 835 (1970).

"Generally, in tort actions involving issues of negligence . . . the law casts upon the plaintiff the burden of showing the defendant's negligence. . . . " *Jernigan v. R. R. Co.*, 275 N.C. 277, 167 S.E. 2d 269 (1969).

The record shows that the collision occurred in a 55 mile per hour zone.

The driver of plaintiff's automobile testified:

" . . . I left my mother's and I came out to the highway and I stopped as I got to the edge of the highway. I looked to my left and then to my right and did not see anything coming, so I went out in the highway, and I guess I had gone about 50 feet, I reckon, and I was hit from the back. . . . When the accident occurred, I had just shifted to second. I was just pulling out and I had shifted to second. I was going about 15 to 20 miles per hour and I had gotten on my side of the road, the right side.

. . . I did not see the defendant's motor vehicle before the accident, nor did I hear anything before the accident. I did not hear a horn blow, nor did I hear tires squeal. I was on my right side of the highway and I was fully in my lane of traffic. . . . The left rear of my automobile was struck by the defendant's car and the right front of the Butts' automobile was damaged. When I pulled up to the edge of Highway 150, and looking to the east, I guess I could see about 200 feet and it was pretty clear looking to the west. The roadway looking to the east from where I was stopped in the driveway at the edge of the highway there is a curve. I guess the curve is about 200 feet from the driveway, but I am not sure.

Q. Can you see much behind the curve?

A. Not unless you get into the highway; not much further, I don't think.

I stopped in the driveway before I pulled onto the highway. I looked both ways; I looked to my left, then to my right, and then I proceeded out into the highway. I had shifted to second as I have said when I was struck from behind. I never did see the Butts' vehicle before the accident. . . .

. . . The road was clear and dry and I had planned to go in a westerly direction. I pulled up to the road and stopped, and I looked first to my left and did not see anything coming. There was nothing to obstruct my view to my left. I looked to my right and to the best of my knowledge there was approximately 200 feet to my right that I could see unobstructedly. I looked to my right approximately 200 feet and did not see anything at all. I then

pulled out into the road. I usually pull into the road at an angle, but I do not remember exactly what I did on this particular day. I had a three-year-old boy in the front seat with me. I believe he was sitting. When I pulled up to the highway and saw nothing to the right, I did not look back to my left. I last looked to my right. When I looked to my right, I just pulled on out because there was nothing coming and there was a clear view to my left. I last looked to my right just before I pulled out. . . . The front bumper of my automobile was at the edge of the paved portion of the road when I stopped before entering the highway. I then pulled out after I had looked to my right because I saw nothing.

Q. Then, you were not looking back to your right after you started out, were you?

A. No."

There was no other witness for the plaintiff. The defendant testified:

"I was traveling between 50 and 55 miles per hour in a westerly direction on Highway 150. As I traveled westerly and before the accident, I did see an automobile at the end of the driveway. . . . The plaintiff's car was stopped there. The bumper of the car was about even with the pavement. I was traveling on my right side of the road, that is the north side of the road. It was about 300 feet from my automobile to the plaintiff's automobile when I first saw her stopped on the side of the highway. When I first saw her, I did not reduce the speed of my vehicle at that time, but about the time I saw her, she started to pull out and I blew my horn and applied my brakes. I put my foot on the brakes to break the speed but not enough to slide.

After I blew my horn, the car kept coming out in the highway. I kept on blowing my horn and I was pretty close to her and I saw this little boy sitting there in the right front seat and I swerved to the left trying to miss her. When I swerved to the left, the right front of my automobile struck her left rear. My car slid a little ways after the collision and stopped and I got out. Her car went over in the man's yard and turned over. . . .

. . . I was really close to the Blackwell car when I first saw the child. I was about 300 feet from the Blackwell car when I first saw it. When I first saw it it was stopped, and I went on, and she pulled out. When I first saw it, she was stopped, and she pulled out and then I blew the horn. . . .

* * *

After my car hit the Blackwell car, it stopped up the road a little ways, but I don't know how many feet; I don't believe it was quite 50 feet. I will make a mark on the blackboard where I was when I blew my horn; it was right along here when I saw her, and I reckon right here when she started out. I blew my horn and I put my brakes on here when I saw that she was coming on out. I do not know how fast my car was traveling when I hit the Blackwell car, I was trying to get away from that little boy. There was not any traffic coming from the other direction. My car was not completely in the west lane of traffic. She was in the middle of the road in an angle. I will make a mark showing what type of an angle that she came into the road. It was like that, and I came in here like that. This is my car and this is her car. She was coming out of the driveway and I was coming up here like that."

[2-4] The driver of the plaintiff's automobile, before entering the public highway from a private driveway, had the duty to yield the right of way to all vehicles approaching on the public highway. G.S. 20-156(a). The fact that the driver of plaintiff's automobile emerging from the private driveway stopped before entering the highway, did not relieve her from further responsibility with respect to the exercise of due care. 60A C.J.S., Motor Vehicles, § 345. She knew that she could not see to her right, that is, to the east more than 200 feet because of the sharp curve to her right. Due care imposed the further duty to proceed with great caution out into the highway before leaving a position of safety. It was also incumbent upon her to look again to her right when she would then have a greater view around the curve before she entered the traffic lane for westbound traffic. It was westbound traffic which would be coming around the curve. It is obvious from her testimony quoted above that she could have seen around the curve further if she had gotten out into the eastbound traffic

lane. The eastbound lane was unobstructed both as to vehicles and view.

If she had then looked, she would have seen the defendant's vehicle in time to let it pass. Instead, she never looked again to the right but proceeded going to the left at an angle and into the westbound traffic lane. The mere fact that the plaintiff's driver got into the westbound lane a split second or two before being struck by the defendant's vehicle did not give her the right of way. *Moore v. Butler,* 10 N.C. App. 120, 178 S.E. 2d 35 (1970).

The factual situation in this case is quite similar to the facts in *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111 (1953), except that in this case the driver of the plaintiff's vehicle succeeded in getting into the highway a little bit further than in the *Garner* case, and instead of being struck in the side, was struck on the left rear corner by the defendant as he was maneuvering to avoid the sudden entrance of the plaintiff's vehicle into the highway immediately in front of him. The defendant had the right of way until it was occluded by the negligent movement of the driver of the plaintiff's automobile. *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305 (1968).

The fact that the driver of plaintiff's automobile succeeded in getting across the highway and into the westbound traffic lane a split second before being struck by defendant's vehicle does not make applicable the rules with regard to following too closely and rear-end collisions. These rules only apply where one vehicle has been in front of another vehicle for a sufficient length of time to enable the following driver, in the exercise of due care, to be conscious of the vehicle in front, which was not the situation here involved. 60A C.J.S., Motor Vehicles § 323.

The evidence in this case does not support the finding of the trial judge "[t]hat the sole proximate cause of the collision complained of and the damages to the plaintiff's automobile was the negligence of the defendant in failing to keep a proper lookout and in failing to keep his Chevrolet automobile under proper control." Under the evidence taken in the light most favorable to the plaintiff, the plaintiff failed to establish his right to a recovery.

The judgment of the Superior Court appealed from is

Reversed.

Judge HEDRICK concurs.

Judge BRITT dissents.

Judge BRITT dissenting:

The majority opinion correctly states that where jury trial is waived, the findings of fact by the trial court are conclusive if supported by any competent evidence and a judgment supported by such findings will be affirmed. *Piping, Inc. v. Indemnity Co.*, 9 N.C. App. 561. In my opinion the findings of fact are supported by competent evidence and support the judgment appealed from.

Crucial findings of fact are numbered 4, 5, and 6 and are set forth in the majority opinion. No exception was noted to 4 and 5, therefore, we can assume that defendant concedes they are supported by competent evidence. 1 Strong, N. C. Index 2d, Appeal and Error, § 28, pp. 157-162. Findings 4 and 5 establish that before entering the highway, plaintiff's wife stopped, looked to her left and her right and "ascertaining that there were no approaching vehicles to be seen, she started off in first gear, then made a left turn onto the highway, proceeding in the (westbound) lane, and thereafter shifted into second gear and obtained a speed of approximately 20 miles per hour in a (westerly) direction down N. C. Highway 150"; thereafter defendant, who had come around a sharp curve some 200 feet east of the point where plaintiff's wife entered the highway, crashed into the rear of plaintiff's vehicle. Plaintiff's wife testified that the front bumper of her car was at the edge of the paved portion of the highway when she stopped; that she had traveled about 50 feet and was in the westbound lane when struck; that the paved portion of the road was 22 feet wide and she looked to her right immediately before driving onto the pavement.

A portion of defendant's testimony is set forth in the majority opinion. If the court had accepted defendant's version of the occurrence, a judgment in favor of defendant could be fully supported, but the court elected to accept plaintiff's version.

Evidently, the Court was influenced by defendant's testimony on cross-examination disclosing that although he was only 19 at the time of the collision he had theretofore had "other traffic violations," one for reckless driving and "about" three for speeding and driving on wrong side of road; he had lost his license once and had been involved in three or four accidents.

In my opinion the trial court's determination that the sole proximate cause of the collision was the negligence of the defendant in failing to keep his Chevrolet under proper control and failing to keep a proper lookout is fully supported by the evidence. I vote to affirm the judgment of the Superior Court.

STATE OF NORTH CAROLINA v. MARQUIS DeLAFAYETTE PITTS

No. 7121SC76

(Filed 3 February 1971)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering and larceny — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on issues as to defendant's guilt of the felonies of breaking and entering a furniture store and larceny of property therefrom.

2. **Criminal Law § 164— review of nonsuit question — failure to renew motion at conclusion of evidence**

The sufficiency of the State's evidence will be reviewed on appeal even though defendant failed to renew his motion for nonsuit at the conclusion of the evidence as required by G.S. 15-173. G.S. 15-173.1.

3. **Criminal Law § 21; Indictment and Warrant § 1— necessity for preliminary hearing**

A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment, and a defendant who is tried on a bill of indictment is not entitled to a preliminary hearing as a matter of right.

4. **Criminal Law § 21; Indictment and Warrant § 1— preliminary hearing 13 days after arrest — dismissal of indictment**

The fact that defendant was given a preliminary hearing on a warrant 13 days after his arrest on the warrant is not grounds for dismissal of an indictment obtained against him more than a month thereafter.

5. **Criminal Law § 167— presumption of regularity**

There is a presumption in favor of the regularity of the proceedings in a trial court.

6. Criminal Law § 21; Indictment and Warrant § 1— preliminary hearing — denial of right to present evidence

The record does not support defendant's contention that he was denied the right to present evidence in his own behalf at his preliminary hearing.

7. Arrest and Bail § 9; Indictment and Warrant § 14— dismissal of indictment — excessive bail

Defendant's contention that bill of indictment returned against him should be dismissed because he had been held under excessive bond is without merit.

8. Arrest and Bail § 9— amount of appearance bond

Appearance bond of $5,000 for defendant charged with felonious breaking and entering and felonious larceny was not excessive.

9. Arrest and Bail § 10— contention that bond increased by arresting officer

Defendant's contention that the bond requirement set by the issuing magistrate was increased by the arresting officer is unsupported by the record.

10. Constitutional Law § 31— notice of charges against defendant

Defendant's contention that he was denied timely notice of the charges against him in the bill of indictment is not supported by the record.

APPEAL by defendant from *Armstrong, Superior Court Judge,* 10 August 1970 Criminal Session of Superior Court held in FORSYTH County.

Defendant was charged in a bill of indictment, proper in form and returned by the grand jury as a true bill at the 27 July 1970 Session of Superior Court of Forsyth County, with the three felonies of breaking and entering, larceny, and receiving stolen goods knowing them to have been stolen. He was tried on the first two counts of breaking and entering and larceny. The jury returned a verdict of "guilty as charged" on both counts. From an active prison sentence on the first count of breaking and entering and a suspended prison sentence on the second count of larceny, the indigent defendant appealed to the Court of Appeals.

Attorney General Morgan, Trial Attorney Cole, and Staff Attorney Ricks for the State.

Curtiss Todd for defendant appellant.

MALLARD, Chief Judge.

The evidence for the State tended to show that the driveway to the loading area of the store and warehouse of the Keith-Lowery Furniture Company, a corporation, at Eighth and Liberty Streets in Winston-Salem was fenced in on 9 June 1970. There was a gate at the entrance of this driveway.

A police officer testified that in response to a call, he went to the area about 4:00 a.m., parked his car with the lights shining into the driveway, and saw a person "poke his head out of the door and look towards me and then his head go back in." The officer thereupon used his radio to call for help. Two other officers arrived. They found the chain and the hasp which secured the gate to the driveway had been broken, and a truck was parked at the loading platform.

A demand was made by the officers for whomever was in the building to come out, whereupon defendant Pitts and a man by the name of James Crosby came out. There was nobody else in there. The defendant Pitts was searched there at the scene, and in his pocket the officer found one of the padlocks which had been used the night before on the chain to secure the gate to the driveway.

Entry into the main warehouse and store had been made through a window from the shipping room. This glass window had been covered with iron bars which had been pulled and bent in order to gain entry, and the window glass was broken. The shipping room was not a part of the main warehouse and store, and it was separated from the loading platform by sliding doors. The door to the shipping room from the main warehouse and store had a bar across it on the inside of the warehouse and store which had been removed and the door opened. The officers found in the shipping room five portable television sets, a stereo tape recorder, and an AM and FM radio combination sitting on top of one of the television sets, all of which had been removed from the main store or warehouse. When the business was closed the night before, these television sets, radio, and tape recorder were not in the shipping room.

The building was locked and secured the night before, the door from the main building to the shipping room was closed with a bar across it on the inside, the bars across the window were not bent, and the window was not broken. An ADT

burglar alarm system was activated by L. J. Keith, Secretary-Treasurer of the Keith-Lowery Furniture Company, when he closed and locked the building on the evening of 8 June 1970 at about 6:00 p.m. In the early morning hours of 9 June 1970, "the ADT people" notified Mr. Keith that the store had been entered and shortly thereafter he went to the store.

Defendant testified that on 8 June 1970, he, "Frankie, the co-defendant," and others went to South Carolina and returned about 12:30 or 1:00 a.m. (It appears that the defendant refers to James Crosby, the other person apprehended by the officers in the building, as "Frankie.") He and Frankie had been drinking and decided to go over on the eastside to a "drink house" although "we stay on the west side of town." They went to a bus station and Frankie left first. Defendant stayed at the bus station for about twenty-five or thirty minutes after Frankie left and then went to Liberty Street. He went "straight up Liberty." Defendant said:

> "I was whistling, you know, and singing to myself. When I got up by Keith and Lowery I was whistling and singing, and when I started by, was just about past Keith-Lowery, somebody said, 'pst. Hey, Dee.' I looked back and didn't see anybody. When I started to turn, I heard it again. So when I stepped back I saw Frankie. He was standing back there on what they say was the loading dock of Keith-Lowery. And he motioned for me to come here. So I went on over to the gate, opened the gate, and when I started in my foot hit something—you know, I kicked it when I was walking—and I picked it up. It was a lock. It was the same lock in question here. I picked the lock up. I walked on back there to see what he wanted. When I walked back there he was standing back there, and it was some televisions and stuff sitting out there on that loading dock. I said, 'Man, what are you doing back here?' you know. When I went back there they were sitting back there, and I told him to come on out, told him to come on out because the place was burglarized. And just as we turned to walk out—I guess he was going to go with me; I was going to go about my business—as we turned to walk out. I guess that is when Sergeant Kelly pulled up because we could see the lights, you know, appear. And Frankie peeped out from around there and said it was the police. And I got kind of mad then.

I told him, I said, 'Now, here I am standing back here; I don't know what is going along, and I am going to jail with you.' And I sat down. I went on out, and it never dawned on me that I had the lock in my pocket until the officers searched me and pulled the lock out."

The defendant testified that he had nothing whatever to do with breaking into the place, that he did not steal anything, and that he did not go there with the intent to steal anything.

On cross-examination as to his criminal record, the defendant testified that he went to training school for storebreaking, had been convicted of "temporary larceny of an automobile," had been convicted of escape, and had been convicted in Federal court of the interstate transportation of a stolen motor vehicle.

[1, 2] Defendant assigns as error the failure of the trial judge to allow his motion for judgment of nonsuit. The State's contention that the defendant's motion for nonsuit should not be considered because it was not renewed as required by G.S. 15-173 at the conclusion of all the evidence is overruled. G.S. 15-173.1, enacted in 1967, provides that "[t]he sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court." See also *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969), and *State v. Davis,* 273 N.C. 349, 160 S.E. 2d 75 (1968). However, we hold that in the case before us there was ample evidence of the defendant's guilt to require its submission to the jury. In finding him guilty, it appears that the jury did not believe the defendant's version of how he happened to be at the place where this crime was committed at the time of its commission.

After the defendant entered a plea of not guilty, he then filed what is denominated a "pretrial motion" which bears no signature and in which he moves to dismiss the charges against him on the following grounds:

"(1.)

Held thirteen (13) days without a probable cause hearing:

(2.)

Denied the right to present evidence in his behalf:

(3.)

Held under excessive bond for duration of incarceration in

Forsyth County Jail under aforesaid charge:

(1A.)

GEMERA v. STATE (See Mallory *Supra*) . . . .*(sic)* which states:

'That a person accused of a crime must be taken before a magistrate for the findings of probable cause within seventy-two (72) hours.'

(1B.)

By holding the Defendant thirteen (13) days, the Court denied them 'due process of law' and 'equal protection of the law.' 'This also is a constitutional rights violation.'

(2A.)

Defendants constitutional rights were violated at the preliminary hearing by the Court denying the accused the right to present evidence in his own behalf.

(3A.)

After arrest and copies of the warrants had been served, the bond requirement as set by the issuing magistrate was increased by the arresting officer from ONE-THOUSAND DOLLARS to FIVE-THOUSAND DOLLARS. This was accomplished by merely marking through the amount the magistrate had typed on the warrants and writing in the altered amount. The arresting officer had no authority to change or alter, in any manner, the warrants. This was prejudicial and discriminatory with evident intent to 'sweat' and coerce the accused into admitting any charge that might be placed against him and/or to make sure he was 'punished' by keeping him in jail with a bond requirement that the arresting officer had reason to believe the accused could not raise.

(4A.)

Denied a timely notice of the charges pending against the accused, by denying him a copy of the 'Bill of Indictment.' In doing this the defendants constitutional rights were violated.

(This has been ruled on by the U. S. Supreme Court in numerous cases) *(sic)*

Denied arraignment proceedings after the 'Bill of Indictment,' was returned:

Here are several rulings that specifically state that a defendant must be arraigned before trial or the trial is void and invalid.

(1)

WATT v. INDIANA, 388 U.S. 49.

Detention with arraignment is a time honored method for keeping the accused under the exclusive control of the police. They can operate at their leisure, the accused is wholly at their mercy. He is without the aid of counsel, or friends and is denied the protection of the magistrate. (From the time the Grand Jury returns an indictment until the defendant goes to trial, which is absolutely up to the State Solicitor you are in the hands of the police and without the protection of the court.)

MCNAB v. U. S. TENN. (1945) *(sic)*

It has been emphasized by the courts that—Detention without arraignment is an illegal method for keeping the accused under coercion and exclusive control of the police while they build a case against the defendless *(sic)* defendant. These illegal methods will not be tolerated.

(This also applies to the thirteen (13) days the defendant was held before preliminary hearing) *(sic)*."

The defendant assigns as error the failure of the court to allow his motion. No authority is cited in his brief filed in this court in support of this assignment of error.

The record reveals that a warrant was issued for the defendant and served on him on 9 June 1970. The record also reveals that a "preliminary examination" was held on 22 June 1970, probable cause was found by a district court judge, and defendant was bound over to superior court under a $5,000 bond.

[3, 4] A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment. *State v. Hartsell*, 272 N.C. 710, 158 S.E. 2d 785 (1968). A defendant who is tried on a bill of indictment, as this defendant was, is not entitled to a prelimi-

nary hearing on the bill of indictment as a matter of right. 4 Strong, N. C. Index 2d, Indictment and Warrant, § 1, p. 335. The fact that the defendant was given a preliminary hearing on a warrant thirteen days after his arrest on the warrant is not grounds for dismissal of an indictment against him which was obtained more than a month thereafter. Moreover, there is nothing in this record to indicate that a delay in holding this preliminary hearing was in any way improper or prejudicial to the defendant. See *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970).

[5, 6] The defendant contends in this unsigned and unverified motion that he was denied the right to present evidence in his behalf. There is a presumption in favor of the regularity of the proceedings in a trial court. In the case of *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968), it is said: "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." There is nothing in this record to suppport this part of the motion that the defendant was denied the right to present evidence in his behalf at any time. The unsigned and unverified motion appearing in this record does not support the allegations therein.

[7, 8] The defendant's contention that the charge in the bill of indictment which was returned by the grand jury at the 27 July 1970 session of court should be dismissed because he was theretofore held under what he contends was excessive bond is without merit. Moreover, in this case an appearance bond for this defendant in the sum of $5,000 was not excessive.

[9] The defendant's contention that the bond requirement set by the issuing magistrate was increased by the arresting officer is not supported by the record and is without merit. Neither is there anything in this record to indicate that there was any effort by anyone to coerce the defendant to admit anything.

[10] Defendant's contention that he was denied timely notice of the charges against him in the bill of indictment is not supported by the record, and no motion for a continuance on the grounds that he did not know what he was charged with was made by the defendant at the time of the trial.

Many of the allegations appearing in the motion are redundant. We are of the opinion and so hold that Judge Arm-

strong correctly denied the defendant's "pretrial motion" to dismiss the charges against him.

In the trial we find no prejudicial error.

No error.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. FRANKIE JAMES CROSBY

No. 7121SC75

(Filed 3 February 1971)

APPEAL by defendant from *Armstrong, Judge,* at the 10 August 1970 Criminal Session, FORSYTH Superior Court.

By indictment proper in form, defendant was charged with (1) breaking and entering the Keith-Lowery Furniture Company store building, (2) felonious larceny of personal property valued at $1,139.00, and (3) feloniously receiving said property. He pleaded not guilty. For its verdict a jury found defendant guilty of storebreaking and felonious larceny. On the storebreaking count, the court imposed a prison sentence of seven to ten years. On the larceny count, the court imposed a prison sentence of seven to ten years, to begin at expiration of sentence on the storebreaking count, but suspended the prison sentence on certain conditions. From judgment imposing the sentences, defendant, an indigent, appealed.

Attorney General Robert Morgan by Staff Attorney Ricks for the State.

Curtiss Todd for defendant appellant.

BRITT, Judge.

The record on appeal in this case and the record on appeal in the case of *State v. Marquis DeLafayette Pitts* (No. 7121SC76) were filed in this Court on the same day. Oral arguments were heard in both cases on the same day but by different panels of the Court. The records disclose that although de-

fendants Crosby and Pitts were charged with the same offenses, they were charged in separate bills of indictment and were tried separately before the same judge at the same session of the court. They were represented at trial by the same attorney and he represents them both in this Court. Evidence for the State was substantially the same in both cases. At his trial Pitts testified and presented testimony of another witness; at his trial defendant Crosby presented no evidence. They were found guilty of the same charges and the court imposed similar sentences.

Briefs filed in this Court by Pitts and defendant Crosby are virtually identical, raising the same questions. No error was found in the Pitts case and Chief Judge Mallard, writing the opinion in that case, reviewed the evidence and discussed each of the quesions raised. We have carefully reviewed the record in this case, with particular reference to the questions raised in the brief, but conclude that for the reasons stated in the opinion filed this day in the Pitts case, defendant Crosby's trial was free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

BUILDERS SUPPLIES COMPANY OF GOLDSBORO, NORTH CAROLINA, INC. v. NORWOOD A. GAINEY AND WIFE, EDNA FRANCES GAINEY

No. 708SC591

(Filed 3 February 1971)

1. **Easements § 7; Deeds § 14— reservation of sand and gravel rights in part of property conveyed — right of grantor to select area — sufficiency of description**

Reservation by the grantor in a deed conveying 331 acres of land to defendants of "the right to lay out and stake off 35 acres of the above described land wherever it so desires and to take therefrom all sand and gravel it so desires," *held* not void for vagueness, where the grantor made the selection of the 35 acres and staked it off without objection from defendants, defendants thereafter removed sand and gravel from the 331-acre tract up to the lines so staked off, and defendants subsequently assisted an assignee of the grantor's sand and

gravel rights to locate the stakes for a survey to be made of the 35-acre tract.

2. **Rules of Civil Procedure § 50— motion for directed verdict — failure to state specific grounds for motion — appellate review of motion**

Appellant who fails to state specific grounds for his motion for directed verdict is not entitled, upon appeal from denial of the motion, to question the insufficiency of the evidence to support the verdict; if such a motion is granted, the adverse party who did not object at trial to the failure of the motion to state specific grounds therefor cannot raise the objection on appeal.

APPEAL by plaintiff from *Bundy, Judge,* 7 May 1970 Session of Superior Court of WAYNE County.

On 18 April 1952, Bryan Rock and Sand Company conveyed to defendants a 331-acre tract of land by warranty deed duly recorded. The deed contained full metes and bounds descriptions of two tracts of land in Wayne County, the first tract containing 223½ acres, more or less, and the second tract containing 107½ acres, more or less. Immediately following the descriptions and a reference to a lease to which the deed was subject was the following provision:

> "The party of the first part expressly reserves the right to lay out and stake off 35 acres of the above described land wherever it desires and to take therefrom all sand, gravel and sand and gravel it so desires with the right of ingress, egress and regress over any part of said land for the purpose of removing said sand or gravel."

On 31 July 1959, Bryan Rock and Sand Company conveyed to American-Marietta Company six tracts of land and "all right, title, interest and estate reserved to Bryan Rock & Sand Company in and to all deposits of rock, stone, gravel and sand in, under and upon the above described lands," referring to the 331 acres conveyed to defendants. On 11 May 1964, Martin-Marietta Corporation by written instrument assigned all of its "right, title and interest of the party of the first part in sand and gravel, clay and earth" under the deed to defendants to plaintiff.

Prior to the sale to American-Marietta or at the time of the transaction, Bryan Rock and Sand Company had its representatives go on the land and stake off a 35-acre parcel, without objection from defendants. After the 35-acre parcel was staked

off, defendants in their own pumping operations, pumped sand up to the lines staked off by Bryan Rock and Sand Company. When plaintiff first went on the land to survey the 35-acre tract, defendant Gainey assisted in locating the stakes and showed plaintiff's surveyor where to get started. The surveyor was able to establish the boundary lines through stakes pointed out by Mr. Gainey.

In 1966, plaintiff went upon the 35-acre tract to set up equipment for the purpose of taking samples of the sand and gravel and was ordered off the land by defendants.

Plaintiff brought this action to obtain an adjudication that it is the owner of an easement for the taking and removal of sand and gravel from the 35-acre parcel, to restrain defendants from interfering or attempting themselves to remove any sand and gravel therefrom, and for damages.

Defendants answered denying generally the allegations of the complaint and setting up the pleas of laches, statutes of limitations, and non-assignability of the sand and gravel rights reserved.

At the close of plaintiff's evidence, defendants' motion for directed verdict was granted and plaintiff appealed.

Smith and Everett, by James N. Smith, for plaintiff appellant.

Taylor, Allen, Warren and Kerr, by John H. Kerr III, for defendant appellees.

MORRIS, Judge.

[1] Defendants contend that the reservation of the sand and gravel rights in the deed of Bryan Rock and Sand Company to defendants is void for vagueness, but if not void for vagueness, constituted a right extending only to Bryan Rock and Sand Company to select the 35-acre tract.

We agree with defendants that the easement now before us leaves a lot to be desired with respect to certainty and clarity and suffers greatly when compared to the reservation approved in *Reynolds v. Sand Co.*, 263 N.C. 609, 139 S.E. 2d 888 (1964). Nevertheless, we are, in our opinion, bound by the result reached in *Gas Co. v. Day*, 249 N.C. 482, 106 S.E. 2d 678 (1958), fol-

lowed by this Court in *Feldman v. Gas Pipe Line Corp.*, 9 N.C. App. 162, 175 S.E. 2d 713 (1970).

In *Gas Co. v. Day, supra,* defendants' predecessors in title, for a valuable consideration, sold to Piedmont Natural Gas Company, Inc., its successors and assigns, "a right of way and easement for the purposes of laying, constructing, maintaining, operating, repairing, altering, replacing, and removing pipe lines (with valves, regulators, meters, fittings, . . . and appurtenant facilities) for the transportation of gas, oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipe line, the Grantee to have the right to select the route (the laying of the first pipe line to constitute the selection of the route by the Grantee) under, upon, over, through, and across lands of the Grantors," (specifically describing a 50-acre tract). The Gas Company contracted to pay and did pay for damages to crops, timber, and fences resulting from the construction of the pipe line. The grantors of the easement subsequently conveyed to defendants a portion of the 50-acre tract, the deed containing an exception as to encumbrances with respect to Gas Company easement. Plaintiff brought suit to enjoin and restrain defendants from interfering with its easement rights. Defendants contended that the easement was void for indefiniteness by reason of the failure to locate the line or boundary of the easement and that the recorded instrument constituted a cloud on their title. Justice Higgins, writing for a unanimous Court, said:

> "The easement here involved is not open to the objection the line along which the pipes were to be laid is not defined in the grant. The instrument itself gives the grantee the right to select the line. The plaintiff made the selection, constructed the line, paid the damages to the crops, timber and fences, and took from the grantors a full receipt for the payment. This occurred long before the defendants acquired title from the original grantors. Both the defendants' contract to purchase and their deed specifically state the land is free and clear of all encumbrances, 'except those certain easements heretofore granted to Duke Power Company, Southern Bell Telephone and Telegraph Company, and Piedmont Natural Gas Company.'
>
> 'It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located,

> the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.' *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541. The defendants' contention the grant is void for uncertainty of description cannot be sustained."

In the case before us, plaintiff introduced evidence which, if believed, tended to show that Bryan Rock and Sand Company made the selection of the 35 acres and staked it off without objection from defendants, that defendants removed sand and gravel from the 331-acre tract up to the lines so staked off, that defendants subsequently assisted plaintiff in locating the stakes for a survey to be made of the 35-acre tract.

In light of *Gas Co. v. Day, supra,* and *Feldman v. Gas Pipe Line Corp., supra,* we are constrained to hold that the evidence presented was sufficient to withstand a motion for directed verdict.

[2] The record before us is barren of the grounds for the motion for directed verdict. G.S. 1A-1, Rule 50(a) contains the requirement that "a motion for directed verdict shall state the specific grounds therefor." Nor does the judgment supply the grounds. This Court has held that an appellant who failed to state specific grounds for his motion for directed verdict is not entitled, on appeal from the Court's refusal to allow the motion, to question the insufficiency of the evidence to support the verdict. *Wheeler v. Denton,* 9 N.C. App. 167, 175 S.E. 2d 769 (1970). Conversely, if such a motion is granted, the adverse party who did not object at trial to the failure of the motion to state specific grounds therefor cannot raise the objection on appeal. *Pergerson v. Williams,* 9 N.C. App. 512, 176 S.E. 2d 885 (1970). The record does not disclose an objection made at trial, nor does appellant raise the question on appeal. Therefore, and also because the Rules of Civil Procedure, at the time the trial of this matter had so recently become effective, we have reviewed the matter on its merits. *Turner v. Turner,* 9 N.C. App. 336, 176 S.E. 2d 24 (1970).

Reversed.

Judges BROCK and VAUGHN concur.

SUSAN DANTZIC, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 7029SC550

(Filed 3 February 1971)

1. **Criminal Law § 180— writ of coram nobis — appropriate jurisdiction of the appellate division**

The Court of Appeals is without authority to entertain an application for writ of *coram nobis;* application for the writ must be made to the Supreme Court.

2. **Criminal Law § 181— post conviction hearing — scope of review — petitioner under suspension of sentence**

The Post Conviction Act is not available to a petitioner whose sentence was suspended and who is not a person imprisoned; petitioner's remedy is to apply for the writ of *coram nobis.* G.S. 15-217.

APPEAL by petitioner from *Snepp, Superior Court Judge,* 9 March 1970 Mixed Session, RUTHERFORD Superior Court.

On 16 August 1969 petitioner represented by privately employed counsel, entered a plea of guilty to a charge contained in a bill of indictment of exhibiting obscene and lewd movies depicting sexual intercourse. Judgment was entered imposing a six months prison sentence, suspended upon certain conditions. Petitioner did not appeal. On 13 October 1969 she applied to this Court for leave to apply to the Superior Court of Rutherford County for a writ of error *coram nobis.* On 30 October 1969 this Court granted petitioner permission to apply for the writ to the Superior Court of Rutherford County. Hearing on the application was held on 19 March 1970. From a judgment denying the relief sought, petitioner appealed.

Attorney General Robert Morgan by Staff Attorney Rafford E. Jones for the State.

Smith and Patterson by Norman B. Smith for petitioner appellant.

VAUGHN, Judge.

[1] Although not raised by either party on this appeal, the opinion of the Supreme Court in *State v. Green,* 277 N.C. 188, 176 S.E. 2d 756, filed subsequent to the order by which this Court, in its discretion, granted petitioner leave to apply to the

superior court for a writ of error *coram nobis,* raises a question as to whether the order was properly entered.

[2] The basic applications of the writ of error *coram nobis* have not essentially changed, though they have been expanded, from its common law genesis in civil cases during the sixteenth century through current criminal practice. Its framework has been adopted by statutes in a number of jurisdictions, including North Carolina, as a means of giving the trial court an opportunity to re-examine judgments of conviction for alleged errors outside of the record and for determining unadjudicated allegations of deprivation of constitutional rights. It has been said that the North Carolina Post Conviction Act (G.S. 15-217 through 15-222) was passed to replace the writ of error *coram nobis* insofar as the constitutionality of criminal trials is concerned *(State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687), and that, as now written, it "incorporates *habeas corpus, coram nobis* and any other common law or statutory remedy under which a person may collaterally attack his sentence." *State v. White,* 274 N.C. 220, 162 S.E. 2d 473. Judgments under this Act may be reviewed by the Court of Appeals, G.S. 15-222, and its decisions rendered thereon are not subject to further review in the courts of this State. G.S. 7A-28. The opinion in *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651, intimates that a convicted defendant, having been subjected to a restraint upon his liberty not shared by the public generally (though not physically restrained) might avail himself of the same procedures for review as one who is actually confined, but the case does not expressly so hold. It appears therefore that the Post Conviction Act is not available to the present petitioner whose sentence was suspended and who is not a "person imprisoned in the penitentiary, Central Prison, common jail of any county . . . assigned to work under the supervision of the State Department of Correction." G.S. 15-217. Thus the defendant properly selected the relatively quiescent remedy of *coram nobis* as a means of seeking redress.

[1] For present purposes the facts in *State v. Green, supra,* may be stated as follows. Defendant was convicted in recorder's court and given a suspended sentence. Thereafter, upon a finding that defendant had violated the conditions of his suspended sentence, the sentence was ordered into effect and defendant appealed to the superior court. While the case was pending trial in the superior court, defendant applied to that court for the

issuance of a writ of error *coram nobis,* contending among other things, that he was deprived of his right to counsel in the recorder's court in violation of the rights secured to him by the Sixth and Fourteenth Amendments of the United States Constitution. From the denial of this application, defendant appealed to the Court of Appeals where the judgment of the trial court was affirmed on the grounds that, since the offense of which the defendant was convicted was a "petty" offense, defendant was not entitled to counsel as a matter of right. *State v. Green,* 8 N.C. App. 234, 174 S.E. 2d 8. On appeal to the Supreme Court, the Court held that defendant's application for the writ of error *coram nobis* should have been denied for the following reasons: (1) The "unauthorized application" was made to the wrong court. It should have been made to the recorder's court where the case was tried rather than to the superior court to which the judgment ordering the suspended sentence into effect had been appealed and was awaiting trial; and (2) application must first be made to and granted by the Supreme Court of North Carolina for permission to apply to the trial court for the writ of error *coram nobis.* The opinion contains the following:

> " . . . [A]uthority for the writ stems from Article IV, Section 8 (now Section 10) of the Constitution of North Carolina which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. *State v. Daniels,* 231 N.C. 17, 56 S.E. 2d 2 (1949).
>
> "Since authority for issuance of the writ derives from the supervisory power of the Supreme Court conferred by the Constitution, 'it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. . . .' "

The requirement that, in every instance, the approval of the Supreme Court must first be obtained before application can be made to the trial court for issuance of the writ of error *coram nobis* appears to be novel to North Carolina and here, of recent vintage. Prior to *In re Taylor,* 229 N.C. 297, 49 S.E. 2d 749, it does not appear that authority for the issuance of the writ, long recognized as an available common law writ, was derived from the supervisory powers granted in the Constitution but rather from G.S. 4-1 which, with certain exceptions,

adopted the common law as the law of this State. In *In re Taylor, supra,* defendant petitioned the Supreme Court to review a judgment of the superior court in a *habeas corpus* proceeding. Counsel appointed by the Supreme Court filed a report with the Court in which he reported that having come "to the conclusion that it was debatable whether the legality of the petitioner's trial based upon the suggestion of deprivation of statutory and constitutional rights could be decided on the merits in a proceeding in *Habeas Corpus,*" he had advised the defendant to petition the Court for permission to file petitions for writs of error *coram nobis* in Pitt County Superior Court but that petitioner had declined to follow his advice. In support of his contention that the Supreme Court *could* grant such a petition for leave to apply to the superior court, counsel cited several cases, which although related to the supervisory powers of the Court, did not deal with the issuance of the writ of *coram nobis.* The Court held that the writ of *habeas corpus* was inappropriate and denied defendant's petition to review the same. In *In re Taylor,* 230 N.C. 566, 53 S.E. 2d 857, the same prisoner apparently decided to follow the advice given him by counsel in the earlier case and did apply to the Supreme Court for leave to apply to the superior court for writs of error *coram nobis.* Although not holding that application must first be made to the Supreme Court in every case, the Court recited that "[t]he instant application for permission to apply to the trial court is addressed to the supervisory authority of this Court over 'proceedings of the inferior courts' of the State" and, in part, granted the application. A similar situation existed in *State v. Daniels,* 231 N.C. 17, 56 S.E. 2d 2. In that case defendants had been convicted of murder and their attorneys were late in serving the case on appeal. Defendants applied to the Supreme Court for *certiorari* to bring up the case on appeal, which the Court denied. The Court then observed that the gravamen of the challenge to the trial consisted of matters extraneous to the record and suggested that resort could be had to the writ of error *coram nobis.* The Court then stated that, upon a *prima facie* showing of substantiality, the Court would, in the exercise of its supervisory power, grant permission to apply for the writ to the court in which the case was tried. Defendant did apply but permission was denied for want of merit in *State v. Daniels,* 231 N.C. 341, 56 S.E. 2d 646. Subsequently in *State v. Daniels,* 231 N.C. 509, 57 S.E. 2d 653, the Court ordered the record

proper to be filed in the case and records to be docketed. The judgment of the trial court was then affirmed and the appeal was dismissed. It may be observed that in the *Taylor* and *Daniels* cases the applications for permission to petition the trial court for the writ were made at the suggestion of the Supreme Court while some phase of the case was pending in and being considered by that Court. Thus the applications were, in those cases, considered by the Supreme Court in exercise of the general supervisory power granted to it by the Constitution of North Carolina. The statement in the *Taylor* and *Daniels* cases are consistent with, though perhaps expansive of, the doctrine set out in *Latham v. Hodges,* 35 N.C. 267, where the Court held that a writ of error *coram nobis* will not lie in the superior court *after* an appeal to the Supreme Court and an affirmation of the judgment in that Court. Although authority on the precise point is divided, cases in some other jurisdictions have held that after affirmance of a judgment on appeal, permission to apply in the trial court for the writ must first be obtained in the appellate court. See 145 A.L.R. 181; 18 Am. Jur. 2d, *Coram Nobis,* Etc., § 10. It is to be noted that a similar restriction does not apply when a defendant is proceeding under our post conviction statute. Prior to *Green* it does not appear that permission of the Supreme Court was generally required before applying to the trial court for the writ in cases where there had been no appeal and when no aspect of the case was under consideration by the Supreme Court. A review of earlier North Carolina cases discloses several instances where petitions for the writ were made directly to the trial court without application for permission to do so having first been made to the Supreme Court. In *Tyler v. Morris,* 20 N.C. 625, defendant made a motion in the superior court for a writ of error *coram nobis* to reverse a judgment alleging that the plaintiff was dead at the time judgment was rendered. From the refusal of the trial judge to issue the writ, the defendant appealed to the Supreme Court which held that, although on the facts shown the writ could have been issued, it was within the discretion of the trial judge and not subject to review by the Supreme Court. See also *Williams v. Edwards,* 34 N.C. 118. In *Roughton v. Brown,* 53 N.C. 393, judgment had been rendered against defendants in the County Court of Yadkin. Defendant petitioned that court for the issuance of the writ on the grounds that at the time of the rendition of judgment she was a *femme covert.* The county

court granted the petition and ordered the writ to issue. Plaintiff appealed to the superior court where the judgment was reversed. On appeal to the Supreme Court, in answer to plaintiff's contention that application for the writ should have been made in the superior court instead of the county court, the Supreme Court stated the following:

> "The distinction between an ordinary writ of error and a writ of error *coram nobis* is that the former is brought for a supposed error in law apparent upon the record, and takes the case to a higher tribunal, where the question is to be decided and the judgment, sentence, or decree is to be affirmed or reversed; while the latter is brought for an alleged error of fact, not appearing upon the record, and lies to the same court, in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice. A writ of error of this kind will lie to any court of record, and as our county courts are courts of record we cannot conceive of a reason why one of them may not correct an error of fact in its judgment, upon a writ of error brought before itself. See 2 Tidd Practice, 1136, and *Lassiter v. Harper,* 32 N.C., 392."

The decision of the superior court was reversed and, again, there was no suggestion that approval of the Supreme Court was required before applying for the writ in the trial court. Notwithstanding these cases, however, it appears to be established that such permission is now required.

Though filed before the decision in *Green,* the petitioner in the case before us did, in fact, apply to this Court for permission to seek the writ of error *coram nobis* in the trial court. The Court of Appeals, acting in what was then thought to be a discretionary exercise of its supervisory power, granted permission. Petitioner, with some persuasiveness, could contend that the statutes creating the Court of Appeals and defining its jurisdiction, along with the supervisory powers granted to the Court of Appeals by 7A-32(c), pursuant to Article IV, Section 10(2) of the Constitution of North Carolina, authorized such action. These enactments, however, antedate the decision of our Supreme Court in *Green* and that case states unequivocally that it is necessary that application be made to the Supreme Court of North Carolina for permission to apply to the trial court for

the writ of error *coram nobis.* Accordingly, since this Court was without authority to entertain the application, all proceedings in the cause subsequent to our order of 30 October 1969, which we now hold to have been improperly entered, are a nullity.

In view of the foregoing we will refrain from discussing other questions raised by the parties and this Court. We did, however, carefully consider the merits of petitioner's appeal from the judgment of the trial court entered after the hearing on the writ of error *coram nobis* and are constrained to say we would affirm that judgment. Post conviction proceedings, whether instituted under the authority of the statute or the common law, cannot be used as a substitute for, or as an alternative to, direct appeal. The court made findings of fact as to all matters which were properly before the court in the instant application for *coram nobis.* The facts so found, being supported by competent evidence, support the judgment and are conclusive. Insofar as this Court is concerned therefore, the procedural difficulties encountered by the petitioner have not, as a practical matter, changed the result.

Appeal dismissed.

Judges CAMPBELL and BRITT concur.

TRIO ESTATES, LTD. v. CULBRETH E. DYSON

No. 7121DC10

(Filed 3 February 1971)

1. Uniform Commercial Code § 20— seller's action for balance due under contract — acceptance of machine by buyer — jury question

In this action to recover the balance allegedly due on a contract of sale of a "Mr. Slushy" machine wherein defendant admitted that he purchased and received the machine, that he made no payments under the contract except a down payment, and that plaintiff repossessed the machine, defendant's denial of any indebtedness to plaintiff raises an issue for the jury as to whether defendant accepted the machine within the meaning of G.S. 25-2-606; if the jury determines that defendant accepted the machine, it must then determine what amount, if any, plaintiff is entitled to recover from defendant under the terms of the contract. G.S. 25-2-607(1).

2. Uniform Commercial Code § 15— counterclaim for breach of implied warranty of merchantability

In this action to recover the balance allegedly due on a contract of sale of a "Mr. Slushy" machine, the evidence was insufficient for the submission of defendant's counterclaim to the jury on the basis of fraud, total failure of consideration, or breach of implied warranty of fitness for a particular purpose, but defendant was entitled to have his counterclaim submitted to the jury on the basis of breach of implied warranty of merchantability unless the contract contains an exclusion or modification of such implied warranty. G.S. 25-2-314; G.S. 25-2-315; G.S. 25-2-316.

APPEAL by plaintiff from *Henderson, District Judge,* 1 June 1970 Session, District Court, FORSYTH County.

This is a civil action by plaintiff, Trio Estates, Ltd. (seller), to recover from defendant, Culbreth E. Dyson (buyer), $1,148.88 together with reasonable attorney's fees allegedly due on a contract of sale of one Polar Chip Slush Machine. In its complaint, the plaintiff alleged that on 26 May 1969 the plaintiff and the defendant entered into a contract denominated "Note and Purchase-Money Security Agreement" under the terms of which the plaintiff sold to the defendant a Polar Chip Slush Machine (a machine which makes fruit-flavored iced drinks) for $2,559.73, with $270.85 being paid by the defendant as a down payment, the balance of $2,288.88 to be paid in monthly installments of $95.37 beginning 1 July 1969. The plaintiff further alleged that the defendant failed to make any of the installment payments, and that pursuant to the contract, it repossessed and sold the machine crediting the net proceeds from the sale to the balance due on the contract which left a deficiency of $1,148.88.

The defendant filed answer admitting that the plaintiff on 26 May 1969 sold and delivered to him a Polar Chip Slush Machine for a total price of $2,559.73 and that the plaintiff repossessed the machine on 3 December 1969. The defendant denied that he was indebted to the plaintiff in any amount and filed a counter claim for $3,000.00 alleging fraud, "total failure of consideration," breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose.

The plaintiff offered evidence tending to prove the material allegations in its complaint.

The defendant offered evidence tending to show that throughout the summer months during which he operated the

machine it was in need of repair on several occasions. During this period the agitator and shear pins had to be replaced twice. In addition, the motor had to be replaced. On another occasion, the main shaft broke, causing the main bushing to allow the syrup to leak out. This necessitated sending the machine to Smithfield, North Carolina, for repairs. Other malfunctions included leaking spigots and a tendency of one side of the machine to freeze, while the other side would not. Nevertheless, the defendant continued to use the machine from the last of May until at least September, at which time he stored it in a back room of his business.

At the close of the evidence, the plaintiff " . . . moved for a directed verdict on all counterclaims made by the defendant." Whereupon, the record discloses: "Motion allowed as to the counterclaims based on implied warranty, the court holding that implied warranty, were [*sic*] excluded by the express disclaimer in the security agreement. Motion also allowed as to counterclaims for breach of warranty of merchantability and warranty of fitness. Motion denied as to counterclaim based on total failure of consideration."

The case was submitted to the jury upon the following issues which were answered as indicated:

"1. Was the machine sold by the plaintiff to the defendant so defective as to be not reasonably fit for the use for which it was intended?

ANSWER: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: No answer.

"3. What amount, if any, is the defendant entitled to recover of the plaintiff?

ANSWER: $270.80."

From a judgment that the defendant recover of the plaintiff $270.80 plus costs, the plaintiff appealed.

Hamilton C. Horton, Jr., for plaintiff appellant.

Jim Dunn for defendant appellee.

HEDRICK, Judge.

[1] With respect to its claim for relief, the seller pleaded and offered evidence tending to show that it sold and delivered to the buyer under the terms of an express contract a Polar Chip Slush Machine, and that because the buyer defaulted in his payments, the seller repossessed and sold the machine pursuant to the terms of the contract.

The buyer admitted that he purchased and received the machine, and that he did not make any payments under the contract except a down payment of $270.85. The buyer admitted that the seller repossessed the machine, but denied that he was indebted to the seller in any amount.

G.S. 25-2-607(1) provides: "The buyer must pay at the contract rate for any goods accepted." In the instant case the defendant's denial of any indebtedness to the plaintiff raises an issue as to whether the defendant accepted the machine. This issue must be determined by the jury from a consideration of all the evidence in connection with G.S. 25-2-606 which, in pertinent part, provides:

"(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of § 25-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him."

If the jury determines that the defendant accepted the machine, it will then proceed to determine what amount, if any, the plaintiff is entitled to recover of the defendant for the sale of the Polar Chip Slush Machine under the terms of the contract.

[2] With respect to his counterclaim, the buyer pleaded: (1) fraud; (2) "total failure of consideration"; (3) breach of im-

plied warranty of merchantability; and, (4) breach of implied warranty of fitness for a particular purpose.

This record contains no evidence of fraud or "total failure of consideration," nor is there any evidence that there was a breach of implied warranty of fitness for a particular purpose. G.S. 25-2-315.

G.S. 25-2-607(4) provides: "The burden is on the buyer to establish any breach with respect to the goods accepted."

If it shall be determined by the jury that the defendant accepted the machine, then the defendant's counterclaim for breach of implied warranty of merchantability must be considered. G.S. 25-2-314.

The court allowed the plaintiff's motion for a directed verdict against the defendant as to his counterclaim based on breach of any implied warranties, stating that the contract contained an "express disclaimer." The defendant's counterclaim was allowed to go to the jury on the theory of "total failure of consideration." The issue submitted to the jury did not properly present the plaintiff's claim nor the defendant's counterclaim. The defendant is entitled to have his counterclaim, based upon a breach of implied warranty of merchantability, submitted to the jury unless the contract contains an exclusion or modification of the implied warranty. G.S. 25-2-316. Since the contract was not made a part of the record on appeal, we are unable to determine the correctness of the court's ruling on the plaintiff's motion for a directed verdict in this regard.

For the reasons herein stated, the judgment of the court awarding the defendant $270.80 is vacated, and the case is remanded to the District Court of Forsyth County for a new trial upon the plaintiff's claim and the defendant's counterclaim.

Vacated and remanded.

Judges CAMPBELL and BRITT concur.

CURTIS BLACK v. MICHAEL WEAVER

No. 7121SC26

(Filed 3 February 1971)

Automobiles §§ 90, 94— injury to passenger — issue of negligence — instructions

In an action to recover for personal injuries sustained by plaintiff while a passenger in a Jeep owned and operated by defendant, an instruction that plaintiff would be guilty of negligence *per se* if he realized there was danger in the manner the Jeep was being operated and failed to take precautionary action for his safety, *held* reversible error, since the issue of negligence was for the jury to determine under the rule of the ordinary prudent man.

APPEAL by plaintiff from *Crissman, Superior Court Judge,* June 1970 Session of FORSYTH County Superior Court.

Action to recover for personal injuries allegedly sustained by plaintiff while a passenger in a Jeep owned and being operated by defendant.

Plaintiff had expressed an interest in purchasing defendant's Jeep. On 22 May 1969 defendant was demonstrating the Jeep to him by driving through woods, down a bank, and along the shoulder of a public road. The Jeep struck a ditch or gulley and wrecked while it was being driven along the shoulder of the public road. There was evidence of excessive speed and reckless driving preceding the wreck. Plaintiff testified that he never asked defendant to stop the Jeep so he could get out, but that he did tell defendant that he was driving too fast and requested that he slow down. Defendant, and another passenger, denied that plaintiff remonstrated with defendant in any manner.

The court submitted to the jury issues of negligence, contributory negligence and damages. The jury answered the first two issues "yes," and from judgment entered on the verdict, plaintiff appealed.

White, Crumpler & Pfefferkorn by Joe P. McCollum, Jr., William G. Pfefferkorn and James G. White for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr. and John M. Harrington for defendant appellee.

GRAHAM, Judge.

Plaintiff excepts to the following portion of the court's charge to the jury:

> "The Court charges you that if you are satisfied from the evidence and by its greater weight that the plaintiff on this occasion under all these circumstances had opportunity to see that there was real danger in the manner in which the defendant was operating this Jeep on this occasion, that there was real danger in it, if you are satisfied from the evidence and by its greater weight that he had opportunity to see that and still failed to make some effort to stop it and to get off the Jeep or to get the operation in line with what would be reasonable and prudent, then the Court charges you that that would amount to negligence; . . ."

This exception is well taken. In this portion of the charge the jury was instructed, in effect, that if plaintiff realized there was danger in the manner the Jeep was being operated and failed to take any of the enumerated actions, his failure to so act would constitute negligence *per se*. Whether it would in fact constitute negligence was for the jury to determine under the rule of the ordinary prudent man. *Dinkins v. Carlton* and *Williams v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543. In *Beam v. Parham*, 263 N.C. 417, 139 S.E. 2d 712, we find the following:

> "It is not the duty of a guest, under all circumstances of negligent or reckless driving, to ask to be allowed to leave the vehicle. A guest who feels endangered by the manner in which a car is operated cannot ordinarily be expected to leap therefrom while it is in motion. A passenger is required to use that care for his own safety that a reasonably prudent person would employ under the same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury. *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33; *Samuels v. Bowers, supra; King v. Pope*, 202 N.C. 554, 163 S.E. 447."

There was plenary evidence to support a finding by a jury, under proper instructions, that plaintiff's own negligence was a proximate cause of his injuries. However, we find that under the instructions given, the question of whether plaintiff's failure to take precautionary actions for his own safety constituted neg-

ligence, under the circumstances, was not left for the jury to determine. This was prejudicial error requiring a new trial.

New trial.

Chief Judge MALLARD and Judge PARKER concur.

AMERICAN CREDIT COMPANY OF WINSTON-SALEM, INC. v. BENJAMIN BROWN

No. 7121DC11

(Filed 3 February 1971)

Rules of Civil Procedure § 51— failure to apply law to the evidence

In this action to recover the balance allegedly due on a conditional sales contract and to recover possession of the automobile covered thereby, plaintiff is entitled to a new trial for failure of the trial judge to declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a).

APPEAL by plaintiff from *Henderson, District Judge,* 1 June 1970 Session of FORSYTH District Court.

Civil action to recover balance alleged to be due on a conditional sale contract and to recover possession of the automobile covered thereby. Defendant denied he was in default. At the trial before judge and jury the parties stipulated answers to the first three of four issues, i.e., that the defendant executed the contract, that he was indebted to the plaintiff as alleged in the complaint, and that the amount of the indebtedness was $2,601.81. Only one issue was submitted to and answered by the jury as follows:

> "4. Is the plaintiff entitled to immediate possession of the automobile described in said contract for its sale and the application of the sale proceeds toward payment of the indebtedness?
>
> "Answer: No."

The court entered judgment that the plaintiff is not entitled to the immediate possession of the automobile and that the defendant is and has been entitled to possession. Plaintiff appealed, assigning errors.

Blackwell, Blackwell, Canady, Eller & Jones, by Jack F. Canady for plaintiff appellant.

White, Crumpler & Pfefferkorn, by Joe P. McCollum, Jr., and James G. White for defendant appellee.

PARKER, Judge.

In charging the jury the trial judge did not at any time "declare and explain the law arising on the evidence given in the case." This he was required to do. G.S. 1A-1, Rule 51(a); 7 Strong, N.C. Index 2d, Trial, § 33, p. 324, *et seq.* The jury was given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative. For failure of the trial judge to comply with the mandate of Rule 51(a), plaintiff is entitled to a

New trial.

Chief Judge MALLARD and Judge GRAHAM concur.

EUGENE K. WILLIAMS v. RUTHERFORD FREIGHT LINES, INC., A CORPORATION, AND LESTER L. WOFFORD, AN INDIVIDUAL

— AND —

JAMES M. WILLARD v. RUTHERFORD FREIGHT LINES, INC., A CORPORATION, AND LESTER L. WOFFORD, AN INDIVIDUAL

No. 7121SC3

(Filed 24 February 1971)

1. **Libel and Slander § 4— words actionable per quod — special damages**

Where false statements are actionable only *per quod*, some special damage must be pleaded and proved.

2. **Rules of Civil Procedure § 9— averment of special damages**

When items of special damage are claimed each shall be averred. G.S. 1A-1, Rule 9(g).

3. **Libel and Slander § 4— special damage**

Special damage, as that term is used in the law of defamation, means pecuniary loss, as distinguished from humiliation.

4. **Libel and Slander § 2— words actionable per se — presumption of malice and damage**

If defamatory words are actionable *per se*, malice and damage are conclusively presumed and do not have to be alleged or proved.

5. **Libel and Slander § 2— words actionable per se**

Where the injurious character of words appears on their face as a matter of general acceptance, they are actionable *per se*.

6. **Libel and Slander § 2— words actionable per se — classification of actionable statements**

False statements which may be classified as actionable *per se* are generally limited to those which charge plaintiff with a crime or offense involving moral turpitude, impeach his trade or profession, or impute to him a loathsome disease; a fourth category, created by G.S. 99-4, applies to statements charging incontinency to a woman.

7. **Libel and Slander § 5; Master and Servant § 16— words actionable per quod — statement that labor officials were "gangsters"**

A statement that the business agent and the shop steward of a Teamsters Union local were "nothing but a bunch of g. . . d. . . . s. . . o. . . b. . . gangsters," which statement was uttered by a trucking company employee during a contract grievance dispute with the Teamsters officials, *held* actionable *per quod*, not actionable *per se;* the statement is insufficient to permit recovery unless there is a showing of special damage.

8. **Libel and Slander § 2— words actionable per se — guilt of a punishable offense**

In order to be actionable *per se*, a false statement must impute that a person is guilty of a punishable offense.

9. Libel and Slander § 4— actions per quod — special damage — mental suffering — emotional distress

Emotional distress and mental suffering are not alone sufficient to establish a basis for relief in cases which are actionable only *per quod.*

10. Libel and Slander § 6— action for slander per quod — filing of supplemental pleadings — special damage — limitation of action

In an action for slander *per quod* arising out of a 1963 labor dispute between the plaintiffs, who were officials of the Teamsters Union, and a trucking company employee, supplemental pleadings which were filed by the plaintiffs in 1970 for the purpose of alleging special damage did not relate back to the plaintiffs' original complaints that were filed in 1963, where (1) actionable damages for slander had not arisen when the original complaints were filed in 1963 and (2) the events supporting the allegations of special damage took place after the expiration of the [then] six-months statute of limitations for slander actions. G.S. 1-54; G.S. 1-55.

11. Libel and Slander § 12— slander per quod — institution of action — special damage

It is essential that some special damage must occur before an action for slander *per quod* is instituted.

12. Rules of Civil Procedure § 15— distinction between supplemental pleadings and amendments

The distinction between supplemental pleadings and amendments is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented; whereas amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. G.S. 1A-1, Rules 15(c) and 15(d).

13. Rules of Civil Procedure § 15; Libel and Slander § 14— slander per quod — pleadings — filing of supplemental pleadings

Plaintiffs' purported "amended complaints" in a slander action were in effect supplementary pleadings where the events alleged in the supplemental pleadings occurred after the filing date of the original complaint.

APPEAL by plaintiffs from *Exum, Superior Court Judge,* 4 May 1970 Session of FORSYTH County Superior Court.

In April of 1963 plaintiffs instituted separate suits alleging that they had been slandered by the individual defendant (Wofford) while he was acting as the lawful agent of the corporate defendant (Rutherford). The complaints allege the following:

In April of 1963 the plaintiff Williams was business agent for Local 391 of the International Brotherhood of Teamsters,

which was the bargaining agent for Rutherford's employees at its Kernersville, North Carolina, terminal. The plaintiff Willard was a truck driver for Rutherford and was the Union shop steward for the bargaining unit at the Kernersville terminal. Wofford was terminal manager. On 4 April 1963, while Willard and Williams were discussing a contract grievance with Wofford, in Wofford's office, Wofford stated in a loud boisterous manner, "You are nothing but a bunch of g. . . d. . . s. . . o. . . b. . . gangsters." The statement was heard by various other employees and was repeated at various times by Wofford outside the office and in the presence of company employees and other persons. When requested to withdraw the statement Wofford refused and added that plaintiffs' conduct in their occupation had been like that of gangsters.

The complaints also alleged that the statements were untrue; that they were made and widely disseminated by defendants with malice; that they were calculated to have a defaming effect upon plaintiffs' reputation; and, that the statements did result in damage to plaintiffs' reputations and standings in their occupations, causing them unrest and worry.

In January of 1970, plaintiffs were granted leave to file amendments to their complaints, or to file supplemental pleadings. They first filed "supplemental complaints" adding paragraphs to their original pleadings in which more specific allegations of damages were set forth. Later, also with leave of the trial court, plaintiffs filed amended complaints. Allegations in the amended complaints were similar to those in the original complaints except for allegations of damages.

Williams' amended complaint alleged that as a direct result of the defamatory statement he was not re-elected business agent of the Union when the elections were held on 20 November 1963; that as a result of this he lost his employment as of 10 December 1963; that he was unable to obtain employment until 4 February 1964, and then only in an area outside of that covered by Local 391; that his new employment required him to move his residence at considerable expense and resulted in his earnings being substantially decreased.

Willard's amended complaint alleged that as a result of defendant's statements, his work with Union members as shop steward was undermined; that he was confronted with the statements so often that on 10 April 1963, he suffered severely

from nervousness and anxiety and was hospitalized for twelve days and unable to work for three weeks thereafter; that he lost wages at the rate of $3.05 per hour during this period of disability; that he was discharged from his employment in July of 1965 and has since been unable to obtain work in the trucking industry, being forced to accept employment in a different line of work at a substantially decreased salary.

Defendants moved for summary judgment at the 27 April 1970 Session of Forsyth County Superior Court. The motion was allowed on 4 May 1970 by judgment wherein the court held, *inter alia,* that the alleged statements were actionable only *per quod,* and that special damages were not alleged as required and could not have been alleged when the complaints were filed since neither plaintiff had suffered any damage at that time. Plaintiffs appealed and their appeals were consolidated by consent.

White, Crumpler and Pfefferkorn by James G. White, Fred G. Crumpler, Jr., Joe P. McCollum, Jr., William G. Pfefferkorn and Michael J. Lewis for plaintiff appellants.

Blakeney, Alexander & Machen by Ernest W. Machen, Jr., and J. W. Alexander, Jr., for defendant Rutherford Freight Lines, Inc., and Childs & Patrick by Bailey Patrick, Jr., for defendant Lester L. Wofford.

GRAHAM, Judge.

[1-3] Where false statements are actionable only *per quod,* some special damage must be pleaded and proved. 5 Strong, N. C. Index 2d, Libel and Slander, § 4, p. 207, and cases therein cited. "When items of special damage are claimed each shall be averred." G.S. 1A-1, Rule 9(g). Special damage, as that term is used in the law of defamation, means pecuniary loss, as distinguished from humiliation. *Penner v. Elliott,* 225 N.C. 33, 33 S.E. 2d 124; *Scott v. Harrison,* 215 N.C. 427, 2 S.E. 2d 1; *Payne v. Thomas,* 176 N.C. 401, 97 S.E. 212; 1 McIntosh, N. C. Practice & Procedure 2d, § 991, p. 541.

[4] The original complaints filed herein contained no allegations of special damage. Plaintiffs say that none are necessary, contending that defendants' alleged statements are actionable *per se.* If defamatory words are actionable *per se,* malice and damage are conclusively presumed and do not have to be alleged

or proved. *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55; *Oates v. Trust Co.,* 205 N.C. 14, 169 S.E. 869.

[5, 6] Where the injurious character of words appear on their face as a matter of general acceptance they are actionable *per se.* 5 Strong, N. C. Index 2d, *supra.* Decisions in this State generally limit false statements which may be classified as actionable *per se* to those which charge plaintiff with a crime or offense involving moral turpitude, impeach his trade or profession, or impute to him a loathsome disease. (A fourth category has been added by statute; that is, statements charging incontinency to a woman. G.S. 99-4).

[7, 8] Plaintiffs argue that the language allegedly used by defendants is actionable *per se* in that it charges them with a crime, and also tends to prejudice them in their occupations as truck drivers and Union leaders. We disagree. It is true that *Webster's Third New International Dictionary* defines a gangster, among other things, as "a member of a gang of criminals." However, the law contemplates that in order to be actionable *per se* a false statement must impute that a person is guilty of a punishable offense. "Words which convey only the imputation of an imperfect sense or practice of moral virtue, duty, or obligation are not sufficient to support the action. The crime charged, too, must be such as is punishable by the common or statute law, for if it be only a matter of spiritual cognizance it is not, according to the authorities, actionable to charge it." *Ringgold v. Land,* 212 N.C. 369, 371, 193 S.E. 267, 268. See also *Penner v. Elliott, supra; Deese v. Collins,* 191 N.C. 749, 133 S.E. 92; *Payne v. Thomas, supra; Beane v. Weiman Co., Inc.,* 5 N.C. App. 276, 168 S.E. 2d 236.

In charging plaintiffs with being "gangsters," defendants were not charging them with a specific crime for which they could be indicted and punished. The language, especially under the circumstances here alleged, was nothing more than vituperation or name calling arising out of a dispute over a labor grievance. This is not sufficient to permit recovery, absent a showing of special damage. As was stated in *Bouligny, Inc. v. Steelworkers,* 270 N.C. 160, 173, 154 S.E. 2d 344, 356, "[e]ven where the plaintiff is an individual, some thickness of skin is required of him by the law in the realm of labor disputes, just as in battles in the political arena."

Neither do we think the language actionable *per se* as an impeachment of plaintiffs' business or occupation. With respect to this category of defamatory statements, Dean Prosser states: "The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities, where such special significance is lacking." Prosser, Law of Torts 3rd, 776.

Plaintiff relies on *Badame v. Lampke,* 242 N.C. 755, 89 S.E. 2d 466. There, a competitor allegedly stated falsely to one of plaintiff's customers that plaintiff, a sewing machine salesman, would not give a good machine and that a police captain could tell the customer all about the shady deals the plaintiff had pulled. The statement was held to be actionable *per se.* However, that statement, unlike the alleged characterization of plaintiffs here, tended to degrade defendant's business rival by charging him with dishonorable conduct in his business. The opinion in the case expressly notes this distinction:

> "However, the better reasoned decisions seem to hold that in order to be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se,* they must be uttered of him in his business relation. *James v. Haymes,* 160 Va. 253, 168 S.E. 333; *Herman v. Post,* 98 Conn. 792, 120 A. 606; *Canton Surgical, etc., Chair Co. v. McLain,* 82 Wis. 93, 51 N.W. 1098; 53 C.J.S., Libel and Slander, Sec. 43; 33 Am. Jur., Libel and Slander, Sec. 64. See also Annotations: 52 A.L.R. 1199 and 86 A.L.R. 442. Defamation of this class ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct in business. *Broadway v. Cope, supra;* 33 Am. Jur., Libel and Slander, Sections 68 and 70."

The trial judge also held that the alleged damages arose out of a labor dispute; that all parties were subject to the National Labor Relations Act; and consequently, even if the allegations charged slander *per se,* plaintiffs could have no right of recovery, in the absence of allegation and proof of special damages. *Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657,

15 L.Ed. 2d 582; *Bouligny, Inc. v. Steelworkers, supra.* Since we hold the allegations actionable *per quod,* it is unnecessary that we pass on this theory of the cases.

[9] Plaintiffs further contend that even if the alleged statements are not actionable *per se,* special damages have been alleged in their supplementary pleadings and amended complaints. It is clear that many of the damages alleged in the later pleadings are not "special" within the meaning of that term as used in the law of defamation, in that emotional distress and mental suffering are not alone sufficient to establish a basis for relief in cases which are actionable only *per quod. Penner v. Elliott, supra; Scott v. Harrison, supra;* McCormack on Damages, § 114, p. 419; 3 Restatement of Torts, § 575. Among cases from other jurisdictions which are particularly pertinent on this point are *Harrison v. Burger,* 212 Ala. 670, 103 So. 842; *Urban v. Hartford Gas Co.,* 139 Conn. 301, 93 A. 2d 292; *Arturi v. Tiebie,* 73 N.J. Super. 217, 179 A. 2d 539.

[10] We assume, for purposes of this decision, that allegations by Williams that he lost a Union election on 20 November 1963, and as a result thereof lost his employment on 10 December 1963, and allegations by Willard that he lost his employment in July, 1965, constitute allegations of special damages. However, all of these events took place more than six months before they were pleaded by way of amended complaints. Defendants pleaded G.S. 1-55 which at the time provided that actions for slander must be brought within six months. (Slander has now been added to G.S. 1-54 which provides for a limitation of one year. However, the amendment to that statute, effective 23 June 1969, applies only to actions brought or accruing after that date.) The trial court held that defendants' plea of the statute of limitations barred the claims since no special damage occurred within six months prior to the filing of the amended complaints in which special damages were, for the first time, alleged. The court also held that since neither plaintiff suffered special damage prior to the filing of the original complaints on 26 April 1963, no right to recover could be established.

[11] Plaintiffs argue, however, that their amendments relate back to the date of the original complaints because an injured party is entitled to recover for all damages, past, present and future. This is true in the ordinary tort case, but where, as here, it is essential that some special damage must occur before a

claim is actionable, at least some special damage must have occurred by the time the action is instituted.

In *Crawford v. Barnes,* 118 N.C. 912, 24 S.E. 670, the special damage relied upon in the complaint was the loss of an election on 6 November. The action was instituted by the issuance of summons on 17 September. Our Supreme Court held that the language alleged to have been uttered by defendant was not actionable *per se,* and in affirming an order sustaining a demurrer, stated:

> "The action, therefore, cannot be sustained, except upon allegation and proof of special damage. The special damage alleged, to wit, the loss of the election of the plaintiff to Congress, did not accrue, according to the complaint, until 6 November, and the summons was issued 17 September. The damage not having accrued before the summons issued, the action cannot be maintained."

In *Bynum v. Commissioners,* 101 N.C. 412, 416, 8 S.E. 136, 138, we find:

> "It would be alike unreasonable and unjust to allow a plaintiff to bring his action and maintain it against the defendants before he had any cause of action in some way arising. In the nature of the pleadings, they relate to the time the action began, and ordinarily the plaintiff and the defendant must respectively allege the cause of action and the counterclaim as they existed at that time."

Plaintiffs further assert that the essential special damages set forth in their amended complaints should relate back under the provisions of G.S. 1A-1, Rule 15(c), to the time when the original complaints were filed. Rule 15(c) provides:

> "*Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

[12, 13] We must note, however, that Rule 15 also provides in subsection (d) for the filing of "Supplemental pleadings." The distinction between supplemental pleadings and amendments is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of

the pleadings sought to be supplemented; whereas, amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. *United States v. Russell,* 241 F. 2d 879 (1st Cir. 1957); *Dewey v. Clark,* 61 A. 2d 475 (Mun. App. D.C. 1948); 1A Barron and Holtzoff, Federal Practice and Procedure (Rules Ed. Wright), § 455. Consequently, plaintiffs' "amended complaints" were in effect supplementary pleadings though designated as amendments. Rule 15(d) does not mention "relation back" as does Rule 15(c). Apparently the case law is not clearly developed on the extent to which a supplemental complaint will be held to relate back for statute of limitations purposes. See Wright, Federal Courts, p. 241. Some cases admittedly take a liberal view and treat a supplementary pleading as an amendment for purposes of applying the relation back doctrine. *Security Insurance Co. of New Haven v. United States,* 338 F. 2d 444 (9th Cir. 1964); *United States v. Reiten,* 313 F. 2d 673 (9th Cir. 1963).

[10] We express no opinion as to whether supplementary pleadings may, in some cases, relate back to the original pleading in order to prevent an action from being barred by the statute of limitations. However, we hold that in this case there can be no relation back because at the time the suits were instituted no actionable damages existed, nor did the claims alleged become actionable within the time provided by statute for the instituting of suits in slander actions. The statute of limitations began to operate when the alleged false statements were made in April, 1963. The first possible element of special damage occurred when Williams lost a Union election more than six months thereafter. With respect to Willard, his special damage did not occur until July, 1965, when he was discharged from his employment. This was more than two years after his complaint was filed. Prior to the times mentioned, there had been no actionable claims and the complaints filed simply anticipated claims that might, or might not, become actionable.

To hold that plaintiffs' later pleadings relate back to the time the original complaints were filed would be to extend the statute of limitations indefinitely in defamation cases which are actionable only *per quod.* For instance, a plaintiff could file complaint within the time provided by statute, though no actionable claim existed at that time, and await the possibility that the alleged utterance would in the perhaps distant future cause

pecuniary damage. We note that the cases at hand are still pending almost nine years after complaints were filed. If, as a result of the alleged statements made in 1963, plaintiffs had first suffered pecuniary damage in 1971, could life be breathed into the otherwise lifeless claims by filing supplemental pleadings and having them relate back to 1963? Logic and justice dictate that the answer be no. The answer must also be "no" where the only pecuniary loss occurred at any time after the statutory period for filing such actions had expired.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

GLADYS BONE v. CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY

No. 7118DC21

(Filed 24 February 1971)

1. **Insurance § 46— accident insurance — lye intentionally thrown in insured's face — injury by "accidental means"**

   Complaint of insured who was allegedly injured when another person secretly threw lye in her face, *held* sufficient to state a claim for relief under an accident policy providing coverage for injuries "effected solely through accidental means."

2. **Insurance § 46— accident insurance — intentional act of another — injury by "accidental means"**

   An accident policy providing indemnity for death or injuries sustained through "accidental means" comprehends liability upon the death of or injury to the insured occasioned by the intentional act of another if the death or injury was not the direct result of insured's misconduct and was unforeseen by him, and the policy contains no exclusion of such liability.

APPEAL by plaintiff from *Kuykendall, District Court Judge,* 1 June 1970 Session of GUILFORD County District Court.

Plaintiff filed suit seeking to recover under a policy of insurance providing for the payment of hospital expenses and $10 per day up to 60 days of hospital confinement. She alleged issuance of the policy and payment of premiums. She further alleged that on 1 June 1966, she was alone in her home when an indi-

vidual came up behind her and secretly threw red devil lye in her face causing third-degree burns of her head, face and neck; that she was admitted to L. Richardson Memorial Hospital on 1 June 1966 and remained a patient there until 8 September 1966; that proof of loss was given defendant although no proof of loss was ever furnished by defendant. She further alleged that immediately after the injuries were sustained an agent of defendant was notified by an agent of plaintiff of the claim; that demand has been made and defendant has refused to pay. A copy of the policy was attached to the complaint as was a copy of the proof of loss.

Defendant answered, admitting the issuance of the policy, the payment of premiums, and the coverage afforded. All other allegations were denied. By way of further defenses, defendant averred that the complaint failed to state a claim upon which relief could be granted; that plaintiff had failed to give prompt notice of claim and failed properly to file proof of claim within the time required by the terms of the policy; and that plaintiff's injury resulted from the intentional act of another person which did not constitute injury through accidental means under the terms of the policy.

Defendant moved for summary judgment for plaintiff's failure to state a claim upon which relief could be granted, assigning as grounds therefor that if plaintiff proved all the allegations in her complaint, her claim could not be sustained because she was not injured by accidental means within the purview of the policy. Plaintiff answered the motion denying all allegations. Upon hearing, the trial court granted the motion and entered judgment dismissing the action at plaintiff's cost. Plaintiff appealed.

Wade C. Euliss for plaintiff appellant.

Max D. Ballinger for defendant appellee.

MORRIS, Judge.

The policy provisions germane to a determination of this appeal are not in dispute. The pertinent provisions are found under the section entitled "Loss Due to Hospitalization." It is there provided that "This policy covers loss due to Hospital residence resulting from accidental bodily injury sustained after the date of this policy, . . ." and " 'Injury' as used in this pol-

icy means bodily injury sustained after the date of this policy which is the sole cause of the loss and which is effected solely through accidental means while this policy is in force." Defendant states that these are the only policy provisions pertinent. The policy is not before us, so we assume that the policy does not contain any exclusion clause.

Defendant strongly urges that because plaintiff's injuries were intentionally inflicted by another person, she is not entitled to recover. His contention is that this does not come within the definition of "accidental means" adopted in this jurisdiction. It is true that this jurisdiction is among those which still make a distinction between loss due to "accidental means" and loss due to "accident." In *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966), the Court said:

> "As this Court has pointed out many times ' "accidental means" refers to the occurrence or happening which produces the result and not to the result. That is, "accidental" is descriptive of the word "means." The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected . . . [T]he emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation.' *Fletcher v. Trust Co.*, 220 N.C. 148, 150, 16 S.E. 2d 687, 688."

In recent years, an increasing number of jurisdictions have repudiated the distinction between the term "accidental means" and the terms "accident," "accidental result," "accidental injury," "accidental death," and the like, and the terms are now more generally regarded as legally synonymous. 44 Am. Jur. 2d, Insurance, § 1221. Various reasons are assigned, but primarily it appears that courts rejecting the distinction do so on the ground that such a distinction is not understood by the average man for whom the policy is written and who purchases the insurance to protect himself from loss or injury in case of an accident to him. The insurance companies have it within their power, by simplicity and clarity of expression, to remove all doubt. For citations of cases from jurisdictions which have removed the distinction see 44 Am. Jur. 2d, *supra,* wherein it is noted that many of the courts were influenced by the dissenting opinion of Mr. Justice Cardozo in *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491, 78 L.Ed. 934, 54 S.Ct. 461 (1933). In his dissent-

ing opinion he noted that the continued attempt to distinguish between accidental results and accidental means would plunge this branch of the law into a "Serbonian Bog."

It is a well-established rule, in the absence of any policy provision on the subject, that where the insured is intentionally injured or killed by another and the insured is himself free from misconduct, the assault being unforeseen by insured, the injury or death is accidental within the meaning of an accident insurance policy. 44 Am. Jur. 2d, Insurance, § 1247.

This rule was set out by Justice Sharp in *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654 (1964), where she said:

> "When an insured is intentionally injured or killed by another, and the mishap is, as to him, unforeseen and not the result of his own misconduct, the general rule is that the injury or death is accidentally sustained within the meaning of the ordinary accident insurance policy, and the insurer is liable therefor . . ."

In an earlier case, *Harris v. Insurance Co.,* 204 N.C. 385, 168 S.E. 208 (1933), the policy involved was a life insurance policy providing for double indemnity in the event insured's death resulted "from bodily injury within ninety days after the occurrence of such injury provided death results directly and independently of all other causes, from bodily injury effected solely through external, violent and accidental means, while the insured is sane and sober." The policy specifically provided that the double indemnity provision did not apply "in case death results from bodily injury inflicted by the insured himself, or intentionally by another person." On appeal from judgment entered on a verdict allowing recovery, defendant contended that its motion for judgment as of nonsuit should have been allowed because there was no evidence at the trial tending to show that the death of the insured was the result of a bodily injury effected solely through accidental means. The evidence was that insured, while engaging in a basketball game, was injured by a player on the opposing team. This player had the ball and was running toward the goal. The insured undertook to prevent the opposing player from making a goal and in the ensuing collision between them, insured was struck in his side or chest, developed pneumonia, and died within the 90-day period. Defendant contended that this mishap was not within the definition of "accidental

means" because it was not unexpected and unforeseen but was the probable result of the game in which the insured had voluntarily engaged. The Court, speaking through Justice Connor, noted that although the distinction between an accidental death and a death by accidental means had been recognized and applied by courts of other jurisdictions, no case involving such distinction had theretofore been presented to the court. With respect to those cases from other jurisdictions recognizing the distinction, the Court said:

> "In each of these cases, it was held that where the death of the insured resulted from his voluntary act, although such death was both unexpected and unforeseen, and for that reason accidental, the death was not caused by accidental means, within the meaning of these words as used in the policy of insurance on which the action was brought. This distinction, if conceded to be sound, is not applicable to the instant case. The insured in this case did not by his own act cause the injury which resulted in his death. He engaged voluntarily in the game of basketball, and while he anticipated collisions during the progress of the game with players on the opposing team, no such injury as that which he suffered by the act of his opponent was probable as the result of the game. This injury was effected by accidental means within the meaning of these words as used in double indemnity clauses in his policies of insurance."

The North Carolina law was interpreted by the United States Court of Appeals, Fourth Circuit, in *Metropolitan Life Insurance Co. v. Henkel,* 234 F. 2d 69 (1956), in an opinion by Parker, Chief Judge. The policy provided for payment of double indemnity for death occurring "as the result directly and independently of all other causes, of bodily injuries caused solely by external, violent, and accidental means . . ." The policy specifically excluded death resulting from bodily injuries intentionally inflicted by insured but did not exclude death resulting from injuries intentionally inflicted by another. Insured was killed in South Carolina while fleeing from officers of the law at a reckless and unlawful rate of speed of 90 miles per hour or more. There was no evidence that he was guilty of violating the law prior to his flight. It appeared that the officers were looking for a violator and when insured came along about midnight, he was accosted by the officers when one of them fired a signal shot. Insured speeded up his car, one of the officers gave chase, and

when insured came to a fork in the road, he lost control of the car, ran on the shoulder and caused the car to overturn, inflicting the fatal injuries to insured. In affirming recovery, the Court said:

> "In interpreting the provisions of the policy, we are governed by the law of North Carolina, as the law of the state in which the policy was applied for and delivered, *Horton v. Home Ins. Co.*, 122 N.C. 498, 29 S.E. 944; and under the law of North Carolina recovery may be had under a provision such as this *only where death results from accidental means and is not merely the accidental result of means knowingly and intentionally employed by the insured. Fletcher v. Security Life & Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687. As we think that the death of insured was clearly the result of accidental means within the meaning of the policy, it is not necessary to go into the distinction between accidental means and accidental result, a distinction described by Mr. Justice Cardozo as a 'Serbonian Bog,' *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491, 499, 54 S.Ct. 461, 78 L.Ed. 934, and one which is being repudiated by 'an increasing number of jurisdictions,' Note 166 A.L.R. 473. An injury, or death, results from accidental means as distinguished from an accidental result, within the rule of those courts observing the distinction, 'if, in the act which precedes the injury', something unforeseen, unexpected, unusual, occurs which produces the injury. *United States Mutual Accident Ins. Co. v. Barry*, 131 U.S. 100, 121, 9 S.Ct. 755, 762, 33 L.Ed. 60, cited by the Supreme Court of North Carolina in *Fletcher v. Security Life & Trust Co., supra.*" (Emphasis ours.)

[1] In the case before us, the throwing of the lye was the act which preceded the injury. Obviously, *to the insured* that act itself was something unforeseen, unexpected, and unusual. She was guilty of no misconduct nor is there any evidence that she provoked the assault.

Our research does not disclose a case in this jurisdiction answering the precise question before us; *i.e.:* Under an accident policy providing for recovery for injuries "effected solely through accidental means," is insured entitled to recover where injuries were intentionally inflicted by another person, the insured being guilty of no misconduct, and the policy containing

no provision excluding coverage where the injuries were intentionally inflicted by insured or another person?

Several cases have been before the Court where the policy provided for coverage for injury or death resulting from causes effected through accidental means when the injuries or death resulted from acts of another person. In *Clay v. Insurance Co.*, 174 N.C. 642, 94 S.E. 289 (1917), recovery was for death resulting from bodily injury sustained and "effected directly through external, violent and accidental means" and excluded death in consequence of the insured's violation of the law. Insured was killed while engaged in an affray in which he was the aggressor and which from the beginning took on the aspect of a deadly encounter. The Court held that the homicide could not be considered an accident. In *Powers v. Insurance Co.*, 186 N.C. 336, 119 S.E. 481 (1923), the policy required bodily injuries effected "solely through external, violent and accidental means" and specifically excluded injuries or death resulting from firearms. Insured heard a noise at the barn, walked out to investigate and was shot. In *Warren v. Insurance Co.*, 212 N.C. 354, 193 S.E. 293 (1937), also reported on subsequent appeals at 215 N.C. 402, 2 S.E. 2d 17 (1939), 217 N.C. 705, 9 S.E. 2d 479 (1940), and 219 N.C. 368, 13 S.E. 2d 609 (1941), the policy provided for coverage for injury resulting in death through external, violent and accidental means and specifically excluded "injuries inflicted intentionally by another person." Insured was killed by a man who opened the car door, grabbed insured's fiancee, and shot the insured. The evidence showed the injuries resulting in death were intentionally inflicted, warranting a peremptory instruction on that issue. In *Whitaker v. Ins. Co.*, 213 N.C. 376, 196 S.E. 328 (1938), the policy provisions and exclusions were the same as in *Warren, supra.* Insured, a game warden, was shot by the occupant of a car who was spotlighting deer, as he approached the car to investigate. In *Scarborough v. Insurance Co.*, 244 N.C. 502, 94 S.E. 2d 558 (1956), the policy insured against loss of life from bodily injuries "through purely accidental means." No exclusion appears. Insured was killed while engaging in an affray in which he was the aggressor. In *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214 (1957), the policy insured against death by "external, violent and accidental means" and excluded death resulting from participation in or attempting to commit an assault or felony and violence intentionally inflicted by another person. The evidence was that

insured and another were fighting and insured's uncle shot at a telephone pole to stop them and hit insured with no intention to injure anyone. The jury verdict for plaintiff was affirmed. In *Goldberg v. Insurance Co.*, 248 N.C. 86, 102 S.E. 2d 521 (1958), the provision for coverage was the same as in *Fallins, supra,* but excluded death from homicide. Insured died as the result of a fractured skull and sub-dural hemorrhage sustained when he was knocked or pushed to the floor by another person. The Court affirmed the trial court in granting judgment as of nonsuit because the death was by homicide within the meaning of the exception clause. In *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438 (1959), the provision for coverage was the same as in *Fallins* and *Goldberg* but excluded from coverage was the intentional act of insured or any other person directly or indirectly causing death of insured. Insured was a taxi driver. His body was found in a ditch. His pistol, money and cab were gone. He had received two pistol wounds causing death. The Court held that plaintiff's own evidence showed an intentional killing and justified the nonsuit entered by the trial court. In *Gray v. Insurance Co.*, 254 N.C. 286, 118 S.E. 2d 909 (1961), the policy provisions and exclusions were the same as in *Slaughter, supra.* Insured was shot and killed by storeowner while insured was attempting to break in the store. The trial court denied recovery and the Supreme Court affirmed, saying that insured should have anticipated that his own misconduct would create circumstances which would render a homicide likely.

The more recent case of *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586 (1964), does not reach the question now before us but the problem is recognized. There the action was to recover the death benefit under a group policy insuring against "loss resulting directly and independently of all other causes from accidental bodily injuries (excluding suicide or any attempt thereat, while sane or insane) sustained while engaged in the discharge of any duties for the employer . . . " The employer-owner insured was shot and killed at 10:00 p.m. while he was drinking beer with other people at a service station. The Court, speaking through Bobbitt, J. (now C.J.), in arriving at the conclusion that insured's death resulted from accidental bodily injuries discussed cases affording coverage for death or injury by "accidental means," noted the distinction drawn by

the Court between "accidental death" and "death by accidental means" and said:

> "It is unnecessary to decide whether under the stipulated facts plaintiff would be entitled to recover if the policy provision were against loss (death) resulting from bodily injuries effected solely through 'external, violent, and accidental means.' We reserve this question for consideration and decision upon an appropriate record."

The Court quoted with approval statements of Higgins, J., in *Fallins v. Insurance Co., supra*: "An injury is *'effected by accidental means'* if in the line of proximate causation the act, event, or condition *from the standpoint of the insured person* is unintended, unexpected, unusual or unknown." (emphasis ours), and: "Injuries caused to the insured by the acts of another person, without the consent of the insured, are held due to *accidental means* unless the injurious acts are provoked and should have been expected by the insured." (Emphasis ours.) The Court also noted that expressions in *Slaughter, supra,* apparently to the contrary, should be regarded as *obiter dicta* and not authoritative.

It appears to us that the adoption of the philosophy expressed in the language of Higgins, J., in *Fallins v. Insurance Co., supra,* results in a logical interpretation. In our opinion the language of the policy should be interpreted as referring to insured's own intent and volition and not to the intent or volition of other persons which he cannot control and which he cannot be expected to foresee. We do not regard it essential, in order to make out a case of injury by "accidental means," so far as the injured party is concerned, that the party injuring him should not have meant to do so; for, if the injured party had no part in bringing the injury upon himself, and to him it was unforeseen, it seems clear that the fact that the deed was intentionally directed against him should not militate against the proposition that, as to him, the injury was brought on by "accidental means."

[2] We, therefore, conclude that an accident policy providing indemnity for death or injuries sustained through "accidental means" comprehends liability upon the death of or injury to the insured occasioned by the intentional act of another, if the death or injury was not the direct result of misconduct or an

assault by the insured but was unforeseen as far as he was concerned, unless the policy specifically excludes such liability.

This result finds support in other jurisdictions. *Travelers Ins. Co. v. Dupree,* 17 Ala. App. 131, 82 So. 579 (1919); *Richards v. Travelers Ins. Co.,* 89 Cal. 170, 26 P. 762 (1891); *Fulnettle v. North American Mut. Ins. Co.,* 43 Del. 505, 50 A. 2d 614 (1946); *Empire L. Ins. Co. v. Johnson,* 142 Ga. 330, 82 S.E. 893 (1914); *Mabee v. Continental Casualty Co.,* 37 Idaho 667, 219 P. 598 (1923); *Kascoutas v. Federal L. Ins. Co.,* 193 Iowa 343, 185 N.W. 125 (1922); *Broyles v. Order of United Commercial Travelers,* 155 Kan. 74, 122 P. 2d 763 (1942); *American Acci. Co. of Louisville v. Carson,* 99 Ky. 441, 36 S.W. 169 (1896); *Lothrop v. Travelers Ins. Co.,* 167 Minn. 340; 209 N.W. 20 (1926); *Fidelity & C. Co. v. Johnson,* 72 Miss. 333, 17 So. 2 (1894); *Ins. Co. v. Bennett,* 90 Tenn. 256, 16 S.W. 723 (1891); *Tabor v. Ins. Co.,* 104 W. Va. 162, 139 S.E. 656 (1927); *Button v. American Mutual Acci. Asso.,* 92 Wis. 83, 65 N.W. 861 (1896).

Reversed and remanded.

Judges BROCK and VAUGHN concur.

BARBARA SPEAS PEOPLES v. MICHAEL PEOPLES

No. 7121DC128

(Filed 24 February 1971)

1. Divorce and Alimony § 22— child custody and support — procedure

It is proper to seek custody and support of a minor child in an action for divorce from bed and board. G.S. 50-13.5(b)(3).

2. Divorce and Alimony § 23— child support — duty of father

Nothing else appearing, the father is primarily liable for the support of a minor child. G.S. 50-13.4(b).

3. Rules of Civil Procedure § 52; Divorce and Alimony § 18— alimony pendente lite — findings of fact

Rule 52 of the Rules of Civil Procedure entitled "Findings by the Court" does not apply in awarding alimony *pendente lite.*

4. Divorce and Alimony § 18— alimony pendente lite — necessity for findings of fact

Upon an application for alimony *pendente lite,* the trial judge is required to find the facts from the evidence presented. G.S. 50-16.8(f).

5. Divorce and Alimony § 18— alimony pendente lite — findings of fact

The facts found in alimony *pendente lite* case must be determinative of all the questions at issue in the proceeding.

6. Appeal and Error § 57— necessity for findings of fact — prejudicial error

A failure to make a proper finding of fact in a matter at issue between the parties will result in prejudicial error, especially where the evidence is conflicting.

7. Divorce and Alimony § 18— alimony pendente lite — requisites of finding of fact

A finding of fact in an alimony *pendente lite* matter is a narrative statement by the trial judge of the ultimate fact at issue and need not include the evidentiary or subsidiary facts required to prove the ultimate facts.

8. Divorce and Alimony §§ 8, 18— divorce from bed and board — alimony — abandonment — sufficiency of findings

In the wife's action for divorce from bed and board and for alimony *pendente lite,* findings that the husband left the home on a certain date, had abandoned the wife, and had failed to provide adequate support for the wife were a narrative statement of some of the ultimate facts in issue and were not conclusions.

9. Divorce and Alimony § 18— alimony pendente lite—dependent spouse—supporting spouse — sufficiency of findings

In the wife's action for alimony *pendente lite,* a purported finding by the trial judge that "the plaintiff is a dependent spouse and the defendant is a supporting spouse within the meaning of G.S. 50-16.1" was a conclusion that was not supported by a finding of fact; consequently, the trial court's award of alimony *pendente lite* must be remanded for specific findings of fact on these issues. G.S. 50-16.1(3),(4).

10. Divorce and Alimony § 18— alimony pendente lite — dependent spouse — requisite findings of fact

To support an award of alimony *pendente lite* to a dependent spouse, there must be factual findings that (1) the dependent spouse is entitled to such relief and (2) the dependent spouse does not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. G.S. 50-16.3(a)(1),(2).

11. Divorce and Alimony § 18— alimony pendente lite — insufficient findings — ability of wife to support herself

In the wife's action for alimony *pendente lite* failure of the trial court to make factual findings as to whether the wife had sufficient means whereon to subsist during the prosecution of her suit and to defray the necessary expenses thereof, *held* prejudicial error. G.S. 50-16.3(a)(2).

12. Divorce and Alimony § 18; Appeal and Error § 26— award of alimony pendente lite — assignment of error to the signing of the order — questions presented

An assignment of error that the trial judge erred in signing and entering the order allowing alimony *pendente lite* does not challenge that part of the order awarding custody and support of the child, but it does present the questions of whether error of law appears on the face of the record and whether the factual findings support the order awarding alimony *pendente lite.*

APPEAL by defendant from *Clifford, District Court Judge,* 20 August 1970 Session of District Court held in FORSYTH County.

Plaintiff instituted this action on 31 July 1970, under the provisions of G.S. 50-7, for divorce from bed and board, alimony *pendente lite,* and custody and support of their minor son. She alleged abandonment and failure to support, indignities to her person, and adultery on the part of the defendant. Defendant denied the material allegations of the complaint and filed a counterclaim for divorce from bed and board, alleging that because of the conduct of the plaintiff, his life had become burdensome and his condition intolerable.

Defendant appealed from the entry of an "Order for Custody and Support" which reads as follows:

"THIS CAUSE coming on for hearing and being heard before the Honorable John C. Clifford, a Judge of the District Court of North Carolina on August 20, 1970, upon motion of the plaintiff for alimony *pendente lite* including possession of the house and its contents, custody and support for their one minor son and for attorney fees;

And it appearing to the court and the court finding as a fact from the evidence of the plaintiff and defendant that the defendant left the home on July 21, 1970 and has wilfully and unlawfully abandoned the plaintiff and has failed to provide adequate support for her; that the defendant is

able-bodied and is regularly employed by the Winston-Salem Post Office Department as a letter carrier and earns $232.00 every two weeks and is able to pay $62.50 for alimony *pendente lite* every two weeks and $62.50 every two weeks for child support which amounts are fair and reasonable; that at the time that the defendant abandoned the plaintiff, said defendant left the plaintiff indebted for a house payment of $178.80 per month, light, water, telephone and gas bills, bank note of $55.00 per month, clothing bills of $50.00 per month, washer and dryer bill of $19.00 per month, master charge account of $20.00 per month. That in addition, the plaintiff has to purchase food and clothing for their minor son and herself and provide school fees, medical expenses and other miscellaneous necessities; that the plaintiff is a dependent spouse and the defendant is a supporting spouse within the meaning of G.S. N.C. Section 50-16.1.

And it further appearing to the court and the court finding as a fact that the plaintiff is a fit and suitable person to have the custody and control of the minor son of the marriage and that the best interest of said child would be served by being in the custody of the plaintiff; that it would be in the best interest of the plaintiff and their minor son that said plaintiff have possession of the house and its contents pending final trial of the matter;

And it also appearing to the court that the defendant has had five days notice as required by law and was present in court and represented by Harold Wilson, Esquire.

IT IS NOW ORDERED that the plaintiff is granted full and complete custody of their minor son, Michael Peoples, Jr., and the defendant is to have reasonable visitation privileges; that the defendant is ordered to pay into the office of the clerk of court the sum of $125.00 every two weeks beginning August 27, 1970 for the support of their son and alimony *pendente lite* which amount is adjudged to be fair and reasonable; that the plaintiff is ordered to pay the house note of $178.80 out of the alimony and support payments; that the plaintiff is awarded possession to the home and its contents.

This cause is hereby retained for further orders of this court.

This 11th day of September, 1970."

Kennedy & Kennedy by Annie Brown Kennedy for plaintiff appellee.

Wilson, Morrow & Boyles by Laurel O. Boyles for defendant appellant.

MALLARD, Chief Judge.

The question of sufficiency or insufficiency of the evidence to support the findings made by the judge is not included in the assignments of error and is therefore not presented on this record.

[1, 2] No assignment of error is made with respect to granting custody of the minor son of the parties to the plaintiff with the defendant having visitation rights or to the finding of fact that the defendant is an able-bodied man who is working and able to pay $62.50 every two weeks for the support of the child. It was proper under G.S. 50-13.5(b)(3) to seek custody and support of a minor child in this action for divorce from bed and board. *Little v. Little,* 9 N.C. App. 361, 176 S.E. 2d 521 (1970). Nothing else appearing, the father is primarily liable for the support of a minor child. G.S. 50-13.4(b). The order entered herein complies with that part of provisions of G.S. 50-13.4(e) and G.S. 50-16.7(a) which requires that the amount allowed for the support of the child and the amount allowed for alimony *pendente lite* shall be separately stated and identified. Therefore, that part of the order granting the custody of the child to the mother and requiring the father to make payments for the support of the child is not involved on this appeal.

In her brief plaintiff contends that where there is no allegation that the wife was unfaithful and no request for findings of fact, detailed findings of fact are not required. In support of this contention plaintiff cites *Teague v. Teague,* 266 N.C. 320, 146 S.E. 2d 87 (1966); *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589 (1965); and *Harrell v. Harrell,* 256 N.C. 96, 123 S.E. 2d 220 (1961). Each of these cases was decided under the law as it was prior to 1 October 1967 and are not applicable.

[3] Rule 52 of the Rules of Civil Procedure entitled "Findings by the Court" does not apply in awarding alimony *pendente lite. Hatcher v. Hatcher,* 7 N.C. App. 562, 173 S.E. 2d 33 (1970).

[4] G.S. 50-16.8(f), enacted in 1967 to be effective 1 October 1967, is applicable in this case. It provides, among other things, that when an application for alimony *pendente lite* is made, the trial judge shall find the facts from the evidence presented. The requirement that the judge shall find the facts is a departure from the practice as it existed prior to 1 October 1967. *Blake v. Blake,* 6 N.C. App. 410, 170 S.E. 2d 87 (1969). In *Blake,* Judge Parker said:

> "In making such findings of fact it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony *pendente lite* under the provisions of G.S. 50-16.3(a)."

In *Hatcher v. Hatcher, supra,* Judge Brock said:

> "We do not interpret G.S. 50-16.8(f) to require the trial judge to make findings as to each allegation and evidentiary fact presented. *Blake v. Blake, supra.* However, it is necessary for the trial judge to make findings from which it can be determined, upon appellate review, that an award of alimony *pendente lite* is justified and appropriate in the case."

Defendant's first two assignments of error are that the finding of fact by the trial judge that "the defendant left the home on July 21, 1970" does not support the further findings that the defendant "has wilfully and unlawfully abandoned the plaintiff and has failed to provide adequate support for her." Defendant contends that the words "has wilfully and unlawfully abandoned the plaintiff and has failed to provide adequate support for her" do not constitute findings of fact but are conclusions.

The word "fact" has a variety of meanings. In Webster's Third New International Dictionary (1968), it is defined, *inter alia,* as "the reality of events or things the actual occurrence or existence of which is to be determined by evidence."

In *Webster* the word "conclusion" also has many definitions, among them being "the necessary consequence of two or more related propositions taken as premises."

A "conclusion of law" is defined in *Webster* as "the court's statement of the law applicable to a case in view of certain facts found to be true or assumed by the jury to be true: the final judgment or decree which the law requires in view of the facts found or the verdict brought in."

From these definitions it is seen that "findings of fact" and "conclusions" are two entirely different things. Yet, the application of these definitions to varying situations is often extremely difficult. From the decided cases it is observed that the difficulty in making findings of fact, as distinguished from conclusions, has plagued the bench and bar for many years.

[5, 6] It may be said that the distinction between the "finding of facts" and the "stating of conclusions" by a trial judge after he has heard the evidence in an alimony *pendente lite* matter is somewhat analogous to the distinction between a witness testifying as to a "fact" and stating his "opinion." The word "opinion" is defined in Stansbury, N. C. Evidence 2d, § 122, p. 280, as "referring to any narrative statement by a witness which does not describe facts directly perceived by his senses in the fullest detail that could reasonably be expected of an average witness and reasonably be understood by an average juror." See also *Taylor v. Security Co.*, 145 N.C. 383, 59 S.E. 139 (1907). The facts found in an alimony *pendente lite* case must be determinative of all the questions at issue in the proceeding. Specific factual findings as to each ultimate fact at issue upon which the rights of the litigants are predicated must be found. The ultimate facts at issue in proceedings often differ, thus a necessary finding of fact in one case may not be necessary in another case. The findings of fact in any given case should be "tailor-made" to settle the matters at issue between the parties. Facts are the basis for conclusions, and to call a "conclusion" a "finding of fact" does not make it one. *Foundry Co. v. Benfield,* 266 N.C. 342, 145 S.E. 2d 912 (1966). A failure to make a proper finding of fact in a matter at issue between the parties will result in prejudicial error, especially where the evidence is conflicting. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969).

[7] A finding of fact in an alimony *pendente lite* matter is a narrative statement by the trial judge of the ultimate fact at issue and need not include the evidentiary or subsidiary facts required to prove the ultimate facts. See *Webb v. Gaskins,* 255 N.C. 281, 121 S.E. 2d 564 (1961).

In the case of *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951), the Court said:

> "There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. * * *
>
> * * *
>
> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. *Christmas v. Cowden,* 44 N.M. 517, 105 P. 2d 484; *Scott v. Cismadi,* 80 Ohio App. 39, 74 S.E. 2d 563 (sic). In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. 54 C.J., Trial, section 1151. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. *Rhode v. Bartholomew,* 94 Cal. App. 2d 272, 210 P. 2d 768; *Citizens Securities & Investment Co. v. Dennis,* 236 Ill. 307; *Mining Securities Co. v. Wall,* 99 Mont. 596, 45 P. 2d 302; *Christmas v. Cowden, supra; Oregon Home Builders v. Montgomery Inv. Co.,* 94 Or. 349, 184 P. 487. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. *Maltz v. Jackoway-Katz Cap. Co.,* 336 Mo. 1000, 82 S.E. 2d 909 (sic); *Tesch v. Industrial Commission,* 200 Wis. 616, 229 N.W. 194."

[8] In this case the findings that the defendant left the home on July 21, 1970, had abandoned the plaintiff, and had failed to provide adequate support for her are a narrative statement of some of the ultimate facts at issue. In the setting of this case they are not conclusions.

There is a distinction between criminal abandonment and the matrimonial offense of desertion. In the case of *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12 (1966), it is said:

> " 'G.S. 50-7 provides, as a ground for divorce from bed and board: "1. If either party abandons *his* or *her* family." (Italics added.) It is available to the husband as well as to the wife. Abandonment under G.S. 50-7(1) is not synonymous with the criminal offense defined in G.S. 14-322. "In

a prosecution under G.S. 14-322, the State must establish (1) a wilful abandonment, and (2) a wilful failure to provide adequate support." *S. v. Lucas,* 242 N.C. 84, 86 S.E. 2d 770. True, the husband's wilful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment as used in G.S. 50-7(1). "A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete." 17 Am. Jur., Divorce and Separation Sec. 98.' *Pruett v. Pruett,* 247 N.C. 13, 23, 100 S.E. 2d 296, 303. Accord: 24 Am. Jur. 2d, Divorce and Separation § 104; Nelson, Divorce and Annulment, Second Edition, Vol. I, § 4.05; Lee, North Carolina Family Law, Vol. 1, § 80, p. 305."

[9] In defendant's third assignment of error he contends that the finding by the trial judge "that the plaintiff is a dependent spouse and the defendant is a supporting spouse within the meaning of G.S. N.C. Section 50-16.1" is not a finding of fact but is only a conclusion which is not based on the finding of facts.

The determination of what constitutes a "dependent spouse" and what constitutes a "supporting spouse" requires an application of principles of statutory law to facts and are therefore mixed questions of law and fact. G.S. 50-16.1(3) defines a "dependent spouse" as follows:

" 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

This statute provides two different factual situations from which the conclusion could be reached that a spouse is a "dependent spouse": (1) when a spouse is actually substantially dependent upon the other spouse for his or her maintenance and support; and (2) when a spouse is substantially in need of main-

tenance and support from the other spouse. To find that one is a "dependent spouse" within the meaning of G.S. 50-16.1(3) is a consequence of two or more related propositions taken as premises, one being the fact that the relationship of spouse exists, and the other consisting of at least the finding that one of the two alternatives in G.S. 50-16.1(3) is a fact. Thus the finding in this case that the plaintiff is a "dependent spouse" within the meaning of G.S. 50-16.1 is a conclusion that is not supported by a finding of fact.

G.S. 50-16.1(4) defines a "supporting spouse" as follows:

> " 'Supporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife."

In this statute there are three factual situations from which the conclusion could be reached that a spouse is a "supporting spouse": (1) when one spouse is actually substantially dependent upon the other; (2) when one spouse is substantially in need of maintenance and support from the other; and (3) unless the husband is incapable of supporting his wife, he is deemed to be the supporting spouse. Thus to find that one is a "supporting spouse" within the meaning of G.S. 50-16.1(4) is a consequence of two or more related propositions taken as premises, one being that the relationship of spouse exists, and the other consisting of the finding that one of three alternatives in G.S. 50-16.1(4) is a fact. Thus the finding in this case that defendant is the "supporting spouse" within the meaning of G.S. 50-16.1 is a conclusion that is not supported by a finding of fact.

[10] G.S. 50-16.3(a) sets forth the grounds for awarding alimony *pendente lite* to a dependent spouse in the following language:

> "(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony *pendente lite* is made, and
>
> (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or

defense of the suit and to defray the necessary expenses thereof."

[11] In the case before us there are sufficient factual findings to support a conclusion that the grounds stated in G.S. 50-16.3(a)(1) existed. However, there are no factual findings or even a conclusion stated with respect to whether the plaintiff had sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. The two quoted sections of G.S. 50-16.3(a) are connected by the word "and"; it is therefore mandatory that the grounds stated in both of these sections shall be found to exist before an award of alimony *pendente lite* may be made.

[12] Defendant's fourth and last assignment of error is as follows: "The trial judge erred in signing and entering the order allowing alimony *pendente lite* for the reasons stated above." This assignment of error does not challenge that part of the order entered awarding the custody of the child and ordering payments for the support of the child. However, this assignment of error does present the questions of whether error of law appears upon the face of the record and whether the facts found or admitted support the order awarding alimony *pendente lite. Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968); *Bridges v. Jackson,* 255 N.C. 333, 121 S.E. 2d 542 (1961). We conclude that the facts found and admitted do not support the judgment for alimony *pendente lite.*

The result is that there is no error as to the award of the custody, maintenance and support of the minor child of the parties. There is error in the award of alimony *pendente lite* for failure to make specific findings.

Error and remanded.

Judges PARKER and GRAHAM concur.

HARDY H. HARRIS v. FRANK L. BLUM CONSTRUCTION COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY

No. 7121IC9

(Filed 24 February 1971)

1. **Master and Servant §§ 93, 96— workmen's compensation — Industrial Commission — conflicts in evidence — findings of fact**

Conflicts in the evidence in a workmen's compensation proceeding are to be resolved by the Industrial Commission, and the findings of fact by the Commission (except jurisdictional facts) are conclusive upon appeal when supported by competent evidence.

2. **Master and Servant § 67— workmen's compensation — cause of stroke suffered at work — finding by Industrial Commission**

Finding by the Industrial Commission that a stroke suffered by plaintiff while at work was not caused by an injury arising out of and in the course of his employment, *held* supported by competent medical evidence.

3. **Master and Servant § 85— workmen's compensation — rehearing for newly discovered evidence — power of Industrial Commission**

The Industrial Commission has the power to grant a rehearing of a proceeding before it on the ground of newly discovered evidence.

4. **Master and Servant § 85— workmen's compensation — authority of Industrial Commission to hear further evidence**

Upon appeal to the Industrial Commission from an opinion and award of the hearing commissioner, the Commission has discretionary authority to receive further evidence regardless of whether such evidence is newly discovered. G.S. 97-85.

5. **Master and Servant § 93— workmen's compensation — denial of motion to remand for further medical evidence**

In this workmen's compensation proceeding, the Industrial Commission did not abuse its discretion and did not commit error in denying plaintiff's motion to remand the cause to the hearing commissioner for the purpose of taking the testimony of a medical doctor.

6. **Master and Servant § 96— workmen's compensation — new trial for newly discovered evidence — motion in Court of Appeals**

A motion for a new trial on the ground of newly discovered evidence in a workmen's compensation case may be granted in the Court of Appeals under proper circumstances.

7. **Master and Servant § 96— workmen's compensation — new hearing for newly discovered evidence — denial by Court of Appeals**

Motion by appellant in a workmen's compensation proceeding for a new hearing on the ground of newly discovered evidence is denied by the Court of Appeals where the evidence constituting the basis

for the motion was in possession of plaintiff before the hearing in the Industrial Commission.

APPEAL by plaintiff employee from an opinion and award by the North Carolina Industrial Commission filed 20 may 1970.

Plaintiff's evidence tended to show that on 14 July 1969 he had been employed by Frank L. Blum Construction Company (employer) for over five years. He was not suffering from hypertension or any heart disease. He testified that he was working on 14 July 1969, and after mixing some cement in a wheelbarrow, he started to pick it up "to push it back over where we were going to use it, and my foot slipped and I fell across the bed of the wheelbarrow. My neck struck that. The back bed of the wheelbarrow was made of steel. My right foot slipped. The ground was wet at the time. * * * This happened between 7:00 and 8:00 o'clock. * * * I had just gone to work and done my first work in the morning. The fall and striking the back of my neck as I referred to did not render me unconscious. It dazed me though. I mean it kinda dazed me. After the fall, I reached up and caught the wheelbarrow with my right hand and pulled myself off the ground. And I saw I couldn't stand up in my left leg, so I sat on a homemade ladder back there. I sat down on it."

Plaintiff was in the hospital from 14 July 1969 to 6 August 1969. He also testified: "My left arm and left leg have been unusuable (sic) since the fall I have described. I can't do anything but just sit around the house at home. I can't use my left arm at all."

Ernest Howard Morgan (Morgan) testified for plaintiff that he was a foreman for employer on 14 July 1969 and that he told plaintiff to mix the cement and later missed him. Morgan testified:

> "So I went around to look for him. And the next time I saw him, he was sitting on that ladder and he couldn't move his left side at all. And I asked him what was wrong and he said he had slipped and fell. So I looked and he did have a print of cement on his neck in the area where he had hit, which was somewhere on the back and to the right of his neck. And he couldn't move anything, so I let him sit there a few minutes and decided I had better take him to the hospital."

Henry Means (Means) testified for plaintiff that on 14 July 1969 he was employed by employer and that he saw plaintiff when Morgan sent him to mix cement. Means testified:

> "I saw him the next time when Mr. Morgan asked me to come and help pick him up. He had fell. He carried him to the hospital.
>
> I did observe the back of Mr. Harris' neck and I seen where he had cement on the back of his neck, around on the back of the neck. Pertaining to the ground there at the wheelbarrow, I saw a small amount of the cement had been knocked out of the wheelbarrow. * * *
>
> I heard Mr. Harris say that he had slipped and fell."

Dr. William Franklin Folds (Dr. Folds) was stipulated to be a medical expert and testified for plaintiff that the first time he saw plaintiff was on 16 July 1969 in the Forsyth Memorial Hospital. His examination revealed "a left hemipareses (sic), or hemiplegis (sic), or left paralysis of the body involving the left upper and left lower extremities."

Dr. Folds treated plaintiff until his discharge from the hospital on 6 August 1969 and had "followed him since his discharge at monthly intervals." Dr. Folds further testified:

> "From my examination, I was able to determine that the cause of the left hemipareses (sic) was a cerebral vascular accident, and, of course, there is always a question as to the cause of it.
>
> I received a history of the accident from the patient. * * *
>
> My diagnosis was gained by examination and it was obvious that he had a cerebral vascular accident. As I stated, there is some question as to the cause of this. * * *
>
> * * *
>
> * * * He had, when he was admitted, a complete flaccid. This is a limb paralysis. I mean he had no use whatever of his left upper and left lower extremities.
>
> As I did not see Mr. Harris prior to his bout in the hospital, I am having to assume some things. I can only say that, by history, he had no blood pressure problem or no cardiac problem, and then he had none until the day the accident happened. And he certainly, by the history, sustained a

broken side of the neck and apparently shortly thereafter lost the use of his left side of his body. My opinion is that there is a strong possibility that the accident could have had something to do with it. I don't think I could state, without reservation, that it caused it because this is just out of my ability to do this.

In my opinion, which is satisfactory to myself, Mr. Harris is presently unable to carry on any gainful employment. The report you hand me is the report I filled out for Mr. Hardy Harris on December 30th, 1969, and it does bear my signature thereon."

Dr. Ernesto de la Torre, who was stipulated and found to be a medical expert specializing in the field of neurosurgery, testified for defendant:

"I was asked to see Mr. Harris in consultation at Forsyth Hospital on July 15, 1969, and I saw him there at the hospital. At the time, I obtained the history that he had fallen while pushing a wheel barrow the day before, hit his right side of the neck and then he couldn't walk immediately after that. And he couldn't do anything nor use his hand in the left side. So I did a neurological examination on him which confirmed that he did have weakness on the left extremities and he could not see to the left side. And I thought that he had a stroke; that he had had a stroke, which is sometimes referred to as a cerebral vascular accident.

Based on my examination of him, I formed an opinion as to the cause of the cerebral vascular accident, with reasonable medical certainty. I thought he had a thrombosis of the carotid artery or the middle cerebral artery on the right side from arteriosclerosis or hardening of the arteries. I found some degree of hardening of the arteries as a condition with Mr. Harris. I didn't do a lot of other tests on him to prove the hardening of the arteries because at 56, we assume that some hardening of the arteries exist (sic) anyway.

I did not find any evidence of trauma to the neck in my examination."

On cross-examination Dr. de la Torre testified that "[a] trauma or blow on the head could not have caused the cerebral vascular accident."

The parties stipulated that they were subject to the provisions of the North Carolina Workmen's Compenstaion Act (Act), that the relationship of employer-employee existed on the date of the alleged accident, the amount of weekly wages paid to plaintiff, and that the Hartford Accident and Insurance Company was employer's insurance carrier.

The deputy commissioner found, among other things, that:

"7. Plaintiff had a stroke on July 14, 1969, while in the employment of the defendant employer, however, such stroke was caused by the hardening of his arteries which produced a rupture of a blood vessel in the brain forming a clot and was not caused by an injury arising out of and in the course of his employment."

The deputy commissioner concluded that the plaintiff was not entitled to recover and denied his claim for benefits under the Act in an undated opinion filed 17 March 1970.

The plaintiff appealed to the North Carolina Industrial Commission (Commission) asserting in his Application for Review, which was filed 20 April 1970, that the deputy commissioner committed error for that the "evidence was not sufficient to support findings of fact and conclusion of law."

After making a typographical correction and punctuation changes in paragraph five of the findings of the deputy commissioner, the Commission adopted his opinion as its own, including his findings of fact and conclusions, and affirmed the results reached by him.

From the denial of his claim for benefits under the Act, the plaintiff appealed to the Court of Appeals.

Robert M. Bryant for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by William F. Maready and John M. Harrington for defendant appellees.

MALLARD, Chief Judge.

[1, 2] Plaintiff contends that the facts contained in paragraph number 7 of the findings of fact of the deputy commissioner and adopted by the Commission are not supported by competent medical testimony. This contention is without merit. The findings are supported by the competent testimony of Dr. de la Torre.

It is established law in North Carolina that conflicts in the evidence are to be resolved by the Commission and that findings of fact by the Commission (except jurisdictional facts) are conclusive upon appeal when supported by competent evidence. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965); *West v. Stevens*, 6 N.C. App. 152, 169 S.E. 2d 517 (1969); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968). No jurisdictional facts are at issue herein. The facts found in this case are based on competent evidence and support the conclusions of law and the decision of the Commission. The Court of Appeals is bound thereby. *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28 (1968); *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969).

Defendants' second assignment of error is that the Commission committed error in denying plaintiff's motion that the cause be reset for hearing for the purpose of taking the testimony of Dr. E. O. Jeffreys.

At the conclusion of the evidence taken before the deputy commissioner, the plaintiff announced that the only other evidence he would offer would be "Dr. Jeffries"; whereupon the following colloquy occurred:

"THE COURT: Are you going to get a report from Dr. Jefferies?

MR. BRYANT: Yes, Your Honor.

THE COURT: Well, then maybe you and Mr. Maready can get together and submit it.

MR. BRYANT: I think so.

MR. MAREADY: That's quite possible, depending on what he says, of course.

THE COURT: All right.

WHEREUPON THIS HEARING WAS CONCLUDED."

In the "opinion and award" by Deputy Commissioner Delbridge, which was filed 17 March 1970, it was stated that the case was heard on 13 January 1970. There is nothing in the record to indicate whether the report of Dr. Jeffreys (or "Jefferies") was offered between the hearing date and the

filing date. The next reference in the record to the testimony of Dr. Jeffreys is contained in a motion by the plaintiff to the Commission dated 8 May 1970 asking that the cause be remanded to the "Commissioner" for the purpose of taking the testimony of Dr. Jeffreys. In this motion plaintiff asserts that he had informed the deputy commissioner at the hearing on 13 January 1970 that Dr. Jeffreys had taken X-rays of the plaintiff but would not be able to furnish a report until some time later; that he had requested the commissioner to hold the case in abeyance until Dr. Jeffreys' findings could be taken as evidence; and that he had received a letter addressed to the Commission from Dr. Jeffreys which he attached to the motion. The letter of Dr. Jeffreys is dated 30 April 1970 and reads as follows:

"N. C. Industrial Commission
Education Building
Raleigh, N. C.

Re: Mr. Hardy Harris

Gentlemen:

I have examined the above patient, and X-rays were made April 24, 1970.

It is my opinion that this patient's illness is due to the injury which occurred while he was at work.

Sincerely yours,
s/EVERETT O. JEFFREYS
Everett O. Jeffreys, M.D."

[3-5] In his brief plaintiff correctly asserts that the Commission had the power to grant a rehearing of a proceeding before it and in which it has made an award on the grounds of newly discovered evidence. In support of this assertion, he cites *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965), and *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935). There is no contention or assertion in plaintiff's *motion* that the evidence of Dr. Jeffreys was "newly discovered." In fact, plaintiff apparently had been examined by Dr. Jeffreys before the 13 January hearing. However, Dr. Jeffreys' letter, upon which plaintiff bases his motion, appears to be based on an examination of the plaintiff that he made more than a month after the deputy commissioner had

denied recovery. The Commission, upon an appeal to it from an opinion and award of the hearing commissioner, had the discretionary authority to receive further evidence regardless of whether it was newly discovered evidence. G.S. 97-85. We hold that the Commission did not abuse its discretion and did not commit error in denying plaintiff's motion to remand to the hearing commissioner for the purpose of taking the testimony of Dr. Jeffreys.

[6] The record on appeal in this case was docketed in this court on 18 August 1970 and came up for oral argument on 26 January 1971. On 13 January 1971 plaintiff filed a motion requesting that the Court of Appeals grant him a new hearing upon the grounds of newly discovered evidence. This motion is supported by an affidavit dated 23 December 1970 of Dr. Jeffreys in substance stating that in his opinion the left hemiparesis suffered by the plaintiff on 14 July 1969 was caused by a trauma or blow to the back of the head. A motion for a new trial on the grounds of newly discovered evidence in a Workmen's Compensation case may be granted in the Court of Appeals under proper circumstances. *Shelton v. Dry Cleaners,* 2 N.C. App. 528, 163 S.E. 2d 288 (1968).

In 2 McIntosh, N. C. Practice 2d, § 1800(7), p. 242, it is said:

> "A motion may be made in the appellate court for a new trial for newly discovered evidence when such evidence has been discovered after the adjournment of the court below and pending the appeal. Such motions are not favored, and the court may grant or refuse the motion in its discretion, and without discussion or a written opinion as a precedent. * * * The same requirements as to the nature of the evidence and the exercise of proper diligence would apply, as upon a similar motion in the lower court, and the facts should be presented by affidavits and counter affidavits."

The prerequisites to the granting of such a motion in the appellate court are set forth in *Brown v. Hillsboro,* 185 N.C. 368, 117 S.E. 41 (1923). See also *McCulloh v. Catawba College,* 266 N.C. 513, 146 S.E. 2d 467 (1966); *State v. Casey,* 201 N.C. 620, 161 S.E. 81 (1931); and 2 McIntosh, N. C. Practice 2d, § 1596(8), p. 100.

In the case of *Ryan v. United States Lines Company*, 303 F. 2d 430 (2d Cir. 1962), it was held that under Rule 60(b) of the Federal Rules of Civil Procedure, the results of a new physical examination of an injured seaman was not "newly discovered evidence" which would permit reopening a judgment and the granting of a new trial.

The evidence in the case before us was in possession of the plaintiff before the opinion and award of the Commission and is not therefore evidence that has been newly discovered since the trial before the Commission.

[7] After consideration of the motion and the supporting affidavit, we hold that the plaintiff's motion should not be allowed. Moreover, it does not meet the requirements of the rule so as to entitle him to a new hearing on the grounds of newly discovered evidence.

The opinion and award of the Commission denying plaintiff's claim for benefits under the Act is

Affirmed.

Judges PARKER and GRAHAM concur.

CLYDENE W. ROBBINS, WIDOW; CLYDENE W. ROBBINS, NEXT FRIEND OF SARAH EDITH ROBBINS, LARRY DEAN ROBBINS, CHARLES RANDY ROBBINS AND KATHY DARLENE ROBBINS, CHILDREN OF CHARLIE ROBBINS, DEC'D., AND VELMA HEWITT WEAVER, NEXT FRIEND OF DANNY LEWIS AND CYNTHIA LEIGH LEWIS, CHILDREN OF MRS. TERRI D. LEWIS, DEC'D. v. O. T. NICHOLSON, EMPLOYER; CASUALTY RECIPROCAL EXCHANGE, CARRIER

No. 7122IC145

(Filed 24 February 1971)

1. Appeal and Error § 49— exclusion of testimony — other similar evidence admitted — harmless error

In this proceeding to recover workmen's compensation benefits for the deaths of two employees who were shot by the *femme* decedent's husband while they were working in a grocery store, the Industrial Commission did not commit reversible error in the exclusion of testimony that the *femme* decedent's husband had told a witness

that he thought *femme* decedent was "running around," where two other witnesses were allowed to give testimony of the same import as that excluded.

2. **Master and Servant § 56— workmen's compensation — causal connection between employment and injury**

As used in G.S. 97-2(6), the words "out of" refer to the origin or cause of the accident, and the words "in the course of" refer to the time, place and circumstances under which it occurred.

3. **Master and Servant § 56— workmen's compensation — employment as cause of injury**

In order for an injury to be compensable under the Workmen's Compensation Act, it need not have been foreseen if it resulted from the employment, and the employment does not have to be the "sole" cause of the injury; it is sufficient if there is "some" causal connection between the employment and the injury.

4. **Master and Servant § 59— workmen's compensation**

In this proceeding to recover workmen's compensation benefits for the deaths of two employees who were shot by the *femme* decedent's husband while they were working in a grocery store, the evidence was sufficient to support the Commission's findings that employment of decedents at the grocery store was the chief origin of matrimonial difficulties between the *femme* decedent and her husband, and that such employment was the direct cause of the fatal assault upon decedents, and the findings support the Commission's conclusion that the deaths of decedents arose out of their employment at the grocery store.

5. **Master and Servant § 93— workmen's compensation proceeding — credibility and weight of evidence — duties of Industrial Commission**

In a workman's compensation proceeding, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony and may accept or reject all or a part of the testimony of any witness.

Judge CAMPBELL dissenting in part.

APPEAL by defendants, employer and carrier, from an opinion and award of the North Carolina Industrial Commission entered on 5 October 1970.

This action consists of two claims, consolidated for purpose of hearing, commenced pursuant to the Workmen's Compensation Act (G.S. 97-1 *et seq.)* to collect benefits for the deaths of Charlie Robbins (Robbins) and Mrs. Terri D. Lewis (Terri), employees of a retail grocery store owned and operated by O. T. Nicholson (Nicholson). It was stipulated that at the time of the injuries by accidents giving rise to the

claims that the parties were subject to and bound by the provisions of the Workmen's Compensation Act; that the employer-employee relationship existed between the deceased employees and defendant employer at such time; and that defendant insurer was the compensation insurance carrier on the risk at such time. The parties further stipulated as to the average weekly wage of the two deceased employees; that said employees sustained injuries by accidents on 25 December 1967; and that such injuries by accidents resulted in the deaths of the deceased employees on that date. Defendants denied that the accidents "arose out of the employment."

Evidence presented before the Hearing Commissioner tended to show: Around 5:00 p.m. on Christmas Day 1967 Terri and Robbins were working at Nicholson's store in the City of Lexington, N. C. Terri was working at the check-out counter and Robbins was "bagging" groceries for a customer. Daniel Lewis (Lewis), husband of Terri, entered the front door of the store with a rifle and proceeded to shoot Terri and Robbins. Lewis then walked to the back of the store where he shot Nicholson. All three of the victims died immediately from their injuries. After shooting Nicholson, Lewis returned to the street in front of the store and awaited the arrival of police. Additional facts are set forth in the opinion.

The Hearing Commissioner, after making findings of fact and conclusions of law, made awards to the respective survivors of both Terri and Robbins. On appeal by defendants the full Commission, after allowing several minor assignments of error not effecting the merits of the claims, sustained the major findings and conclusions of law, and affirmed the award of, the Hearing Commissioner. Defendants appealed, assigning error.

T. H. Suddarth, Jr., and Jack E. Klass, for plaintiffs Robbins, appellees; and J. Lee Wilson and Ned A. Beeker for plaintiffs Lewis, appellees.

Kennedy, Covington, Lobdell & Hickman by Edgar Love III for defendants, appellants.

BRITT, Judge.

Did the injuries and resulting deaths of Terri and Robbins arise "out of their employment" within the meaning of the

Workmen's Compensation Act? The Industrial Commission answered in the affirmative and we think the Commission's decision should be affirmed.

The two basic contentions of defendants are: (1) the Commission committed reversible error in refusing to admit testimony of a witness which, if allowed, would have indicated what Lewis' state of mind was at the time of the shooting, this testimony being an exception to the hearsay rule; and (2) that the Commission erred in finding and concluding that the injuries and resulting deaths of Terri and Robbins "arose out of" their employment.

[1] (1) Defendants argue that it was error for the Commission not to permit a friend of Lewis to testify that sometime between 22 November 1967 and 25 December 1967 Lewis told her that he thought his wife was "running around." Without going into the question of whether this testimony was admissible as an exception to the hearsay rule, it is clear that it was not reversible error to exclude it in this case. The record discloses at least two instances where others testified as to Lewis' state of mind regarding his wife's conduct. One witness, an employee at Nicholson's store, testified as to statements about "running around" made by Lewis to his wife on 1 November 1967. Another witness, Foyelle Cecil, testified that on the day of the killing Lewis visited her and stated that his wife had a lover. Testimony of Lewis' state of mind was before the Commission, and there is a well-recognized rule that the exclusion of testimony will not be held prejudicial when the party offering the evidence has the full benefit of other evidence in establishing the fact sought to be established. 1 *N.C. Index* 2d, Appeal and Error, Sec. 49, pp. 201-202. See also 88 C.J.S., Trial, Sec. 91, p. 199; 5A C.J.S., Appeal and Error, Sec. 1604, p. 89. We hold that it was not prejudicial error for the Commission to refuse to allow the testimony in question.

(2) This contention has no simple answer. G.S. 97-2(6) provides that an injury to be compensable must be an injury caused by accident "arising out of and in the course of the employment."

[2, 3] Our Supreme Court has held that the words "out of" refer to the origin or cause of the accident, while the words "in the course of" have reference to the time, place and circum-

stances under which it occurred. *Clark v. Burton Lines,* 272 N.C. 433, 158 S.E. 2d 569 (1968); *Zimmerman v. Freezer Locker,* 244 N.C. 628, 94 S.E. 2d 813 (1956). Courts favor a liberal construction of the Act in favor of the claimant. *Petty v. Transport, Inc.,* 276 N.C. 417, 173 S.E. 2d 321 (1970); *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907 (1942). Also, whether the injury "arose out of" the employment is to be decided on the facts of the individual case and cannot be precisely defined. *Berry v. Furniture Co.,* 232 N.C. 303, 60 S.E. 2d 97 (1950); *Taylor v. Wake Forest,* 228 N.C. 346, 45 S.E. 2d 387 (1947). In North Carolina there is no requirement that the injury should be foreseen if it resulted from the employment nor does the employment have to be the "sole" cause of the injury; it is sufficient if there is "some" causal connection between the employment and the injury. *Taylor v. Twin City Club,* 260 N. C. 435, 132 S.E. 2d 865 (1963). *Harless v. Flynn,* 1 N.C. App. 448, 162 S.E. 2d 47 (1968). The law is well stated in *Zimmerman* where it was said: "There must be some causal relations between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." (Authorities cited.)

Among other facts, the Commission found the following: Lewis became resentful and mentally disturbed with Terri on account of her working at the grocery store. In July of 1967 Lewis rented a beach cottage with the intention of his family vacationing at the cottage; however, Terri could not get off work from Nicholson's store and did not take a vacation with the family because of her work. In September 1967 Lewis thought that Terri was acting unusual. Lewis was regularly drinking intoxicants and he and Terri separated around Thanksgiving 1967. In late November 1967 a warrant was issued against Lewis for inadequate support of his children; he was thereafter convicted of the charge and required to contribute stated sums for the children. Following the separation Lewis went to Nicholson's store on several occasions and tried to get Terri to go back and live with him; he threatened to kill her and insisted that Nicholson discontinue employing Terri. Lewis resented the fact that Terri worked long hours at the store and that she worked with male employees, including Robbins. Lewis threatened to kill Robbins and Terri on more than one occasion

and also threatened to kill James Waller, another employee, but Waller stopped working at the store some two weeks before Christmas 1967.

[4] Finding of fact No. 11 which defendants assign as error is as follows:

> "The employment of Terri and Robbins at the Nicholson store was the chief origin of the matrimonial difficulties between Terri and Lewis. The employment of Terri and Robbins was the direct cause of the fatal assault upon them by Lewis. Both Terri and Robbins were in the course of their employment at the time of the injuries by accidents resulting in their death. Such injuries by accidents likewise arose out of their employment with Nicholson."

We think the findings of fact made by the Commission were amply supported by the evidence.

[5] Defendants' remaining assignments of error relate to the failure of the Commission to find certain facts that would have been favorable to defendants. While there was evidence that would have justified different findings of fact by the Commission, findings which would have supported conclusions of law favorable to the defendants, it is well settled that 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; it 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. *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968). The assignments of error are overruled.

The findings of fact made by the Commission fully support its conclusions of law, and its conclusions adequately justify the award.

The opinion and award appealed from is

Affirmed.

Judge HEDRICK concurs.

Judge CAMPBELL concurs in part and dissents in part.

Judge CAMPBELL dissenting in part:

While I concur in that portion of the opinion affirming the award of the Industrial Commission to the children of Terri Lewis, I do not believe that the evidence was sufficient to sustain the findings of fact and award in favor of the wife and children of Charlie Robbins.

In order for an injury to be compensable, it must arise out of the employment, that is, have a causal connection with the employment. ". . . An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein. . . . There must be some causal relation between the employment and the injury . . . . " *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865 (1963). I do not believe that the evidence establishes such a causal relation between the death of Charlie Robbins and his employment. The evidence indicates only that Daniel Lewis was upset with Charlie Robbins because he felt that Charlie Robbins was having an affair with his wife.

I would reverse the award of the Industrial Commission to the wife and children of Charlie Robbins.

SYLVIA SUE RUTLEDGE v. DELMA JAMES RUTLEDGE

No. 7119SC149

(Filed 24 February 1971)

1. **Insane Persons § 2; Rules of Civil Procedure § 17— appointment of guardian — notice and opportunity to be heard**

The appointment of a guardian for a party litigant is erroneous in the absence of notice to the defendant and of an opportunity for him to be heard.

2. **Insane Persons § 2; Rules of Civil Procedure § 17— appointment of guardian — mentally incompetent person**

A party in a civil action who has been judicially determined or is conceded to be mentally incompetent must be represented by a guardian or a guardian *ad litem.* G. S. 1A-1, Rule 17(b).

3. Insane Persons § 2; Rules of Civil Procedure § 17— appointment of guardian — disputed competency of party litigant — duty of trial court

If a substantial question arises during a civil action as to the competency of a party litigant who is not already represented by a guardian, it is the duty of the trial judge to see that proper determination of this question is made before proceeding further with the trial in any way which might prejudice the rights of such party.

4. Insane Persons § 2; Rules of Civil Procedure § 17— substantial question of party's competency — determination by court

Whether the circumstances are sufficient to raise a substantial question of a party's competency is a matter to be initially determined in the sound discretion of the trial judge.

5. Insane Persons § 2; Rules of Civil Procedure § 17— appointment of guardian — initial determination of competency — voir dire — presence of litigant — findings of fact

In making the initial determination as to a party's competency, the trial court should conduct a *voir dire* examination; if practicable, the party whose competency is questioned should be present; if the evidence is conflicting, the trial judge should make findings of fact to support his determination whether a substantial question of competency is raised.

6. Insane Persons § 2; Rules of Civil Procedure § 17— competency of party litigant — initial determination — notice to party

When the trial judge initially determines that a substantial question as to a party's competency has been raised, the party must be given notice and opportunity to be heard.

7. Rules of Civil Procedure §§ 6, 17; Insane Persons § 2— appointment of guardian — five days notice to party litigant.

A party for whom a guardian or guardian *ad litem* is proposed is entitled to five days notice unless the court, for good cause, should prescribe a shorter period. G.S. 1A-1, Rule 6(d).

8. Insane Persons § 2; Rules of Civil Procedure § 17— appointment of guardian — failure of trial judge to make initial determination of competency — evidence of party's commitment to Dix Hospital

In a wife's action for alimony without divorce and for child custody and support, the trial court committed reversible error in hearing the action on its merits and in rendering judgment in favor of the wife, without first determining whether a guardian should be appointed for the husband, where the husband's attorney offered sufficient evidence, consisting of medical records showing the husband's commitment to Dix Hospital, to require a *voir dire* examination on husband's disputed competency.

APPEAL by defendant from *Gambill, J.*, 21 September 1970 Civil Session of RANDOLPH Superior Court.

Plaintiff wife instituted this action in the Superior Court of Randolph County on 9 September 1970 against defendant husband seeking alimony without divorce, custody of the seven-year-old child of the parties, subsistence for the child, and possession of a house trailer and the furnishings therein. In her complaint plaintiff alleged various acts of the defendant which had made her life burdensome and her condition intolerable. The complaint also contained the following allegations:

> "The plaintiff is informed and believes and upon such information and belief alleges that the defendant has become addicted to some sort of drug which causes him to go completely out of his head at times. The defendant has threatened to kill the plaintiff on numerous occasions and the plaintiff has for a considerable length of time lived in fear of her life and the life of her son. The defendant has been confined at Dorothea Dix Hospital on three different occasions within the last year. He refuses to take the medication which has been prescribed for him by the doctors at Dorothea Dix."

Plaintiff also moved for alimony and custody of the child *pendente lite,* for a writ of possession of the house trailer and its contents, and for counsel fees.

Summons and complaint and notice of the motion for relief *pendente lite* were personally served upon the defendant on 14 September 1970. Plaintiff's motion for relief *pendente lite* came on for hearing on 1 October 1970 before Judge Gambill, Judge of the Superior Court assigned and holding the 21 September 1970 two-week civil session of Superior Court in Randolph County. Defendant did not appear in person or file answer, but at the time of the hearing a written motion was filed, expressed to be by "the defendant through counsel," asking "that a guardian be appointed to represent his interest in this matter and defend the same as the defendant is incompetent to plead in this case." This motion was signed by Ottway Burton, "Attorney for Defendant." In support of this motion Mr. Burton introduced medical records covering admissions of defendant to Dorothea Dix Hospital for various lengths of time commencing on 1 November 1966, 1 October 1968, 22 July 1969, 15 December 1969, and 27 March 1970, and showing defendant was last released from the hospital "on trial visit to his wife" on 13

April 1970 with a psychiatric diagnosis of paranoid schizophrenia. Mr. Burton also introduced the medical records of defendant's admissions to the Moses H. Cone Memorial Hospital on 29 April 1961, 20 August 1961, and 5 September 1961. These records indicated that defendant had first been admitted to that hospital on 29 April 1961 "with a severe generalized brain injury" from an automobile accident which occurred on that date, and that during his stay in the hospital "[h]e became somewhat maniacal in his behavior and was a problem in management for a time." In opposition to the motion for appointment of a guardian for defendant, plaintiff presented the affidavit of a District Engineer of the State Highway Department, dated 17 September 1970, showing that defendant was an employee of the State Highway Commission working under the affiant in the Maintenance Department of the Commission in Asheboro, that his hourly wage was $2.05, that he ordinarily worked forty hours per week, and that he had gross earnings for the pay period between 19 June and 14 August 1970 of $588.35.

The court denied the motion for the appointment of a guardian to represent defendant, and after considering additional evidence presented by plaintiff, entered an order making findings of fact upon which the court awarded custody of the child and possession of the trailer to plaintiff, and ordered defendant to pay alimony and child support *pendente lite* and counsel fees. Defendant appealed.

Miller, Beck & O'Briant by Adam W. Beck for plaintiff appellee.

Ottway Burton for defendant appellant.

PARKER, Judge.

No question is raised by this appeal as to the sufficiency of the evidence to support the court's findings of fact or the sufficiency of these in turn to support the order awarding plaintiff relief *pendente lite*. The only exceptions brought forward are, first, that the court erred in denying the motion for the appointment of a guardian to represent the defendant, and, second, that the court erred in proceeding to hear the matter and enter the order appealed from.

[1] There was clearly no error in the court's refusal of the motion to appoint a guardian for the defendant. The record

does not indicate that the defendant had any knowledge or notice that such a motion was being made. In the absence of notice to the defendant and opportunity granted him to be heard, appointment of a guardian for him would have been error. *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490.

[2] A more serious question is presented by the second exception and assignment of error. Infants and persons *non compos mentis* are peculiarly entitled to the protection of the court. A principal means for extending this protection is by appointment of a guardian or, where appropriate, a guardian *ad litem*. Where a party in a civil action has been judicially determined or is conceded to be mentally incompetent, the law is clear; he must be represented by a guardian or guardian *ad litem*. In *Bell v. Smith*, 262 N.C. 540, 138 S.E. 2d 34, our Supreme Court said:

> "If a defendant in a civil action is *non compos mentis*, he must defend by general or testamentary guardian if he has one within the State, otherwise by guardian *ad litem* to be appointed by the court. *Hood v. Holding*, 205 N.C. 451, 171 S.E. 633. The court may not quash the service on an incompetent, but should see to it that he is properly represented before any action is taken which is detrimental to his interests. Either party, or the court upon its own motion, may initiate proceedings for the appointment of a guardian *ad litem* before any hearing on the merits.

Substantially the same requirement is now contained in our Rules of Civil Procedure. G.S. 1A-1, Rule 17(b).

The difficulty arises when the party has not previously been judicially declared to be an incompetent and a dispute arises as to his competency. Justice Sharp, speaking for the Court in *Hagins v. Redevelopment Comm., supra,* pointed out that the statute and court rule then in effect, former G.S. 1-64 and Superior Court Rule 16, failed to specify a procedure for adjudicating a dispute over a party's competency to conduct his litigation. The new Rules of Civil Procedure, while spelling out the appointment procedure in G.S. 1A-1, Rule 17(c), also fail to specify the method or procedure by which a disputed question of competency is to be determined. Of necessity, therefore, we must look elsewhere for guidance.

In a criminal case, "[o]rdinarily, it is for the court, in its discretion, to determine whether the circumstances brought to

its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense." *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560. By virtue of statutes now codified as G.S. 122-83 and G.S. 122-84, such determination may be made by the court with or without the aid of a jury. *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458. However, "[w]hether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment." *State v. Propst, supra.* In the criminal case the defendant whose competency is being determined is, of course, present in person before the judge who is called upon to make the determination.

In the course of the trial of both civil and criminal cases the trial judge may at times be called upon to determine on *voir dire* whether a young child or an adult of low mentality, who is presented as a witness, has sufficient capacity and understanding to testify. Ordinarily this determination also rests in the sound discretion of the trial judge to be exercised by him in the light of his examination and observation of the particular witness. *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826; *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E. 2d 321. In such cases the person whose competency as a witnesss is being determined is, of course, present in person before the judge who is called upon to make the determination.

[3-7] We are of the opinion, and so hold, that if in the course of the trial of a civil action or proceeding, circumstances are brought to the attention of the trial judge which raise a substantial question as to whether a party litigant, who is not already represented by a guardian, is *non compos mentis,* it is the duty of the trial judge to see that proper determination of this question is made before proceeding further with the trial in any way which might prejudice the rights of such party. Whether the circumstances which are brought to the attention of the trial judge are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge. In making this initial determination, normally a *voir dire* examination should be conducted. Where practicable, it is preferable that the party whose competency is questioned be present in person before

the court. If the evidence is conflicting, the trial judge should make findings of facts as the basis for his determination as to whether any substantial question of competency is raised. If the trial judge determines that a substantial question as to the party's competency is raised, notice and opportunity to be heard must then be given the party for whom appointment of a guardian is proposed. These requirements and the method by which the question is to be resolved are spelled out in the opinion in *Hagins v. Redevelopment Comm., supra,* in the following language:

> "It follows, therefore, that a person for whom a next friend or guardian *ad litem* is proposed is entitled to notice as in case of an inquisition of lunacy under G.S. 35-2. This statute does not specify the time but, by analogy to G.S. 1-581, ten days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period. If, at the time appointed for the hearing, the party does not deny the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith, and that the party is *non compos mentis,* the judge may proceed to appoint a next friend to act for him. If, however, he asserts his competency, he is entitled to have the issue determined as provided in G.S. 35-2."

It should be noted that the opinion in *Hagins* was filed on 31 January 1969, which was before the effective date of the Rules of Civil Procedure. Rule 17(b) makes no reference to a "next friend," but provides for the appointment of a guardian or guardian *ad litem* for infants and incompetents who are parties, whether plaintiff or defendant, in any civil action. Therefore, the reference to a "next friend" in the foregoing quotation from *Hagins* is no longer appropriate. Similarly, G.S. 1-581, which provided for service of a motion ten days before the time appointed for the hearing unless the court prescribed a shorter time, has been repealed. Rule 6(d) of the Rules of Civil Procedure now provides that notice of hearing of a motion shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by the rules or by order of the court. Therefore, following the analogy suggested in *Hagins,* and taking cognizance of the changes effected by the Rules of Civil Procedure, it would now appear that five

days notice, rather than ten, would be appropriate unless the court, for good cause, should prescribe a shorter period.

[8] In the case presently before us, while the trial court properly denied the motion for appointment of a guardian for the defendant, since no notice of such motion had been given to the defendant, in our opinion it committed error in then proceeding immediately into a hearing on the merits and entering the order appealed from. The evidence bearing on the question of defendant's competency was at least sufficient to require the court to conduct a *voir dire* examination into the matter, preferably with the defendant present in person so that the court could observe him. If at such examination conflicting evidence had been presented, the court should then have made findings of fact, and, on the basis of these findings, made an initial determination whether a substantial question as to defendant's competency existed. If such a question had been found to exist, it should then have been resolved, after giving defendant notice and opportunity to be heard, in the manner set forth in *Hagins v. Redevelopment Comm., supra,* as modified to reflect the changes effected by the Rules of Civil Procedure.

For the errors noted, the order appealed from is vacated and this cause is remanded for such further proceedings, consistent with the legal principles set forth herein, as may be initiated.

Error and remanded.

Chief Judge MALLARD and Judge GRAHAM concur.

E. R. EVANS, PLAINTIFF v. W. B. EVERETT, EARLY & WINBORNE, INC., AND STANDARD BRANDS, INC., NATIONAL PEANUT CORPORATION, A DIVISION OF STANDARD BRANDS, ORIGINAL DEFENDANTS

— AND —

SHIRLEY PIERCE, MARION ODOM AND LEBRON MORRIS, OWNERS OF FARMERS TOBACCO WAREHOUSE, AND FARMERS CO-OPERATIVE EXCHANGE, ADDITIONAL DEFENDANTS

No. 706SC618

(Filed 24 February 1971)

1. **Uniform Commercial Code § 71— security interest in farm crops — insufficiency of documents to create enforceable security interest**

A promissory note containing the words "This note is secured by *Uniform Commercial Code financing* statement of North Carolina," together with financing statements containing (1) a description of the cropland serving as collateral for the note and (2) the words "same securing note for advanced money to produce crops for the year 1969," *held* insufficient to create an enforceable security interest in the crops. G.S. 25-9-105(1)(h); G.S. 25-9-203(1)(b).

2. **Uniform Commercial Code § 1— purpose of the code — uniformity of the law**

One of the purposes of the Uniform Commercial Code is to make uniform the law among various jurisdictions. G.S. 25-1-102(c).

3. **Uniform Commercial Code § 73— security agreement — grant of the security interest**

A security agreement under the Uniform Commercial Code must contain a grant of the security interest. G.S. 25-9-105(1)(h).

APPEAL by plaintiff from *Copeland, Special Superior Court Judge* at the July 1970 Term of HERTFORD Superior Court.

Plaintiff instituted this action against the original defendants to recover on a promissory note which he alleged was secured by a Uniform Commercial Code financing statement. Farmers Cooperative Exchange and Shirley Pierce, Marion Odom and Lebron Morris, owners of Farmers Tobacco Warehouse, were made additional defendants upon motion of defendant Early & Winborne, Inc. The allegations of the complaint are, in substance, as follows. The defendant Everett executed a note and delivered it to the plaintiff on 23 January 1969. By the terms of the note, Everett promised to pay the plaintiff $75,000.00 by or on 15 November 1969. The note contained the

following statement: "This note is secured by Uniform Commercial Code financing statement of North Carolina." On 24 January 1969 instruments entitled "Financing Statement" were filed in the office of the Register of Deeds for Bertie and Hertford Counties. These financing statements contain the names and addresses of the debtor and the secured party. They also contain a description of the land on which the crops are to be grown (the sufficiency of which is not questioned on this appeal) and they are signed by both the creditor and the debtor. Following a description of the collateral, the following language appears: " . . . same securing note for advanced money to produce crops for the year 1969." Everett owes plaintiff $24,418.57 on the note, and plaintiff seeks to recover from the defendant purchasers of the crops.

All the defendants except Everett moved to dismiss the complaint on the grounds that it did not state a claim upon which relief could be granted. From the granting of the motion, plaintiff appealed.

Pritchett, Cooke and Burch by J. A. Pritchett, W. L. Cooke and S. R. Burch for plaintiff appellant.

White, Hall and Mullen by Gerald F. White and Philip P. Godwin for original defendant appellees Early & Winborne, Inc.

Revelle and Burleson by L. Frank Burleson, Jr., for original defendant appellees Standard Brands, Inc., and National Peanut Corporation.

Jones, Jones and Jones by Carter W. Jones and L. Bennett Gram, Jr., for additional defendant appellees.

VAUGHN, Judge.

[1] The only question requiring an answer in order to dispose of the appeal is whether the complaint discloses that plaintiff has an enforceable security interest in the crops sold by Everett. We hold that it does not and, therefore, the motion to dismiss for failure to state a claim upon which relief can be granted was properly allowed.

[2] The law applicable to this case is found in the Uniform Commercial Code, N. C. Gen. Stat. 25-1-101 *et seq.* Because the Uniform Commercial Code is a relatively recent enactment in

North Carolina, it is not surprising that this is a case of first impression in this jurisdiciton. In the course of our research and writing, we have read and cited many cases from other jurisdictions including some opinions by referees in bankruptcy and by the Federal District Courts. We do not necessarily regard such cases as authoritative in this jurisdiction, but we have looked to them for guidance and explanation, remembering that one of the purposes of the Uniform Commercial Code is "to make uniform the law among various jurisdictions." N. C. Gen. Stat. 25-1-102(c).

In theory, the method used to perfect a security interest in farm products under the Code is a system of notice filing. A financing statement must be filed in the office of the register of deeds in the county in which the debtor resides and in the county in which the crops are to be grown. N. C. Gen. Stat. 25-9-401(1)(a). The requirements for a financing statement in effect at the time of this transaction are found in N. C. Gen. Stat. 25-9-402(1):

> "A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessee thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties."

A brief explanation of the notice filing system is found in Official Comment 2 to N. C. Gen. Stat. 25-9-402:

> "This Section adopts the system of 'notice filing' which has proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before

> the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution."

As a result of the notice filing system, "[u]nder Article 9 a financing statement may be filed by the parties in the anticipation of a loan, which is never consummated. The mere filing of a financing statement, therefore, does not necessarily indicate that a security interest exists." *In re Freese,* 2 U.C.C. Rep. Ser. 656 (E.D. Pa. Ref. in Bankruptcy, 1964).

[3] The parties do not question, and because of our disposition of the case, it is unnecessary to decide whether the instrument entitled "Financing Statement" fulfills the requirements of N. C. Gen. Stat. 25-9-402(1). Assuming but not deciding that an adequate financing statement has been filed in the appropriate places, there is an additional requirement for an enforceable security interest: A security agreement must exist which complies with N. C. Gen. Stat. 25-9-203(1)(b):

> " . . . [A] security interest is not enforceable against the debtor or third parties unless (b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, a description of the land concerned. In describing collateral, the word 'proceeds' is sufficient without further description to cover proceeds of any character."

From the language in the statute, at least four requirements for an enforceable security interest in farm products appear: (a) There must be a security agreement; (b) the debtor must sign

it; (c) the collateral must be described; and (d) the land on which the crops are to be grown must be described. Although not explicit in the statute, a reading of the definition of "security agreement" ("an agreement which creates or provides for a security interest." N. C. Gen. Stat. 25-9-105(1)(h)) suggests that some grant of a security interest is required. One treatise writer, formerly a Comment writer for Article 9, disagrees:

> "Article 9 distinguishes not only between 'security interest' and 'security agreement' but between 'security agreement' and 'financing statement.' When a security interest is perfected by filing, the document which is placed on record is referred to as a 'financing statement.' Confusingly and unnecessarily, the formal requisites of the security agreement (§ 9-203) and the formal requisites of the financing statement (§ 9-402) are not the same. Under § 9-203, all that is required in the 'security agreement' is the debtor's signature and a description of the collateral (plus, in some cases, a description of land). Under § 9-402, however, the 'financing statement' must contain the signatures of both the secured party and the debtor and must also give addresses for both of them. The financing statement must also contain descriptions of collateral and, in some cases, of land: the § 9-402 'description' provision does not exactly mesh with the § 9-203 'description' provision . . . Certainly, nothing in § 9-203 requires that the 'security agreement' contain a 'granting' clause." Gilmore, Security Interests in Personal Property, Volume I, Sec. 11.4, p.p. 346-348.

One case which considers the view that no grant of a security interest is required is *In re Walter W. Willis, Inc.*, 313 F. Supp. 1274 (N.D. Ohio, 1970):

> " . . . [T]here is authority in the Official Comments to the Code that the agreement need not contain language that creates or provides for a security interest. In particular, Comment No. 1 to O.R.C. § 1309.14 [Official Comment 1 to N. C. Gen. Stat. 25-9-203], in pertinent part, reads as follows:
>
> > 'The only requirements for the enforceability of non-possessory security interest in cases not involving land are (a) a writing; (b) the debtor's

> signature; and (c) a description of the collateral or kinds of collateral. (Typically, of course, the agreement will contain much more.) * * *'
>
> Conspicuously absent in this Comment is the requirement that the agreement contain language that a security interest was being created or provided for. One commentator has also noted that nothing in the Uniform Commercial Code requires that a security agreement contain a clause granting a security interest."

After stating the foregoing proposition, District Judge Lambros noted that cases which have applied the terms of the statute have rejected the view that language creating or providing for a security agreement is not required.

[1] Some grant of a security interest is needed, then. What words will be enough to create a security interest? "[U]nder *Code Ann.* § 109A-9-203 [N. C. Gen. Stat. 25-9-203] the security agreement must be in writing but not in any particular form." *Citizens & Southern Natl. Bank v. Capital Const. Co.*, 112 Ga. App. 189, 144 S.E. 2d 465. In *In re Nottingham*, 6 U.C.C. Rep. Ser. 1197, (E.D. Tenn., Ref. in Bankruptcy, 1969), the Referee in Bankruptcy said:

> "There are no magic words that create a security interest. There must be language, however, in the instrument which when read and construed leads to the logical conclusion that it was the intention of the parties that a security interest be created. . . . The requirements of the Code for creating a security interest are simple—an intention to create a security interest is all that need be shown —a dozen words or less are sufficient, but the security agreement must contain language that meets this simple requirement."

The language needed for a security agreement and the wide variety of forms in which the necessary language can be found are discussed in the following quotation:

> "Any written agreement signed by the debtor, which recites that certain described property is being encumbered as security for a debt, will operate to create a security interest; and such an instrument would be a 'security agree-

> ment' as defined in U.C.C. 9-105(1)(h). This instrument could take the form of a security agreement drawn with specific reference to the Code; or an ordinary chattel mortgage would do the job. Trust receipts issued pursuant to a trust receipt loan agreement would be effectual to create a security interest; and some lending institutions which formerly made inventory loans in this state under the Uniform Trust Receipts Act (now repealed in Arkansas) continue to make such loans in Arkansas under the same procedure. See U.C.C. 9-102(2). A security interest could also be created through the pledge of warehouse receipts or other title documents." Meek, "Secured Transactions Under the U.C.C." 18 Ark. L. R. 30, 34.

The task of finding words that provide for or create a security interest remains undone.

Can the note serve as the security agreement in which a security interest is granted? It has been said that a promissory note which does not purport to retain title or create a lien will not qualify as a security agreement. *Central Arkansas Milk Producers Ass'n. v. Arnold,* 239 Ark. 799, 394 S.W. 2d 126. Assuming that collateral is described in a note containing ordinary promissory terms, a security interest is not created. In *Safe Deposit Bank and Trust Company v. Berman,* 393 F. 2d 401, (1st Cir. 1968), the Court said, "A note, even reciting data relating to collateral security is not thereby converted into such an agreement." Our research has disclosed at least one case that holds that a note contained language sufficient to create or provide for a security interest. In *In re Center Auto Parts,* 6 U.C.C. Rep. Ser. 398 (C.D. Calif. 1968), the note read, "This note is secured by a certain financing statement." In *Center,* the Federal trial court, reviewing a decision of a referee in bankruptcy held those words to be sufficient to create or provide for a security interest. The description of the collateral was provided by the financing statement, which, it was stipulated, was the only one between the parties. Even if it were stipulated that the note and the two financing statements in the present case were the only ones between the parties, we do not regard the words, "This note is secured by Uniform Commercial Code financing statement of North Carolina" as a sufficient grant of a security interest and therefore do not consider the reasoning in that case persuasive.

Can the financing statement serve as a security agreement? In one of the earliest cases on this point, the Rhode Island Supreme Court said: "[W]hile it is possible for a financing statement and a security agreement to be one and the same document as argued by claimants, it is not possible for a financing statement which does not contain the debtor's grant of a security interest to serve as a security agreement." *American Card Co. v. H.M.H. Co.*, 97 R.I. 59, 196 A. 2d 150. We have found no authoritative case in which a bare financing statement was held to be sufficient as a security agreement. There are, however, many cases in agreement with *American Card, supra:*

> "In the instant situation, since Rabin can proffer no writing signed by the debtor giving, even sketchily, the terms of the security agreement, it is unenforceable. The financing statement signed by the parties and duly filed with the Secretary of State is no substitute for a security agreement. It alone did not create a security interest. It was but notice that one was claimed. *Mid-Eastern Electronics, Inc. v. First National Bank of Southern Maryland* . . . [380 F 2d 355 (4th Cir. 1967)]." *M. Rutkin Elect. Sup. Co., Inc. v. Burdette Elect., Inc.*, 98 N.J. Super. 378, 237 A. 2d 500.

Other cases holding that a bare financing statement does not create or provide for a security interest are *General Electric Credit Corp. v. Bankers Comm. Corp.*, 244 Ark. 984, 429 S.W. 2d 60, and *In re Sanelco*, 7 U.C.C. Rep. 65 (M.D. Fla., Ref. in Bankruptcy, 1969). See also, *Annot.* 30 A.L.R. 3d 9, Secs. 11, 15. In *Kaiser Aluminum and Chemical Sales, Inc. v. Hurst*, 176 N.W. 2d 166 (Iowa 1970) a financing statement and a promissory note dated 9 March 1967 and containing the notation "This note covered by security agreement dated March 9, '67" were executed. The Court held:

> "The cases uniformly hold that a financing statement does not ordinarily *create* a security interest. It merely gives notice that one is or may be claimed. These same authorities hold a financing statement *may* double as a security agreement if it contains appropriate language which grants a security interest. The financing statement now before us contains no language which can be interpreted as granting such an interest."

The only language in the financing statement in the instant case that was not present in the one in *Kaiser, supra,* is "same securing note for advanced money to produce crops for the year 1969." We do not regard that language as a sufficient grant of a security interest to cause the present documents, entitled "FINANCING STATEMENTS," to suffice as a security agreement. It, at most, is a recital of what the parties expected to do.

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. DEMPSEY ROY POWELL

No. 7119SC83

(Filed 24 February 1971)

1. **Indictment and Warrant § 12— allowance of motion to amend warrant — amendments not made**

The allowance of a motion to amend a warrant is not self-executing, and when the amendments are not actually made pursuant to the court's ruling, the defects are not cured.

2. **Indictment and Warrant § 15— motion to quash in superior court — failure to make motion in recorder's court**

Motion to quash the warrant made for the first time in the superior court on appeal from conviction in a recorder's court, although not made in apt time, may be entertained by the superior court judge in his discretion.

3. **Indictment and Warrant § 7— uniform traffic ticket — purported warrant — insufficiency as an information**

In this prosecution for resisting arrest and assault, neither a uniform traffic ticket nor a warrant purportedly charging the offenses is sufficient to be treated as an information under G.S. 15-140.

4. **Arrest and Bail § 6; Assault and Battery § 11— resisting arrest — assault — insufficiency of allegations in uniform traffic ticket**

Uniform traffic ticket in which charge of resisting arrest is set forth only by use of the words "resist arrest," and charge of assault is set forth by use of the words "Assault On An Officer" without any identification of the person assaulted, *held* insufficient to serve as a warrant for either offense.

5. Arrest and Bail § 6— warrant for resisting arrest — identification of officer by name

The affidavit supporting an order of arrest for the offense of resisting arrest must identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of G.S. 14-223.

6. Arrest and Bail § 6— warrant for resisting arrest — identification of officer as "the affiant"

In a warrant for resisting arrest, use of the words "the affiant" in lieu of identifying by name the officer allegedly resisted is disapproved by the Court of Appeals.

7. Arrest and Bail § 6— resisting arrest — highway patrolman as public officer

A State highway patrolman is a public officer within the purview of G.S. 14-223. G.S. 20-188.

8. Indictment and Warrant §§ 10, 14— accused incorrectly named in one place in affidavit — redundant allegation — motion to quash

Where the name of the accused was correctly stated as "Dempsey Roy Powell" in three places in an affidavit for an arrest warrant, a subsequent statement in the affidavit naming the accused as "Dempsey Roy Smith" is a redundant allegation, and a motion to quash the warrant for such redundancy is addressed to the sound discretion of the trial judge. G.S. 15-153.

9. Indictment and Warrant § 10— order of arrest — incorrect name for accused

Portion of a warrant which erroneously orders the arrest of "Dempsey Roy Smith" rather than the person named in the affidavit, "Dempsey Roy Powell," does not meet the requirement that an arrest warrant be directed to a lawful officer commanding the arrest of the *accused.*

10. Indictment and Warrant § 7— arrest warrant — order of arrest — affidavit

An order of arrest and its supporting affidavit constitute the warrant and must be construed together.

11. Arrest and Bail § 6; Indictment and Warrant §§ 10, 11— warrant for resisting arrest — failure to identify officer by name — incorrect name for accused in arrest order

Warrant for resisting arrest is fatally defective where the officer allegedly resisted is not identified by name in the affidavit, and the order of arrest erroneously refers to defendant as "Dempsey Roy Smith" rather than by his correct name of "Dempsey Roy Powell."

State v. Powell

APPEAL by defendant from *Long, Superior Court Judge,* 31 August 1970 Session of Superior Court held in RANDOLPH County.

Defendant was tried upon an instrument purporting to be a warrant, the pertinent parts of which read as follows:

"R. L. Thompson, S.H.P., being duly sworn, complains and says, that at and in said County, and Asheboro Township on or about the 21st day of Aug., 1969, Dempsey Roy Powell, did unlawfully, wilfully resist, delay, and obstruct a duly qualified officer to-wit: this affiant, a N. C. State Highway Patrolman, while performing or attempting to perform a duty of his office, to-wit: while serving a warrant on the said Dempsey Roy Powell, for improper passing, he, the said Dempsey Roy Powell, refused to go with said officer after being place *(sic)* under arrest and grabbed warrant and started fighting said officer, said officer summoned help to place Dempsey Roy Smith *(sic)* under arrest, 2nd count; and Dempsey Roy Powell did on the above date unlawfully and wilfully assault one R. L. Thompson by striking him about the body with his fist, 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.

Subscribed and sworn to before me, this 15th day of Sept., 1969
R. G. Delk, J.P.

R. L. Thompson

STATE OF NORTH CAROLINA
To Any Lawful Officer of Randolph County—GREETING:

You are commanded to arrest Dempsey Roy Smith *(sic)* and to safely keep, so that you have him before me at my office in said County, immediately, to answer the above complaint, and be dealt with as the law directs.

Given under my hand and seal this 15th day of Sept., 1969.

R. G. Delk, (J. P. SEAL)"

The evidence for the State tended to show that the witness R. L. Thompson (Thompson) was a State highway patrolman

on 21 August 1969. On that date Thompson, accompanied by another State highway patrolman, W. L. Smith (Smith), went to the home of Tiffany Troy Powell (Troy) with a warrant for the arrest of Dempsey Roy Powell (defendant) for improper passing. Thompson was in uniform at the time but Smith was in civilian clothing. The two patrolmen had been there earlier that day for the purpose of investigating the charge against the defendant (who had been operating a motorcycle) for improper passing of Smith who at the time was operating a private automobile. Thompson placed the defendant under arrest, and while he was reading the warrant to him, the defendant grabbed it out of the officer's hand, "wadded it up," and threw it on the ground. Then the defendant "jerked away" from Thompson, pushed him, and struck him on the shoulder. Thompson used mace on the defendant who ran. Thompson caught him and took him to jail.

The defendant did not offer any evidence. Tiffany Troy Powell, who was charged with an assault on the two officers and whose case was consolidated for trial with the defendant's case, without objection, did offer evidence. Troy's evidence tended to show that the defendant lived with him. The defendant ran when the officers came and received a broken arm while being arrested.

The jury returned a verdict of "guilty as charged," and from a judgment of imprisonment for a term of six months, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Trial Attorney Magner for the State.

Bell, Ogburn & Redding by J. Howard Redding for defendant appellant.

MALLARD, Chief Judge.

Defendant contends in the first two assignments of error that the judge committed error in failing to allow his motion to quash the charges in the purported warrant. The motion was made "[b]efore evidence was introduced."

It appears from the record that at the 8 December 1969 Term of Recorder's Court of Randolph County, the defendant pleaded not guilty and was found guilty of assault on an officer

and resisting arrest. From the judgment imposed, he appealed to the superior court. No motion to quash the warrant appears in the record of the trial in the recorder's court. The record is silent at what stage of the proceedings in the superior court the motion to quash was made other than it was "[b]efore evidence was introduced on behalf of the State or the defendants."

[1] In moving to amend the warrant in superior court, the solicitor stated as follows: "I would like to amend the warrant to refusing to submit to arrest." The motion was allowed, but the instrument itself was not amended. Defendant correctly contends that the allowance of a motion to amend a warrant is not self-executing. In 4 Strong, N. C. Index 2d, Indictment and Warrant, § 12, it is stated:

> "An order allowing an amendment it not self-executing, and when the amendments are not actually made pursuant to the order, the defects are not cured."

Thus we must construe the warrant as if no amendment had been allowed.

[2] No grounds were stated by the defendant in superior court, and the trial judge made no inquiry, as to why the defendant contended the warrant should be quashed. In his brief defendant contends that the warrant "as amended" fails to charge the defendant with the offense of resisting arrest. This motion to quash was not made in apt time. In the case of *State v. St. Clair*, 246 N.C. 183, 97 S.E. 2d 840 (1957), Chief Justice Winborne said:

> "Decisions of this Court are uniform in holding that a motion to quash the warrant or bill of indictment, if made after plea of not guilty is entered, is addressed to the discretion of the trial court. The exercise of such discretion is not reviewable on appeal."

However, in the case of *State v. Matthews*, 270 N.C. 35, 153 S.E. 2d 791 (1967), Justice Bobbitt (now Chief Justice) said: "Whether the motion to quash *would be entertained when made for the first time in the superior court* was for determination by the trial judge in the exercise of his discretion." In the case before us Judge Long did not dismiss the motion for being improperly made but exercised his discretion and entertained the motion, and after consideration denied it. The exercise of such

discretion to rule on the motion is not reviewable on appeal. *State v. St. Clair, supra.* The ruling on the motion, however, is subject to review.

The question is neither presented nor decided whether upon the factual situation alleged in this case the attempted charge of assault is included in the offense of resisting arrest.

[3] Thompson testified on cross-examination by Mr. Bell, defendant's attorney:

> "I believe, Mr. Bell, that when we tried Dempsey Roy Powell in Recorder's Court, and tried him for the citation, you stipulated that the warrant was lost. You stipulated that the warrant could not be found. There had been a warrant issued and we would try him and you would not object to trying him on the warrant that I had issued out of my citation book."

Even if the trial judge had made findings with respect to this so-called "stipulation," neither of the instruments in this case are sufficient to be treated as an information under the provisions of G.S. 15-140.

[4] There are two instruments purporting to be warrants in the record. One is "North Carolina Uniform Traffic Ticket 195061" and the other is the "warrant" quoted above. In the uniform traffic ticket the charge of resisting arrest is set forth by using only the two words "resist arrest." This is not sufficient to charge the offense. Also in this instrument the charge of assault is set forth by the use of the words "Assault On An Officer." The use of this language to identify the person assaulted is not sufficient to charge the offense of assault. In order to properly charge an assault, there must be a victim named, since by failing to name the particular person assaulted, the defendant would not be protected from a subsequent prosecution for assault upon a named person. *State v. Scott,* 237 N.C. 432, 75 S.E. 2d 154 (1953). A *valid* warrant "must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense, and to enable the court to proceed to judgment." 4 Strong, N. C. Index 2d, Indictment and Warrant, § 9. The uniform traffic ticket appearing in the record does not properly charge any crime. *State v. Teasley,* 9 N.C. App. 477, 176 S.E.

2d 838 (1970). However, upon reading the charge of the court, it is made clear that the defendant was not tried upon the uniform traffic ticket but was tried upon the instrument purporting to be a warrant as hereinabove set out.

[5] The prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest are set forth in *State v. Wiggs,* 269 N.C. 507, 153 S.E. 2d 84 (1967) and *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349 (1965). One of these prerequisites is that the affidavit upon which the order of arrest is based shall "identify *by name* the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute." (Emphasis added.) In the affidavit of the instrument purporting to be a warrant upon which the defendant was tried, instead of using the *name* of Thompson, the identity of the officer is referred to as "this affiant."

[6, 7] In preparing warrants and bills of indictment, the law, as enacted by the Legislature and as interpreted by the courts, should be followed. The instruments in this record indicate that scant heed has been paid to the rules relating to the proper preparation of warrants. We do not approve of the words "this affiant" being used in lieu of identifying the officer by name in the warrant; however, the warrant does show on its face that R. L. Thompson was the affiant. When acting as such, a State highway patrolman is a public officer within the purview of G.S. 14-223. See G.S. 20-188.

[8] The name "Dempsey Roy Smith" appearing in the *affidavit* does not necessarily make the affidavit invalid because the allegation referring to "Dempsey Roy Smith" may be treated as a redundant allegation. A motion to quash for redundancy in the affidavit portion of a warrant upon which the order of arrest portion is based is addressed to the sound discretion of the trial judge. G.S. 15-153; *State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932); *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686 (1947).

Conceding but not deciding that the affidavit in the warrant upon which the defendant was tried was sufficient, a more serious question is presented when the order of arrest portion of the warrant is considered. In *State v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703 (1956), Justice Higgins said:

"A valid warrant of arrest must be based on an examination of the complainant under oath. G.S. 15-19. It must identify the person charged. *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609. It must contain directly or by proper reference at least a defective statement of the crime charged. *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989; *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470. It must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. * * * "

See also *State v. Smith,* 262 N.C. 472, 137 S.E. 2d 819 (1964).

[9] In the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell." The instrument, therefore, does not meet the requirement that it be directed to a lawful officer commanding the arrest of the *accused.* In the affidavit the accused is listed as Dempsey Roy Powell, but Dempsey Roy Smith is ordered to be arrested.

In *State v. Matthews, supra,* it is said:

"The order of arrest signed by 'R. F. Johnson, Desk Officer,' and the attached affidavit of C. G. Smith on which it is based, are to be read and considered as a single document and together constitute a warrant. *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989; *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729, and cases cited. Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. *S. v. Blackwell,* 246 N.C. 642, 99 S.E. 2d 867."

[10, 11] The affidavit and the order of arrest together constitute the instrument purporting to be a warrant upon which this defendant was tried. The order of arrest and the affidavit must be construed together. *State v. Matthews, supra; Moser v. Fulk, supra.* While an affidavit similar to the one under consideration may be sufficient under some circumstances, we hold that the warrant in this case is fatally defective and void because of the combination of failing to identify the officer by name in the affidavit and failing to order the defendant arrested in the order of arrest. The trial judge committed error in denying the defendant's motions to quash. The verdict and judgment are

therefore vacated. This does not bar further prosecution of this defendant if the solicitor deems it advisable. *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109 (1964); *State v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497 (1957).

Defendant has other assignments of error, some of which have merit; but in view of the ruling herein, we do not deem it necessary to discuss them.

Reversed.

Judges PARKER and GRAHAM concur.

EDNA WOLFE WILLIFORD v. R. E. WILLIFORD

No. 7119SC82

(Filed 24 February 1971)

1. **Husband and Wife § 11— separation agreement — wife's action to recover support payments — breach of husband's visitation rights**

In the wife's action to recover $2400 in support and maintenance payments under the terms of a separation agreement, the wife's breach of her covenant not to interfere with the husband's visitation rights with the children of the marriage does not constitute a valid defense to the husband's failure to make payments in conformity with the separation agreement, the support and maintenance provisions of the separation agreement being independent of the provisions relating to the husband's visitation rights.

2. **Husband and Wife § 11— construction of separation agreement — effect of support provisions in divorce decree**

Although a divorce judgment contained a verbatim copy of the paragraph in a separation agreement relating to the husband's duty to provide support and maintenance payments to the wife, the court was required to look to the separation agreement, not the divorce judgment, in order to determine the rights and obligations of the parties with respect to support payments.

3. **Husband and Wife § 11— construction of separation agreement — breach of provisions — defense to action for alimony or support**

The question whether the wife's breach of a provision in the separation agreement will constitute a defense to her action upon the agreement to enforce an alimony or support provision is generally made to turn upon the question whether the two provisions are dependent or independent.

4. Husband and Wife § 11— separation agreement — enforcement of custody and visitation rights

Enforcement of custody and visitation rights under a separation agreement may best be had through the courts.

APPEAL by defendant from *Long, J.*, 19 October 1970 Three-Week Civil Session of RANDOLPH Superior Court.

On 25 February 1967, plaintiff and defendant, who were then married, executed a written separation agreement in conformity with the requirements of G.S. 52-6. By paragraph 6 of the agreement defendant husband agreed to pay plaintiff wife $1,200.00 per month for her support and maintenance, payable on or before the first day of each month beginning with March, 1967, and continuing so long as both parties lived or, in event of a later divorce between the parties, until the wife's remarriage. Paragraph 5 of the agreement provided that the wife should have exclusive custody of the two minor children of the parties, with the husband being given certain visitation rights. In this paragraph the wife covenanted "that she will not discourage any such visits or do any act or thing to alienate the desire or sentiment of said children with respect to said visits." Other paragraphs of the agreement made provision for monthly payments by the husband toward the support and maintenance of the two children, for payment by him of medical and educational expenses of the children, for maintenance of life insurance on the life of the husband, and for division and separate ownership of certain real and personal property belonging to the parties. It was also agreed that each party might acquire and own both real and personal property free of any estate or interest of the other, and that the agreement was "a complete settlement of the respective property rights of the parties hereto in the property, real and personal," which was referred to in the agreement or which they might thereafter acquire. Paragraph 12 of the agreement provided that in the event either party should bring an action for divorce, the provisions of certain paragraphs of the agreement, including paragraphs 5 and 6, should be incorporated in any decree entered in such action.

On 5 March 1969 an absolute divorce decree was entered in a divorce action brought by the husband on the ground of one year's separation. The judgment of divorce made reference to the separation agreement and recited that "pursuant to the

provisions of paragraph '12' of said separation agreement" certain numbered paragraphs of the separation agreement, including paragraphs 5 and 6, were ordered "incorporated" into the decree, which was done by copying such paragraphs verbatim in the divorce decree.

The present civil action was brought by plaintiff, the former wife, on 4 September 1970 against defendant, the former husband, seeking to recover $2,400.00 plus interest. In her verified complaint, plaintiff alleged the execution of the separation agreement by the parties, the incorporation of certain paragraphs thereof into the divorce decree, and that defendant had defaulted in the payments due plaintiff for August and September, 1970. Copies of the entire separation agreement and divorce decree were attached as exhibits to the complaint. Defendant answered, admitting execution of the written separation agreement and entry of the divorce decree, and admitting that he had not paid plaintiff the $2,400.00 as alleged in the complaint. In a further answer defendant alleged that plaintiff had breached the separation agreement by refusing since 25 June 1970 to allow the two minor children of the parties to visit with defendant and by doing "everything in her power to alienate the desire and sentiment of the said children to visit with the defendant." Plaintiff replied, denying the allegations of defendant's further answer and defense.

On 7 October 1970 plaintiff filed affidavit and motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. Plaintiff's affidavit repeated the allegations of the complaint relative to the default by the defendant in making the payments due plaintiff for the months of August and September and denied that plaintiff had refused to allow the children to visit the defendant since 25 June 1970. No opposing affidavit was filed by defendant. Notice of the motion for summary judgment was served on defendant and his counsel.

Plaintiff's motion for summary judgment came on for hearing before Judge Long, Judge of Superior Court presiding at the October Civil Session of Randolph Superior Court. After hearing argument of counsel and considering the allegations in the verified complaint and the admissions in defendant's verified answer, the court, being of the opinion that the facts alleged in defendant's answer do not constitute a defense to

plaintiff's action, entered judgment that plaintiff recover of defendant $2,400.00 with interest and court costs. Defendant appealed.

Miller, Beck & O'Briant by Adam W. Beck for plaintiff appellee.

Bell, Ogburn & Redding by John N. Ogburn, Jr. for defendant appellant.

PARKER, Judge.

[1] Defendant having admitted the contract and his failure to pay, plaintiff is entitled to summary judgment unless the facts alleged in the further answer constitute a valid defense. G. S. 1A-1, Rule 56(c). We agree with the trial judge that they do not.

[2] At the outset we observe that, on the record before us, the defendant's obligation to make the monthly support payments to plantiff arises from the written separation agreement and not from the divorce decree. By copying verbatim in the divorce decree the paragraph in the agreement in which defendant agreed to make these payments, the court did not adopt the agreement of the parties as its own determination but merely approved or sanctioned the payments which defendant had agreed to make for his wife's support. "Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court," *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240, and may not be enforced by contempt proceedings. See opinion by Graham, Judge, in *Williford v. Williford,* filed this date. Since the agreement rather than the judgment controls, we must look to the entire agreement, and not merely to those portions thereof which were copied into the divorce judgment, in order to determine the nature and extent of interdependency of the reciprocal rights and obligations of the parties.

The chief merit and object of written separation agreements is to bring some stability and continuity into what is at best a troublesome relationship. Of necessity such agreements must deal with a large number of disparate subjects, particularly when children are involved. The principal purpose of such agreements might frequently be frustrated if a violation of one provision by one party should be held to furnish legal excuse for the other to refuse performance of some unrelated covenant.

Therefore, the authorities have generally held that it is not every violation of the terms of a separation agreement by one spouse that justifies the other in refusing performance. *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148.

[3] "The question whether the wife's breach of some of the provisions of the separation agreement will constitute a defense to her action upon the agreement to enforce a provision for alimony or support is generally made to turn upon the question whether the two provisions are dependent or independent, and the tendency of the courts seems to be to hold that provisions for alimony or support are independent of the other provisions, so that the breach is not a defense to the action." 24 Am. Jur. 2d, Divorce and Separation, § 923, p. 1050.

In *Smith v. Smith, supra,* plaintiff, the former wife, sued her former husband to recover judgment for the amount of unpaid monthly installments which he had agreed to pay her under the terms of a written separation agreement. The agreement contained a provision that each party would refrain from molesting the other in any manner, and defendant sought to excuse his failure to pay in accordance with the terms of the agreement on the ground that plaintiff had violated her covenant against molestation of defendant. Our Supreme Court held that this was no defense. Winborne, J. (later C.J.), speaking for the Court, after reviewing the authorities, said (at p. 197):

> "These authorities are to the effect (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability from the latter's covenants, the respective covenants must be interdependent rather than independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith."

The Supreme Court held that the plaintiff in that case was entitled to have judgment entered in her favor on the pleadings.

[1] The written separation agreement signed by the parties in the case now before us dealt with a large number of distinct matters in fourteen numbered paragraphs. Included among the

matters dealt with was a division between the parties and provision for separate ownership of certain real and personal property previously owned by them jointly. Each agreed that the other might acquire and own real and personal property free of any estate or interest of the other. The wife expressly accepted the provisions made in the agreement for her benefit "in full satisfaction for her support and maintenance," and both parties agreed that the written separation agreement was "a complete settlement of the respective property rights of the parties hereto in the property, real and personal," which was referred to in the agreement or which either might thereafter acquire. Under these circumstances it is our opinion, and we so hold, that the provisions in the agreement by which the husband agreed to pay his wife $1,200.00 per month for her support and maintenance were independent of the provisions contained in the separate paragraph of the agreement dealing with the custody of the children and the husband's visitation rights. Therefore, even if the defendant in this case should offer evidence in support of the allegations in his further answer, such a showing would furnish no defense to the plaintiff's action.

[4] If plaintiff is in fact interfering with defendant's visitation rights with the children, defendant is not without remedy. Minor children remain always in the protective custody of the court, *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487, to which either parent has ready access in event custody and visitation privileges come into controversy. Resort to that remedy would result in far less hardship on the children than would normally be the case if the father should seek to enforce his visitation privileges by withholding support from the mother.

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

ALLEN J. BRANDON v. JANE HUTCHINS BRANDON

No. 7121DC27

(Filed 24 February 1971)

1. **Infants § 9— awarding custody of minor — ex parte order**

Trial court had authority to issue an *ex parte* order awarding the father custody of his 18-month-old son pending a hearing on the merits. G.S. 50-13.5(c)(2); G.S. 50-13.5(d)(2).

2. **Infants § 9— child custody hearing — notice to the wife — unscheduled hearing**

The fact that a child custody hearing was held at least one week prior to the date scheduled by the husband was not prejudicial to the wife, notwithstanding the wife was also entitled to five days notice prior to the hearing, where the wife appeared at the hearing and presented testimony, and where the wife failed to show that she would have benefited from a later hearing.

3. **Notice § 3— waiver of notice**

A party entitled to notice of a motion may waive such notice.

4. **Infants § 9; Rules of Civil Procedure § 6— child custody hearing — five days notice to parent — waiver of notice**

The right of a parent to have at least five days notice of a child custody hearing is not an absolute right but may be waived by the parent. G.S. 50-13.5(e)(1), (2); G.S. 1A-1, Rule 6.

5. **Appeal and Error § 10.5— motion in the Court of Appeals — addition of new parties**

Where the trial court had awarded custody of a child to the paternal grandparents rather than to its parents, the Court of Appeals granted the motion of the grandparents to be made a party to the custody action. Rule of Practice in the Court of Appeals No. 20(c).

6. **Infants § 9; Parent and Child § 6— child custody hearing — award of child to paternal grandparents — sufficiency of evidence**

The trial court in a child custody hearing did not abuse its discretion in awarding custody of an 18-month-old child to the paternal grandparents rather than to its mother or father or to the maternal grandparents, where the paternal grandmother testified that she and her husband were willing to accept the child, that although her home lacked indoor toilet facilities and hot water she could give the child her full attention, and that her two daughters could help her.

7. **Infants § 9— child custody hearing — award of counsel fees — abuse of discretion rule**

In disallowing the award of counsel fees to the wife's attorney in a child custody hearing, the trial court erred in ruling that it had to find as a "matter of law" that the wife was substantially dependent upon her husband, the applicable statute requiring only that the trial court not abuse its discretion in making its ruling. G.S. 50-13.6.

Brandon v. Brandon

APPEAL by defendant from *Henderson, District Judge*, 29 June 1970 Civil Session of FORSYTH District Court.

This civil action was instituted pursuant to G.S. 50-13.5(b) (1) to determine custody of the 18-month-old child born to the marriage of plaintiff and defendant. Summons was issued and complaint filed on 26 June 1970. At the time the complaint was filed plaintiff also filed an affidavit in which he alleged facts tending to show that defendant was not a suitable person to have custody of the child and asked that he be granted the child's custody pending a hearing. The court entered an *ex parte* order on 26 June 1970 awarding plaintiff custody of the child until the matter could be heard on the merits. A hearing to determine custody was begun on 29 June 1970.

Plaintiff's evidence disclosed: Several weeks prior to the hearing plaintiff and defendant during the course of a hearing in another domestic relations case between them in district court, agreed to a reconciliation in their marriage after having lived separately for some time but defendant failed to consummate the reconciliation. Defendant had been dating several men during the time she and plaintiff had been living apart; she had been seen parked in automobiles until late at night with these men and had also been seen in several places drinking beer with them. There was testimony that indicated defendant had been leaving the child with various relatives to be cared for and that on several occasions she had left the child with these people until late at night.

Defendant's evidence tended to show that plaintiff on occasion had locked defendant out of their living quarters, had told people that defendant had a venereal disease, had been unduly suspicious of defendant, and had mistreated her in various ways.

Both the paternal and maternal grandparents testified at the hearing. The maternal grandmother stated that she lived in a relatively modern house; that she would not mind defendant's child staying with her if defendant was awarded custody; and that she and her husband had been "checked out" for adoption of a child. The paternal grandmother testified that she was 50 years of age, that although the house in which she lived lacked indoor toilet facilities and hot running water she could give the child her full attention, that her daughters could

help her, and that she and her husband were willing to accept custody of the child.

After hearing all the testimony the trial judge found as fact that neither plaintiff nor defendant should have custody; that defendant was not a fit person to have custody of the child; and that custody of the child should be awarded to the paternal grandparents with certain visitation rights granted to the defendant. From an order embodying said findings and awarding custody to said paternal grandparents, defendant appealed.

Deal, Hutchins and Minor by Richard Tyndall for defendant appellant.

Pettyjohn and Dunn by H. Glenn Pettyjohn for plaintiff appellee.

BRITT, Judge.

[1] Defendant first assigns as error the entry of order by the trial court awarding plaintiff custody of the child pending a hearing. G.S. 50-13.5(d) (2) provides that if the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending service of process or notice. G.S. 50-13.5 (c) (2) provides that the courts of this state have jurisdiction to enter orders providing for the custody of a minor child when the child resides, has his domicile, or is physically present in this state. The verified complaint and affidavit indicate that the child had her residence, domicile and was physically present in the state at the time of the entry of the order.

In 3 Lee, *N. C. Family Law,* Sec. 222, 1968 Cumulative Supplement, p. 15, we find the following:

> "There may be occasions when there is considerable urgency for a temporary order for the custory of a child. In such instances the judge may reach a decision on the basis of affidavits and other evidence produced at a preliminary hearing. The persons who have signed the affidavits are, of course, not present and there is no opportunity to cross examine them, but this is said not to be objectionable because the ultimate right of examination will be afforded the parties at the trial of the cause. The real reason is that

the welfare and custody of a small child is an urgent matter in which substantial harm can be caused by unnecessary delay. Furthermore, all custody orders are from their very nature temporary and founded upon conditions and circumstances existing at the time of the hearing."

We hold that the *ex parte* order entered in this case was authorized; furthermore, the question raised is moot. The assignment of error is overruled.

[2] Defendant assigns as error the failure of the trial court to allow her motion for a postponement of the hearing when defendant did not have five days notice. The record on appeal reveals that when the case was called for hearing on 29 June 1970 the following transpired:

MR. TYNDALL: If it please the court, the defendant moves to continue the case on the grounds that we have not been able to contact all the witnesses and we are not ready to proceed.

MR. PETTYJOHN: We oppose the motion to continue since we are ready to proceed, and it is my understanding that the defendant's attorney agreed to hear the case today.

COURT: It is the court's understanding that the defendant would be ready to proceed today.

MR. TYNDALL: Your Honor, if I recall correctly, I stated in chambers that we could hear the case if the defendant could get ready by today and I am not ready. Therefore I must move to continue the case.

COURT: I'll deny your motion.

MR. PETTYJOHN: Could we let the record show that all parties agree to hear the case today?

COURT: Call your first witness.

[3] It appears to be well settled in this jurisdiction that a party entitled to notice of a motion may waive such notice. 6 Strong, *N. C. Index* 2d, Notice, Sec. 3, p. 134. The record before us discloses that plaintiff issued notice of hearing for 7 July 1970 but for some reason attorneys for the parties were before the court on 29 June 1970 as above indicated. It appears that there might have been an agreement between the parties for

the hearing to be held on 29 June 1970 rather than 7 July 1970 but this is not definitely established. If there was such an agreement it should have been set forth in the record, either as a stipulation or as a finding of fact by the trial court. Nevertheless, assuming there was no definite agreement for the hearing to be held on 29 June 1970, we hold that the assignment of error is without merit.

In the case of *In re Woodell,* 253 N.C. 420, 117 S.E. 2d 4, (1960), in an opinion by Parker, Justice, (later Chief Justice), we find the following:

> This Court said in COLLINS v. HIGHWAY COM., 237 N.C. 277, 74 S.E. 2d 709: "A party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it."

The record reveals that the hearing in this case began on 29 June 1970 and terminated by entry of the order appealed from on 3 July 1970; that plaintiff presented 13 witnesses, all of whom were cross-examined by defendant's counsel; that defendant testified and introduced five witnesses in addition to herself. Defendant has suggested no additional testimony that would have been available to her at a later hearing and fails to show how she might have benefited from a later hearing.

[4] Although the statutes indicate that ordinarily a parent is entitled to at least five days notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child, G.S. 50-13.5(e)(1) and (2), G.S. 1A-1, Rule 6, this is not an absolute right and is subject to the rule relating to waiver of notice above mentioned. It is also subject to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial amounting to the denial of a substantial right. 1 Strong *N. C. Index* 2d, Appeal and Error, Sec. 47, p. 192. Defendant has failed to show how she was prejudiced by the court's failure to postpone the hearing, therefore, the assignment of error is overruled.

[5, 6] Defendant contends that the court erred in awarding custody of the child to the paternal grandparents who were not legally before the court and abused its discretion "when the record revealed that the paternal grandparents were in poor health and that their home was very primitively equipped."

Pursuant to motion filed in this court by the paternal grandparents, an order has been entered making them parties to this action, thereby subjecting them to the jurisdiction of this court and of the District Court of Forsyth County to the same extent as if they had been original parties plaintiff. Rule 20(c) of the Rules of Practice in the Court of Appeals of North Carolina. We do not think the trial judge abused his discretion in awarding custody to the paternal grandparents. His findings that the child's custody should not be awarded to plaintiff or defendant, or to defendant's parents, but should be awarded to plaintiff's parents, are fully supported by the testimony. It is well settled that the question of custody is addressed to the trial court and its decision will be upheld if supported by competent evidence. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d, 73 (1966); *Roberts v. Short,* 6 N.C. App. 419, 169 S.E. 2d 910 (1969); *In re McCraw Children,* 3 N.C. App. 390, 165 S.E. 2d 1 (1969). The assignment of error is overruled.

[7] Finally, defendant contends the trial court erred in failing to find that she is a dependent spouse and awarding fees for her attorney. The record discloses that on 3 July 1970 the trial judge entered an order denying defendant's motion for counsel fees. The order contains the following paragraph:

> "While the court finds as a matter of law that the husband is deemed to be the supporting spouse, the court fails to find from all of the evidence that the wife is, *as a matter of law,* the dependent spouse for lack of showing that she is substantially dependent upon her husband for her maintenance and support or that she is substantially in need of maintenance and support from her husband." (emphasis added)

Taking the words as they were expressed and giving them their normal meaning, it appears that the trial court, by inadvertance or otherwise, held that in order to grant attorney fees on behalf of defendant it was necessary to find as a "matter of law" that she was substantially dependent upon her husband. We do not think the applicable statutes require such finding "as a matter of law."

G.S. 50-13.6 provides as follows: "In an action or proceeding for the custody or support, or both, of a minor child the court may in its discretion allow reasonable attorney's fees to

a dependent spouse, as defined in G.S. 50-16.1, who has insufficient means to defray the expenses of the suit."

The quoted statute provides the trial court with considerable discretion in allowing or disallowing attorney fees in child custody or support cases. The court's discretion in *disallowing* fees appears to be limited only by the abuse of discretion rule; but the court's discretion in *allowing* fees appears to be limited not only by the abuse of discretion rule but by certain provisions of the quoted statute as well as other statutes, particularly G.S. 50-16.1(3) and G.S. 50-16.1(4).

The question before us in the instant case involves the *disallowance* of attorney fees. We hold that the trial court, in its discretion, was fully authorized to disallow attorney fees for defendant's counsel but to disallow such fees as a matter of law was error.

The order awarding custody appealed from is affirmed but the order denying attorney fees is vacated and this cause is remanded for proper determination and order as to attorney fees.

Error and remanded.

Judges CAMPBELL and HEDRICK concur.

BETTY ALBRIGHT ROBINSON v. BILLY LEWIS ROBINSON

No. 7118DC4

(Filed 24 February 1971)

1. **Attachment § 9— vacation of attachment**

The trial court properly vacated the attachment of an airplane where the attachment was levied more than 10 days after the issuance of the order of attachment. G.S. 1-440.13(b); G.S. 1-440.16(c).

2. **Divorce and Alimony § 19— modification of support award — husband's decrease in income — issue of husband's good faith — findings of fact**

The trial court which reduced a husband's support payments *pendente lite* from $900 monthly to $100 weekly was required to resolve and to make findings of fact on the issue whether the husband's substantial decrease in income resulted from his disregard of the obligation to support his wife and children, where the husband had testified

that he was voluntarily selling for $3,000 his business which had netted him $15,000 annually and was accepting a job which would pay him approximately $6,240 annually.

3. **Divorce and Alimony § 18— award of subsistence pendente lite — consideration of husband's current income**

If the husband is honestly and in good faith engaged in a business to which he is properly adapted and is making a good faith effort to earn a reasonable income, the award of subsistence *pendente lite* should be based on the amount which defendant is earning when the award is made.

4. **Divorce and Alimony § 18— award of subsistence pendente lite — husband's earning capacity**

To base an award *pendente lite* on the husband's capacity to earn rather than on actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children.

5. **Divorce and Alimony § 19— modification of alimony award — change of circumstances**

An order for alimony or alimony *pendente lite* may be modified or vacated upon motion and a showing of changed circumstances. G.S. 50-16.9.

6. **Divorce and Alimony § 19— modification of alimony award —burden of proof**

Upon a motion for modification of an award of alimony and support *pendente lite* the movant has the burden of going forward with the evidence to show change of circumstances.

7. **Divorce and Alimony § 19— modification of support award — change in husband's earnings — consideration of husband's good faith**

A finding of changed circumstances in the husband's actual earnings does not necessarily require or justify a modification of a prior support order, especially where the husband has voluntarily reduced his actual earnings and is failing to exercise his earning capacity because of a disregard of his marital or parental obligations to provide support.

8. **Divorce and Alimony §§ 18, 22— award of child support and alimony — separate statement of each allowance**

An order that awards both child support payments and alimony or alimony *pendente lite* payments must separately state and identify each allowance. G.S. 50-13.4(e); G.S. 50-16.7(a).

APPEAL by plaintiff from order dated 9 March 1970, entered by *Haworth, District Court Judge,* following hearings in chambers on 3 and 4 March 1970 in Guilford County.

Plaintiff instituted this action on 8 December 1969 seeking alimony without divorce, custody of and support for three minor children, alimony *pendente lite,* and counsel fees. Notice of a hearing to be held on 18 December 1969 was duly served upon defendant.

On 18 December 1969 a hearing was conducted by District Court Judge Washington. The parties stipulated that the only question in controversy was the amount of alimony and child support defendant should be required to pay *pendente lite.* Plaintiff offered evidence which tended to show that defendant was owner and operator of Robinson Welding Service and that his net income for 1967 was $13,707.00 and for 1968 was $11,871.75. Her evidence further tended to show that while she and defendant lived together he provided $1,000.00 per month for family living expenses, and that she and the children reasonably needed that amount monthly.

Judge Washington entered his order *pendente lite* awarding custody of the three children to plaintiff, granting possession of the home place to plaintiff, and requiring defendant to make the following payments: $900.00 per month for the support and maintenance of plaintiff and the three children; $5.00 per month allowance to each child; the note account at the bank; and maintain life and hospital insurance.

On 22 December 1969 defendant filed a motion to modify the 18 December 1969 order upon the grounds that his income was not sufficient to comply. Judge Washington "left open" the matter of defendant's motion to modify to allow the parties to negotiate a settlement as to amount of support. On 29 January 1970 District Court Judge Haworth issued an order to defendant to show cause why he should not be adjudged in contempt for failure to comply with Judge Washington's order of 18 December 1969. On 19 February 1970 defendant offered evidence in reply to the show cause order. Defendant testified as follows:

> "I am in the process of selling my business for approximately $3,000.00. Yes, this business has earned me net earnings of approximately $15,000.00 per year for 1967 and 1968 and the earnings for 1969 are as good or better. I am going to take a job at $3.00 per hour with Superior

Stone Company. I have not paid anything into court in compliance with the order of 18 December 1969."

At the close of defendant's testimony Judge Haworth continued the matter, over plaintiff's objection, to 3 March 1970.

On 23 February 1970 plaintiff caused attachment to be issued by the clerk of court for all business and welding equipment of Robinson Welding Service, for one two-bedroom mobile home occupied by defendant, and for defendant's Piper airplane. The attachment for the business and welding equipment was returned on 26 February 1970 showing no business and welding equipment to be found. On 20 March 1970 plaintiff was notified by the sheriff that the mobile home had been sold by defendant before attachment could be completed. On 4 April 1970 the sheriff attached defendant's Piper airplane, but this attachment was vacated by order of court on 30 April 1970 because the attachment had not been kept alive by alias and pluries orders of attachment.

At the hearing on 3 March 1970 plaintiff's evidence tended to show that all of the business and welding equipment of Robinson Welding Service was sold to one Coleman L. Grant on 20 February 1970; that Coleman L. Grant had never worked in the welding business before, that he had known defendant only about two weeks before he purchased the business, that he was unemployed prior to purchasing the business, and that he paid defendant cash for the business; that defendant sold his truck, equipped with a welding machine, on 21 February 1970 for $900.00; and that defendant sold his Corvette automobile on 25 February 1970 for $200.00.

At the conclusion of the hearing Judge Haworth adjudged defendant to be in contempt of court for failure to make payments in accordance with the 18 December 1969 order, but allowed him to purge himself of contempt by the payment of a lump sum of $500.00 in satisfaction of all arrears in support payments. Judge Haworth further found: "That the change of employment by defendant and the decrease in the financial needs of plaintiff is a change of circumstances which, in the opinion and in the discretion of the Court, justifies a modification of the Order rendered December 18, 1969 as hereinafter set out." Judge Haworth's order thereafter provided that defendant pay $100.00 weekly for the support and maintenance of plaintiff and the

three children. The order further provided for plaintiff's possession of the home place and Buick automobile, and required defendant to make mortgage payments, to pay up outstanding indebtedness, to maintain life and hospital insurance, and to pay attorney fees to plaintiff's counsel.

Plaintiff appeals from Judge Haworth's order, in particular that portion which reduced the support payments from $900.00 per month to $100.00 per week.

John Randolph Ingram for plaintiff.

Morgan, Byerly, Post & Herring by W. E. Byerly, Jr. for defendant.

BROCK, Judge.

[1] Plaintiff assigns as error the order vacating the attachment of defendant's Piper airplane. The order of attachment was issued by the clerk of court on 23 February 1970, and the levy under the original order was made by the sheriff on 4 April 1970. G.S. 1-440.16(c) provides that levy under an order of attachment must be made within ten days of the issuance of the order. G.S. 1-440.13(b) provides procedure for issuance of alias and pluries orders of attachment. In this case the sheriff's levy was under the original order for attachment of defendant's Piper airplane and was 41 days after its issuance. This was insufficient to constitute a valid levy, and there was no error in the entry of the order to vacate it.

[2] Plaintiff's primary argument on this appeal is centered upon the order allowing the reduction in support payments based, at least in part, upon defendant's "change of employment." Plaintiff argues that defendant sold a profitable business for a small sum, and took a job at $3.00 per hour, for the deliberate purpose of rendering himself unable to pay adequate support for plaintiff and their children.

[3, 4] Plaintiff is entitled to a fair and reasonable allowance for support for herself and her three children. The granting of an allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who is able bodied and capable of earning, may be ordered to pay subsistence. *Brady v. Brady,* 273 N.C. 299, 160 S.E. 2d 13; *Harrell v. Harrell,*

253 N.C. 758, 117 S.E. 2d 728. If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made. To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912.

In the present case defendant filed a motion seeking to modify the 18 December 1969 order by reducing the amount of the award of support. At the hearing he testified that his net earnings were approximately $15,000.00 per year from his welding business, but that he was in process of selling his business and was going to take a job at $3.00 per hour. On the basis of a forty hour work week, if he works without vacation or other time off, defendant's gross earnings from his new job will be approximately $6,240.00 per year; this is less than half of his net earnings from the business he sold.

[5] Prior to the passage of G.S. 50-16.9 (effective 1 October 1967) an order for alimony or support *pendente lite* could be modified in the discretion of the judge without a finding of a change of circumstances. *Snuggs v. Snuggs,* 260 N.C. 533, 133 S.E. 2d 174; *Rock v. Rock,* 260 N.C. 223, 132 S.E. 2d 342. However, G.S. 50-16.9 provides that an order for alimony or alimony *pendente lite* may be modified or vacated upon motion and a showing "of changed circumstances." The criteria for determining the amount of alimony are provided in G.S. 50-16.5(a) as follows: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, *earning capacity,* condition, *accustomed standard of living of the parties,* and other facts of the particular case." (Emphasis added.) The determination of the amount of alimony *pendente lite* shall be in the same manner as alimony. G.S. 50-16.3(b).

[6, 7] Upon a motion for modification of an award of alimony and support *pendente lite* the movant has the burden of going forward with the evidence to show change of circumstances. However, a finding of a change of circumstances does not necessarily require or justify a modification of the previous order.

And where, as in the present case, an issue of whether the husband is failing to exercise his capacity to earn because of a disregard of his marital and parental obligations to provide adequate support is raised, the trial judge should make findings from the evidence to resolve that issue. If the evidence supports a finding, and the trial judge so finds, that the husband has voluntarily reduced his actual earnings, and is failing to exercise his capacity to earn because of a disregard of his marital or parental obligations to provide adequate support, then the award should not be modified to accommodate the reduced actual earnings.

[2] The trial judge made no findings of fact to resolve this issue and the judgment appealed from is therefore vacated and this cause is remanded to the District Court, Guilford County.

We make no observations concerning the propriety of the requirements of the 18 December 1969 judgment of Judge Washington; defendant did not appeal from that judgment and it is therefore not before us.

[8] We also note that G.S. 50-13.4(e) provides in part as follows: "In every case in which payment for the support of a minor child is ordered and alimony or alimony *pendente lite* is also ordered, the order shall separately state and identify each allowance." And G.S. 50-16.7(a) provides in part: "In every case in which either alimony or alimony *pendente lite* is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance." Neither of the orders entered in this case comply with the statutory provisions quoted above.

Order vacated.

Cause remanded.

Judges MORRIS and VAUGHN concur.

GEORGE WAYNE BLEDSOE v. MILDRED M. GADDY

No. 7120SC165

(Filed 24 February 1971)

1. **Negligence § 35— contributory negligence—grounds for directed verdict**

A directed verdict on the ground of contributory negligence will be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom.

2. **Automobiles § 79— intersectional accident — malfunctioning traffic light — contributory negligence**

Plaintiff's testimony that he approached an intersection controlled by a malfunctioning traffic light, that he knew from prior experience that the light would change from red to blank, that after the light had changed from red to blank in the instant case he entered the intersection and collided with defendant's car, which had approached the intersection from plaintiff's right, *held* insufficient to establish plaintiff's contributory negligence as a matter of law.

3. **Automobiles § 19— intersectional collision — malfunctioning traffic light — liability of the drivers — instructions**

Where two drivers approaching an intersection at right angles knew that the traffic light controlling the intersection was malfunctioning in relation to their respective streets — the light changing from red to blank for one street and the light changing from blank to green for the other street — the liability of the drivers for the resultant intersection collision was to be determined on the supposition that the light was properly working at the time of the collision; consequently, the trial court properly refused to instruct the jury on the law governing the right of way at an intersection not controlled by traffic lights. G.S. 20-155(a).

APPEAL by defendant from *Kivett, J.*, September 1970 Session, RICHMOND Superior Court.

This case arose out of an automobile collision at a street intersection in the City of Rockingham, resulting in personal injuries and property damage to both plaintiff and defendant. Defendant filed counterclaim for her damages.

The evidence tended to show: on 6 November 1968 traffic at the intersection of Randolph Street, which ran north and south, and Green Street, which ran east and west, was controlled by an overhanging automatic traffic light. Around 1:15 p.m. on that date plaintiff was operating his automobile south on Randolph Street and defendant was operating her automobile east on

Green Street. It was stipulated that the traffic light was erected pursuant to lawful authority and on said date was not functioning properly. For some week or two prior to the accident, and at the time of the accident, the light as seen from Randolph Street emitted only a red signal and no signal was emitted when the green light should have shone. Plaintiff, who traveled Randolph Street daily, was aware of this condition and assumed that when no light was emitted on Randolph Street he could proceed. On Green Street the signal emitted only a green light and when it should have turned red no signal was emitted. Defendant, who traveled Green Street almost daily, was aware of this condition and interpreted it to mean that when no signal was being emitted she should stop. Neither party was aware of the condition of the light as seen from the direction that the other party was traveling.

Plaintiff testified that as he approached the intersection he slowed to five m.p.h.; that when he was about one car length from the intersection the light in his direction changed from red to blank; that he had observed the defendant approaching from his right and had thought that she was slowing down; that he continued on into the intersection where the defendant struck him. Plaintiff also saw the witness Tyler coming north on Randolph and saw her stop for the red light at the time plaintiff was about one and one-half car lengths from the intersection. Immediately thereafter the light on Randolph Street turned from red to blank.

Defendant testified: As she approached the intersection she never saw plaintiff's vehicle although there was nothing to obstruct her vision in plaintiff's direction. She saw the Tyler car stop at the intersection. As she approached the intersection the traffic light facing her was green and since she knew of its defective condition, she watched it all the way. She entered the intersection at approximately 15 m.p.h. on a green light and could not remember the actual collision.

An investigating officer stated that he questioned the defendant after she was released from the hospital and defendant told him that she did not pay any attention to the traffic light.

Mrs. Doris Tyler, driver of the northbound vehicle on Randolph Street which was stopped at the intersection at the time of the collision, testified: She was familiar with the defective traffic signal and knew that it was malfunctioning as to

traffic on Randolph and Green Streets. When she approached the intersection a few moments before the collision the light was red for traffic on Randolph. When she saw the light turn from red to blank she did not proceed because she saw defendant's car approaching from her left. A few seconds before the collision the light on Randolph turned from red to blank. She saw plaintiff approach the intersection and the light was blank when he entered.

Defendant's counsel made timely motions for directed verdict and for judgment n.o.v. The motions were denied and from judgment entered on verdict in favor of plaintiff, defendant appealed.

E. A. Hightower and Leath, Bynum & Kitchin, by Fred W. Bynum, Jr. for plaintiff appellee.

Webb, Lee, Davis & Sharpe by Hugh Lee for defendant appellant.

BRITT, Judge.

[1, 2] By her first assignment of error, defendant contends that the trial court erred in failing to direct a verdict in her favor because of the contributory negligence of plaintiff. This assignment of error is without merit. A directed verdict on the ground of contributory negligence will be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727 (1967); *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365 (1970). We hold that the evidence did not establish plaintiff's contributory negligence as a matter of law, therefore, the assignment of error is overruled.

[3] By her second and third assignments of error, defendant contends that the court erred in instructing the jury that the law pertaining to properly erected and operating traffic signals was applicable in this case; and in refusing to instruct the jury on failure to yield the right-of-way at an intersection as required by G.S. 20-155(a). We hold that these assignments of error are without merit.

The legal proposition presented by the second and third assignments of error appears to be without precedent in this court or the Supreme Court; however, we think the case of *Kelly v. Ashburn,* 256 N.C. 338, 123 S.E. 2d 775 (1962) is analogous. In that case the evidence tended to show: The accident in question occurred at the intersection of Woodland Avenue and Hughes Street in the City of Sanford. Plaintiff was driving north on Woodland and defendant was driving west on Hughes. Plaintiff testified that he was familiar with the intersection and that after Hughes Street was completed, stop signs were erected at its east and west entrances into Woodland; he knew these signs had been at the intersection for the previous two years and at the time of the accident he had no notice that the stop sign at the eastern approach on Hughes was down. The stop sign was replaced after the accident. Defendant testified that he was not familiar with the intersection, did not know that stop signs had ever been erected on Hughes Street, and he thought he could cross the intersection at Woodland before plaintiff entered the intersection. The trial judge instructed the jury on the provisions of G.S. 20-155(a) to the effect that when two vehicles approach or enter an unmarked or uncontrolled intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle to the right; the court specifically charged as follows:

> "And I charge you peremptorily that if you find that if you find that there wasn't a stop sign there and that these motor vehicles approached this intersection, the two of them, at approximately the same time, which I shall define to you in a moment, —and if Kelly failed to yield the right of way to Ashburn, he would have been guilty of negligence under our law."

The jury found that defendant was negligent and plaintiff was contributorially negligent; from judgment on the verdict, plaintiff appealed. The Supreme Court, in an opinion by Higgins, Justice, held that the instruction was erroneous; we quote from the opinion:

> "This evidence is sufficient to present the question whether as to the intersection on the occasion of the accident the plaintiff had the right to assume that traffic from the east on Hughes would yield. Plaintiff's conduct

is to be judged by the rule of the prudent man; that is, by that which a man of ordinary prudence would do under the same or similar circumstances when charged with like duty. These questions arise on the issue of negligence.

* * * *

"The defendant was not familiar with the intersection. He was on the plaintiff's right and was not confronted by stop sign notice that Woodland was the preferred street. His conduct likewise must be judged by the rule of the prudent man, by that which a man of ordinary prudence would do under the same or similar circumstances, when charged with like duty. Each party's responsibility is to be judged in the light of conditions confronting him.

* * * *

"After all, responsibility for an accident must be determined upon the basis of the particular facts of each case. One party, or both, or neither, may have acted in accordance with the rule of the prudent man. Consequently, a collision at an intersection where a stop sign has been erected and then removed or defaced may result from the negligence of one party, or both, or neither. The court's charge in this case was a peremptory instruction to find the plaintiff was negligent by reason of his failure to yield to the defendant on his right.

* * * *

"In the case before us the evidence was sufficient to present the question whether the plaintiff, under the circumstances that confronted him, was warranted in assuming he had the right of way through the intersection. The peremptory instruction to the contrary was prejudicial error for which we order a

New trial."

Although the facts in *Kelly v. Ashburn, supra,* are quite different from those in the instant case, we think the legal principles in the two cases are sufficiently similar for us to conclude that "in the case before us the evidence was sufficient to present the question whether the plaintiff, under the circumstances that confronted him, was warranted in assuming he had the right-of-way through the intersection." The jury

instructions which defendant insists she was entitled to in the instant case—that the vehicle approaching an intersection from the right had the right-of-way under G.S. 20-155(a)—was the same instruction which the Supreme Court disapproved in *Kelly v. Ashburn, supra.* In the case at hand each party knew of the malfunctioning traffic signal. On cross-examination defendant testified: "I go along this street almost every day. * * * I knew the light had not been working for several days. * * * I knew the green came on and the red did not come on facing me. * * * If the light was not shining green, it means for you to stop, but it was shining green. * * * If the light had been shining nothing and was not shining green, I would have stopped and I knew I was supposed to stop. * * * I do not recall ever having seen Mr. Bledsoe nor do I recall looking to my left."

Defendant did not contend that she misinterpreted the traffic signals; she insisted that she had a green light when she entered the intersection.

With each party knowing how the traffic signal malfunctioned on his or her street, we think the rights and duties of the drivers were determined on the basis of their prior knowledge and not on the objective condition of the intersection. The assignments of error are overruled.

We hold that the parties received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

VESTER M. COX v. MARTHA H. COX

No. 7119SC2

(Filed 24 February 1971)

Contempt of Court § 6; Divorce and Alimony § 23— enforcement of child support order — contempt of court — finding that father presently possesses means to comply with order

An order in a contempt hearing which confines a father to jail until he complies with a child support order must find not only that the father's failure to comply with the support order was wilful but also that the father presently possesses the means to comply with the order.

Judge BROCK concurring by separate opinion.

APPEAL by plaintiff from *Copeland, Special Superior Court Judge,* 2 March 1970 Civil Session, RANDOLPH Superior Court.

This matter was heard upon a motion in the cause filed by defendant and an order to show cause why plaintiff should not be held in contempt of court for failure to comply with an order of the Superior Court of Randolph County requiring plaintiff to pay defendant $35.00 each week for the support of the two minor children of the parties. After hearing the evidence of both parties, the court found that plaintiff's admitted failure to comply was wilful, adjudged him to be in contempt and ordered him confined in the Randolph County Jail until he complied with the order. Plaintiff was also ordered to pay the defendant's counsel attorney fees for representing her in the contempt proceeding. Plaintiff appealed.

John Randolph Ingram for plaintiff appellant.

Ottway Burton for defendant appellee.

VAUGHN, Judge.

The findings of fact material to this appeal are as follows:

"4. That by admission of the plaintiff and his counsel, the plaintiff is Four Hundred Thirty-Five and 00/100 ($435.00) Dollars in arrears on the payments due under Judge Seay and Judge Lupton's orders for the support of the two minor children and from the evidence, the plaintiff has had sufficient earnings to make said payments."

It appears that plaintiff's contention that the court's findings of fact are insufficient to support the judgment has merit. Our decision is controlled by the opinion by Justice Branch in *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391, where we find the following:

"A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. 'Manifestly, one does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered.' *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403.

"Hence, this Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default.

"Parker, J. (now C.J.), speaking for the Court in the case of *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867, said: 'The lower court has not found as a fact that the defendant possessed the means to comply with the orders for payment of subsistence *pendente lite* at any time during the period when he was in default in such payments. Therefore, the finding that the defendant's failure to make the payments of subsistence was deliberate and wilful is not supported by the record, and the decree committing him to imprisonment for contempt must be set aside.' (Citing cases.)

" In *Green v. Green,* 130 N.C. 578, 41 S.E. 784, it was held that in proceedings for contempt the facts found by the judge are not reviewable by this Court except for the purpose of passing upon their sufficiency to warrant the judgment. Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount.

"In the case of *Vaughan v. Vaughan,* 213 N.C. 189, 195 S.E. 351, this Court further stressed the necessity of finding as a fact that the plaintiff possessed the means to comply with the orders for payment. Here plaintiff had been ordered to make certain monthly payments for the

support of his wife and child. Upon the hearing of an order directing plaintiff to show cause why he should not be held in contempt for failure to comply with the prior order, the trial judge found only that plaintiff was 'in contempt of court because of his willful failure and neglect to comply. . . . ' This Court found error and remanded, holding that 'the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition.' The Court has reaffirmed this position as recently as *Gorrell v. Gorrell,* 264 N.C. 403, 141 S.E. 2d 794.

"The finding of facts by the trial court in the instant case is not sufficient basis for the conclusion that defendant's conduct was wilful and deliberate, nor for the founding of the judgment entered.

"The court entered judgment as for civil contempt, and the court must find not only failure to comply but that the defendant presently possesses the means to comply. The judgment committing the defendant to imprisonment for contempt is not supported by the record and must be set aside."

Plaintiff's assignment of error as to the allowance of counsel fees is without merit. See *Blair v. Blair,* 8 N.C. App. 61, 173 S.E. 2d 513.

For the failure to find facts in accord with *Mauney v. Mauney, supra,* the case is remanded for further hearing and findings of fact.

Remanded.

Judge MORRIS concurs.

Judge BROCK concurring.

I concur in the holding of the majority opinion that the judgment of indefinite confinement in this case is not supported by a finding that the husband *presently possesses the means to comply.* Obviously the husband's financial condition will not be enhanced by confining him to jail; and, absent a present capa-

bility to comply, the indefinite confinement order is self-defeating. I am aware that there are instances where the "clanging of the jail door" will suddenly sharpen the memory of a recalcitrant husband so that he will pursue a financial resource that had "slipped his mind." Nevertheless, absent evidence and a finding of present capability to comply, an order indefinitely imprisoning a husband cannot be allowed to stand; our system must not operate on assumed clairvoyance of either the trial or appellate bench.

The purpose of this concurring opinion is to point out that the holding of the majority in this case, and earlier opinions by our Supreme Court, is not to be construed as tying the hands of the trial courts in the enforcement of its support orders.

Committing a husband to jail for an indefinite term, *i.e.*, until he complies with an order for support, is authorized when there is a present and continuing contempt. A present and continuing contempt exists when the husband presently possesses the means to comply, and wilfully fails or refuses to comply. A finding to this effect by the trial judge is necessary to support confinement for an indefinite term.

In situations where the evidence merely establishes that a husband *was able to pay* at the time a payment was required by an order, and that he then wilfully failed or refused to make the payment, the contempt is a past contempt, *i.e.*, an act already accomplished. The statutes and the cases are unclear as to limitation on punishment in proceedings as for contempt under G.S. 5-8. The decision in *Basnight v. Basnight,* 242 N.C. 645, 89 S.E. 2d 259, seems to say that confinement for failure to pay alimony and support is limited by G.S. 5-4 to thirty days. However, the Court in *Smith v. Smith,* 248 N.C. 298, 103 S.E. 2d 400, holding that confinement is not limited by G.S. 5-4, explains that the proceedings in *Basnight* were instituted under G.S. 5-1(4) and consequently the confinement was limited by statute. *Smith* reaffirmed *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157, in holding that a present and continuing contempt may be punished by indefinite confinement, but the concurring opinion by Bobbitt, J. (now Chief Justice), joined in by Johnson, J., would limit confinement to thirty days under G.S. 5-4 for a past contempt. Also the last paragraph of the opinion in *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391, strongly indicates

that a judgment as for civil contempt must contain a finding of present capability. The cases seem to hold that a finding of a past contempt would be a finding of criminal contempt, for which punishment is limited by G.S. 5-4.

However, since the above cases were decided the legislature has extensively rewritten Chapter 50 of the General Statutes and specifically has made provisions for enforcement of orders for alimony, support and custody. G.S. 50-16.7(j) provides: "The wilful disobedience of an order for the payment of alimony or alimony *pendente lite* shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9." In a like manner G.S. 50-13.4(f)(9) provides: "The wilful disobedience of an order for the payment of child support shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9." Punishment for wilful disobedience of an order providing for custody of a minor child is likewise "punishable as for contempt." G.S. 50-13.3(a).

The legislature has clearly provided that punishment for wilful violation of orders for alimony, support and custody shall be *as for contempt* as provided by G.S. 5-8 and G.S. 5-9. These new statutes clearly eliminate the use of G.S. 5-1 in alimony, support, and custody cases, therefore the thirty day limitation on punishment as provided in G.S. 5-4 has no application to such proceedings, whether the contempt is present and continuing, or whether it is a past contempt. Nevertheless, *indefinite* confinement for failure to pay alimony or support is not authorized unless there is the finding of present capability to comply.

MARY L. WEATHERMAN v. DR. EDWARD R. WHITE

No. 7121SC5

(Filed 24 February 1971)

1. Physicians and Surgeons § 16— malpractice action — breast cancer — allegation of faulty diagnosis — sufficiency of evidence

In a malpractice action, the *femme* plaintiff failed to establish that her family physician was negligent in not diagnosing a lump in her breast as cancerous, where (1) plaintiff's own evidence indicated that the defendant had exercised reasonable care and his best judgment in the diagnosis and (2) plaintiff's surgeon testified that the cancer which he found "was not near the surface, superficial area."

2. Physicians and Surgeons § 20— malpractice action — faulty diagnosis of breast cancer — causal connection between injury and malpractice

Even if *femme* plaintiff had established her family physician's negligence in not diagnosing a lump in her breast as cancerous, her evidence nonetheless failed to show a causal connection between the negligence and the removal of her left breast, where all the testimony was to the effect that removal of the breast is the only proper treatment for breast cancer in women, regardless of the size of the cancer.

APPEAL by plaintiff from *Exum, J.*, 11 May 1970 Session, FORSYTH Superior Court.

This is a malpractice action brought by plaintiff against her former physician. All witnesses at the trial were presented by plaintiff. She testified herself and offered testimony of Dr. Starling, a general surgeon, Dr. Amparo, a resident in surgery at Forsyth Memorial Hospital, Dr. Dudley, a pathologist at said hospital, and Dr. Means, the surgeon who performed a radical mastectomy on plaintiff. Stipulations and plaintiff's evidence tended to show:

From 1956 until March of 1969, defendant was a general practitioner of medicine in the city of Winston-Salem. In 1956 defendant became plaintiff's family physician and examined and treated plaintiff regularly from 1956 until February of 1969. Early in 1967 plaintiff discovered a small lump in her left breast and called it to defendant's attention. Defendant examined the breast by palpation and advised plaintiff that the lump was not anything to be concerned about. Between 1967 and February of 1969, plaintiff expressed her concern about the lump to defendant on numerous occasions but defendant continued to reassure plaintiff that the lump was not harmful. In early February of 1969 plaintiff developed some female difficulty and defendant referred her to Dr. Means for examination and possible corrective surgery. On examination, Dr. Means concluded that plaintiff needed a partial hysterectomy and on 10 March 1969 plaintiff entered Forsyth Memorial Hospital under Dr. Means' care. In a routine preoperative examination Dr. Amparo examined plaintiff's breasts and reported to Dr. Means discovery of two lumps in plaintiff's left breast. Thereafter Dr. Means again examined plaintiff and concluded that while plaintiff was anesthetized for her partial hysterectomy he would perform

a minor operation on her left breast for purpose of checking on the lump or lumps. On 11 March 1969 while plaintiff was anesthetized for the corrective surgery aforesaid, Dr. Means performed a minor operation on plaintiff's left breast and removed a small lump. Upon careful examination of the removed tissue Dr. Means was suspicious of cancer and referred the tissue to Dr. Dudley for immediate pathological examination. Within a few minutes Dr. Dudley reported that the tissue was cancerous and Dr. Means proceeded to perform a radical mastectomy which procedure included a removal of plaintiff's entire left breast and also the muscles under it and lymph nodes under her left arm. Because of the additional breast surgery, the corrective surgery originally planned was not performed at that time but was delayed until several months later. Following removal of plaintiff's breast and other tissue further pathological tests were performed and it was discovered that a few cancer cells had developed in the lymph nodes. Plaintiff was approximately 46 years old at the time of the surgery.

Plaintiff contends that defendant was negligent in failing to diagnose the presence of cancer in her breast and in failing to exercise reasonable care in connection with his treatment of plaintiff; that he failed to refer plaintiff to a surgeon for appropriate surgery and as a consequence, plaintiff had to undergo a radical mastectomy.

Defendant contends that he was not guilty of any negligence or malpractice at any time; that any lumps in plaintiff's breasts at the time she was examined or treated by defendant consisted of a fibrotic condition, that at no time during examination or treatment by defendant did any lumps or nodules in plaintiff's breast present carcinomic (cancerous) characteristics; that if carcinoma did develop in plaintiff's breasts, it developed after plaintiff was last seen by defendant; and that once plaintiff developed carcinoma of the breast there was no alternative except to perform a radical mastectomy no matter when it was diagnosed.

At the conclusion of plaintiff's testimony, the court allowed defendant's motion for a directed verdict and from judgment dismissing the action, plaintiff appealed.

White, Crumpler and Pfefferkorn by Joe P. McCollum, Jr., William G. Pfefferkorn, and James G. White for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by John M. Harrington, Ralph M. Stockton, Jr., and William F. Maready for defendant appellee.

BRITT, Judge.

In *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762 (1955), cited in briefs for both parties, in an opinion written by Higgins, Justice, we find the following:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. (Citing authority.) If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

In *Belk v. Schweizer,* 268 N.C. 50, 149 S.E. 2d 565 (1966), in an opinion by Parker, Chief Justice, we find the following:

> "A qualified physician or surgeon does not guarantee or insure the correctness of his diagnosis, and ordinarily he is not responsible for a mistake in diagnosis if he uses the requisite degree of skill and care. Generally stated, a qualified physician or surgeon is not liable for an honest error or mistake in judgment if he applies ordinary and reasonable skill and care, keeps within recognized and approved methods, and forms his judgment after a careful and proper examination or investigation. He is not charged with the duty of omniscience, and ordinarily is not an insurer. In order to afford a basis for an action for malpractice, the want of skill or care must be a proximate cause of the injury or death of the patient. 70 C.J.S., Physicians and Surgeons, p. 48, a, c, d, e."

[1] We hold that the trial court properly allowed defendant's motion for a directed verdict. In the first place, we think that plaintiff failed to show negligence on the part of defendant. None of the testimony presented by plaintiff herself or by her witnesses indicates that defendant failed to possess the requirements set forth in *Hunt v. Bradshaw, supra,* quoted above. Her evidence indicates that defendant, taking into account plaintiff's condition, exercised reasonable care and his best judgment in her treatment. The testimony of Dr. Means and Dr. Amparo tended to show that many women have a fibrotic condition, that is, lumps in their breasts; that whether these lumps are treated or allowed to remain untreated is decided by the individual doctor based upon the patient's history as well as the size, texture and shape of the lumps. They also testified that it was not the general practice to remove all lumps found in women's breasts merely because they were there. There was further testimony that the fibrotic or cystic disease is not cancerous but that its presence makes the detection of cancer much more difficult because the symptoms of the former mask or hide those of the other; that no one can tell when or where a cancer forms or how long it has been there; that a cancer may remain small for a long time or it may grow rapidly. Dr. Dudley testified that the tissue he examined, which was removed from plaintiff's breast, contained a fibrotic condition as well as a cancerous one. There was no showing that the cancerous lump was present at the time defendant last examined plaintiff; neither was there testimony that the lump which plaintiff was aware of was the same lump that was determined to be cancerous. Dr. Means testified that the cancer which he found "was not near the surface, superficial area." He further testified that when he first examined plaintiff's breast he did not have any suspicions at that time about cancer; that he was surprised that the mass which he removed was found to be cancerous.

[2] There is an additional reason why the trial court was correct in allowing defendant's motion for a directed verdict. In order for plaintiff to make out a *prima facie* case, it was necessary that she not only show negligence on the part of defendant, but that such negligence was the proximate cause of her injury —that the negligence shown had a causal relationship to the injury complained of. 6 Strong *N. C. Index* 2d, Negligence, Sec. 8, pp. 17-18. If the evidence failed to show a causal connection between the alleged negligence and the injury complained of, motion for directed verdict in favor of defendant was proper.

Reason v. Singer Sewing Machine Company, 259 N.C. 264, 130 S.E. 2d 397 (1963). Conceding, *arguendo,* that plaintiff showed negligence on the part of the defendant, we think she failed to show causal connection between the negligence and the injury complained of.

The testimony of all the doctors was to the effect that once cancer is found in a woman's breast, removal of the breast is the only proper treatment since failure to remove could cause death of the patient. Dr. Starling testified: " . . . I think the most generally accepted procedure throughout the country, in Winston-Salem and every place—is a radical mastectomy. . . . Where the lump is discovered to be cancerous while it is still small, say, the size of a marble, it would be the same procedure." Dr. Amparo testified: " . . . (E)ven when it is of microscopic size, or later, and at any other stage, . . . the standard accepted treatment for that cancer whenever it is diagnosed is removal of the breast." Dr. Dudley testified: " . . . (I)f cancer is there, the breast must be taken off, if it is as small as a pea or as large as a lemon, it still must be taken off right then. If there was some way to diagnose it even in the earliest stages, we would still remove the breast . . . It would be the customary procedure in this community to also remove the muscles, the underlying muscles, although there are some exceptions. Some surgeons like to spare the muscles, if they can. I would say probably 80 percent or more of the operations we get they take the muscles as well as the breast. It does not make a difference as to whether it is an early discovery or an enlarged tumor. . . . It is normal procedure, also, to remove the lymph nodes in the area under the armpit. That's standard procedure." Dr. Means testified: "I determined it was necessary at that time to proceed with the usual cancer operation, which involves a radical mastectomy and axillary section; removing the lymph nodes under the armpit, which is the usual operation for malignacy of the breast."

For reasons stated, the judgment of the superior court is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

J. R. WATKINS, EMPLOYEE v. CENTRAL MOTOR LINES, INC., EMPLOYER, AND MICHIGAN MUTUAL LIABILITY, CARRIER

No. 7118IC15

(Filed 24 February 1971)

1. **Master and Servant § 94— compensation agreement as award**

An agreement to pay compensation, when approved by the Industrial Commission, is equivalent to an award.

2. **Master and Servant § 77— workmen's compensation — claim for permanent partial disability — change of condition — one-year limitation**

Where the injured employee received weekly compensation benefits pursuant to an agreement entered by the parties and was given notice in the closing receipt that a further claim for benefits must be made within one year from the date of receipt of the final payment, a claim for permanent partial disability filed more than a year after the final payment involves a "change of condition and is barred by G.S. 97-47, notwithstanding the employer and its carrier knew at the time the closing receipt was signed that the employee was still undergoing treatment for his injury.

3. **Master and Servant § 77— workmen's compensation — change of condition — estoppel to plead one-year limitation — misrepresentation inducing signature on closing receipt**

Employer and its insurance carrier would not be estopped from pleading the one-year limitation of G.S. 97-47 if a misrepresentation by an agent of the employer induced the injured employee to sign a closing receipt, Industrial Commission Form 28B, since the signature of the employee is not required on Form 28B in order for the one-year limitation period to begin.

4. **Master and Servant § 94— workmen's compensation — necessary findings of fact**

While the Industrial Commission is not required to make a finding as to each fact presented by the evidence, specific findings with respect to the crucial facts upon which the question of claimant's right to compensation depends are required.

5. **Master and Servant § 77— workmen's compensation — change of condition — misrepresentation as to matter of law — delay of claim for permanent disability — estoppel to plead one-year limitation**

Statement by employer's agent that a closing receipt signed by claimant had nothing to do with permanent disability, if a misrepresentation which induced claimant to delay his claim for permanent partial disability until more than a year after he received his final weekly compensation payment, constituted a misrepresentation as to a matter of law, which would not estop the employer and its carrier from relying on the limitation of G.S. 97-47 as a bar to the claim.

6. Master and Servant § 77— workmen's compensation — alteration of award — change of condition

The Workmen's Compensation Act contains no basis for altering a final award of compensation other than for a change of condition as provided in G.S. 97-47.

Judge VAUGHN dissents.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 14 May 1970.

The facts of this case may be summarized as follows: Plaintiff was injured in a truck accident in Indiana on 19 May 1967, sustaining injury to his neck, right shoulder, right arm, right hand, and head, the latter being minor in nature; since his injury, plaintiff has been under the care of several physicians in Indiana and North Carolina, including Dr. R. H. Ames and his associate, Dr. L. U. Anthony, of Greensboro, North Carolina; on 2 June 1967, an agreement was executed among the parties, on Industrial Commission Form 21, providing for compensation to plaintiff in the amount of $37.50 per week, beginning as of 27 May 1967 and "continuing for necessary weeks"; on 2 January 1968, plaintiff returned to work for defendant employer; on 18 January 1968, plaintiff received the last of his compensation payments pursuant to the agreement of 2 June 1967, and plaintiff signed Industrial Commission Form 28B, which provides, in pertinent part: "14. Does This Report Close the Case—including final compensation payment? Yes— Except for med. . . . NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is 'Yes,' this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check." On 19 March 1968, Dr. Ames examined plaintiff and reported that plaintiff had not yet reached maximum improvement and that plaintiff was to return after six months for possible rating as to disability; on 22 July 1968, in response to plaintiff's letter of 11 July 1968, defendant carrier sent to plaintiff copies of hospital and doctor bills from its files. On 12 September 1968, Dr. Ames examined plaintiff and reported that he had improved, that no treatment was "indicated at this time," and that he planned to see plaintiff in six months for "further follow-up"; on 29 November 1968, Dr. Ames examined plaintiff and reported that he planned to rate plaintiff for final disposition

in March 1969; on 8 May 1969, Dr. Anthony examined plaintiff and reported he had a twenty percent permanent partial disability of the right arm; on 18 June 1969, plaintiff filed with the Commission a request for a hearing, using Industrial Commission Form 33, seeking compensation for permanent partial disability; Dr. Ames' reports of 19 March 1968 and 12 September 1968, and Dr. Anthony's report of 8 May 1969, were addressed to Dr. B. J. Christian of Greensboro, who apparently had referred plaintiff to Dr. Ames, with copies to defendant carrier; however, Dr. Ames' report of 29 November 1968 was addressed to defendant carrier; on 29 July 1969, defendant carrier wrote to defendant employer, referring to Dr. Ames' letter of 8 May 1969, and denied further liability to plaintiff, for that more than one year had elapsed between the last payment of compensation and the rating; on 29 August 1969, a hearing was held before Deputy Commissioner R. F. Thomas, at which plaintiff appeared *pro se;* after brief evidence was taken, it developed that plaintiff did not wish to proceed without counsel; the case was reinstated on the Commission's docket until plaintiff could arrange for representation; on 13 March 1970, Deputy Commissioner Thomas denied plaintiff's claim for further compensation, hearing having been held on 13 February 1970, at which plaintiff was represented by Mr. Crihfield; by opinion of 14 May 1970, the full commission affirmed the opinion and award of Deputy Commissioner Thomas, and plaintiff appealed to this court.

Douglas, Ravenel, Hardy & Crihfield by G. S. Crihfield for plaintiff-appellant.

Robert L. Scott for defendants-appellees.

BROCK, Judge.

The decision of the hearing commissioner, which was upheld by the full commission, was that plaintiff's claim was barred by G.S. 97-47, which provides:

> "Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall

immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article. . . . "

[1] An agreement to pay compensation, when approved by the Industrial Commission, is equivalent to an award. *White v. Boat Corporation,* 261 N.C. 495, 135 S.E. 2d 216. Thus, the one-year limitation of G.S. 97-47 began to run on 18 January 1968, and forecloses plaintiff's claim, *if* there was a "change in condition" as contemplated by the statute, and *if* defendants are not estopped to invoke the limitation.

[2] This case clearly involves a "change in condition" within the purview of G.S. 97-47. See *Smith v. Red Cross,* 245 N.C. 116, 95 S.E. 2d 559, which we regard as precisely controlling. Plaintiff attempts to avoid the result of *Smith* by his contention that, in the present case, the commission and the defendants were aware, at the time when the closing receipt was signed, that plaintiff was still undergoing treatment for his injury. The evidence discloses that, on 18 January 1968, none of the parties realized that plaintiff's injury might result in permanent disability; indeed, plaintiff's exhibit 8, a report to defendant carrier from Dr. D. M. Hickman of Fort Wayne, Indiana, dated 29 July 1967, indicates the contrary. In *Smith, supra,* the Court said: "It is manifest that none of the parties, on 9 December, 1952 [the date when plaintiff received her last compensation payment and executed the closing receipt], realized that the injury which the plaintiff sustained would result in permanent disability." Mere awareness of continuing medical attention is not inconsistent with the eventual prospect of complete recovery.

Plaintiff contends that if, as we hold, the limitation of G.S. 97-47 is applicable, defendants are nontheless estopped to plead it, because of representations made to plaintiff when he signed the closing receipt, by A. C. Hinnant, an employee of defendant employer who was in charge of Workmen's Compensation matters, and that the Deputy Commissioner and the full commission erred in not finding facts relative thereto. The evidence as to the representations was as follows:

"(the plaintiff testified): 'Mr. Hinnant asked me to sign this form, said that it was—that I would receive it in my last check on weekly benefits, and I asked him if that was what it was and he said, yes, that on that it meant that I had a year to re-open this case if I wanted more weekly benefits; if I wanted to go back on weekly benefits. I asked him something about permanent disability payment and he said that this had really nothing to do with that because that would be left up to when the doctors released and rated me.'

"(Robert Eller testified): 'During the afternoon or evening of January 18, 1968, Mr. Watkins and I went to the log clerk's office at which time Mr. Watkins had a conversation with Mr. Hinnant. We went down to go out and Mr. Hinnant called us in his office and gave a paper to Mr. Watkins to sign and Mr. Watkins told him that he had not been released or rated yet on the disability, and Mr. Hinnant said, "Well, this is just to show the Industrial Commission that you have been receiving your weekly benefits." So he signed it. Mr. Hinnant didn't say anything to Mr. Watkins about any permanent injury. He said if he wanted to renew his weekly benefits, why, he had a year's time to do it in.' "

[3] From plaintiff's assignment of error, and his brief, it appears that he is complaining that Mr. Hinnant's representation induced him to sign Form 28B. The law requires only that the injured employee be given notice of the one-year limitation, *White v. Boat Corporation, supra,* and that the Commission be given notice that the final payment of compensation has been made. G.S. 97-18(f). Moreover, an inspection of Form 28B reveals that the signature of the employee is not called for. The limitation would have begun to run when notice was given plaintiff on 18 January 1968, with or without plaintiff's signature. G.S. 97-47. Therefore, plaintiff's signature affected his rights not in the least, except, possibly, as proof that he received notice of the limitation, which he does not deny. However, the assignment of error is subject to the interpretation that plaintiff was induced, not merely to sign the form, but to delay his claim until more than one year had elapsed since the last payment of compensation, and we shall consider it in that light.

" . . . the one-year limitation is not jurisdictional, the statute merely providing a plea in bar which may be asserted by the employer. Thus, the employer and its insurance carrier may be estopped from asserting the one-year limitation where the employee is not given notice, as required by the rules of the Commission, that a claim for a change of condition would have to be filed or the Commission notified within one year of the last payment, or where the employee's delay has been induced by acts, representations, or conduct on the part of the employer." 5 Strong, N. C. Index 2d, Master and Servant, § 77.

[4, 5] The Industrial Commission is not required to make a finding as to each and every 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. *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619. Thus, the question presented to us is whether the evidence, taken in the light most favorable to plaintiff, would have justified a finding that defendants are estopped to plead the limitation of G.S. 97-47. Plaintiff's own evidence is, at best, equivocal as to what was said by Mr. Hinnant. We are unable to say that any false statement is shown. If a false representation was made, it was as to a matter of law. "The well-recognized rule is that a misrepresentation as to a matter of law will not ordinarily support an action for fraud or deceit, *nor constitute an estoppel to rely upon the statute of limitations* (emphasis supplied), ... " Annot., 24 A.L.R. 2d 1413 (1952) ; Annot., 24 A.L.R. 2d 1039 (1952) ; *Parker v. Bank*, 152 N.C. 253, 67 S.E. 492.

[6] In an effort to avoid the twelve-month limitation of G.S. 97-47, plaintiff contends that the statute is inapplicable to this case on the ground that there was no "change in condition" as contemplated by the statute, but " . . . that this was a continuing part of the same condition which had been in existence since the date of the injury and which was in existence at the time of the signing of Form 28B and which continued to be true until he was finally released and rated in May, 1969." If that were true, plaintiff's position would be no sounder. We discern in the Act no basis for altering a final award of compensation, other than that provided by G.S. 97-47.

Affirmed.

Judge MORRIS concurs.

Judge VAUGHN dissents.

IN THE MATTER OF THE WILL OF HAZEL V. HODGIN, DECEASED

No. 7119SC6

(Filed 24 February 1971)

1. **Wills § 8— revocation by defacement or obliteration**

Paper writing duly executed as a last will and testament was not revoked, in whole or in part, by defacing, cancellation or obliteration unless testatrix defaced or obliterated the paper writing, or some portion thereof, with the intent thereby to revoke it in whole or in part. G.S. 31-5.1.

2. **Wills § 8— revocation by obliteration or defacement**

A showing of defacement or obliteration by the testatrix is not alone sufficient to show revocation.

3. **Wills §§ 13, 24— caveat proceeding — jury trial — setting aside verdict**

A caveat proceeding is an *in rem* action in which the issue raised by the caveat must be determined by the jury and the court may not grant a motion for a directed verdict; however, the trial judge may in his discretion set aside the verdict when it is against the greater weight of the evidence.

4. **Wills §§ 8, 24— caveat proceeding — failure to set aside jury verdict — abuse of discretion**

In this proceeding to caveat a typewritten attested will, the trial court abused its discretion in failing to set aside as against the greater weight of the evidence a jury verdict finding that pen marks through certain provisions of the will were made by testatrix and that testatrix intended to revoke part of the provisions through which pen marks had been made.

APPEAL by respondents the Arthritis Foundation, Inc., the North Carolina Heart Association, and the American Cancer Society, Inc., from *Long, Superior Court Judge,* 4 May 1970 Session of the Superior Court of RANDOLPH County.

This matter was heard upon the petition of James Vickrey and Charles Vickrey to propound in solemn form a paper writ-

ing purporting to be the last will and testament of Hazel Hodgin. The will was executed on 15 August 1963. Hazel Hodgin died on 5 December 1968, and the petition to admit the paper writing, or such portions thereof as the court might deem to be the last will and testament of Hazel Hodgin, to probate in solemn form was filed 14 January 1969.

Citation was issued to all interested parties. Thereafter one grandniece of Hazel Hodgin filed a caveat contending that the paper writing was not the last will and testament of Hazel Hodgin for that by cancellations, obliterations, changes, and additions in her own handwriting, Hazel Hodgin had effectively revoked the purported attested will.

Appellants were the residuary beneficiaries named in the original typewritten paper, which they contend was the true last will and testament of Hazel Hodgin.

The paper writing sought to be admitted to probate in solemn form is as follows:

"MY LAST WILL AND TESTAMENT

I, Hazel V. Hodgin, of sound mind do make, publish and declare the following to be my last will and testament.

ITEM I

I direct that all my just debts, funeral expenses and the cost of administering my estate be paid by my executor hereinafter named. Second, all the remainder of my estate, real, personal or mixed, I give, devise and bequeath unto my husband, Clyde V. Hodgin, for his own use and benefit forever. Third: Should my husband, Clyde V. Hodgin, be not living at my death, it is my will that the amount of the legacy herein provided for him shall be distributed as follows:

~~Five Hundred Dollars (500.00) to Centre Friends Church, Route 1 Greensboro, N. C.~~

200 00
~~400.00~~ =====

Two ~~Five~~ Hundred Dollars (~~500.00~~) to Bob and Blanch Overman, Pleasant Garden, N. C.

400
Four ~~Five~~-Hundred Dollars (~~500.00~~) to Wyatt and Florence Church 316 Liberty Road, High Point, N. C. ~~400.00~~

400
Four ~~Five~~ Hundred dollars (~~500.00~~) to Mr. and Mrs. Ray L. Cox, 659 ~~400.00~~ Castana, Pasadena, California.

600.00
Six ~~Five~~ Hundred Dollars (~~500.00~~) to Charles Vickrey, Pleasant Garden, N. C.

00
1000
Thousand ~~Five~~ Hundred Dollars (~~500.00~~) to James Vickrey, Route 1, ~~1,000.00~~ Pleasant Garden, N. C.

Five Hundred Dollars (500.00) to Ethel Hodgin Whiteley, Route 2, Manteca, California, Box 96.

Five Hundred Dollars (500.00) to Beulah Hodgin, 407 W. Washington Street, Greensboro, N. C.

Two Hundred Dollars (200.00) to Julia R. Groat, 315 N. El Molino Street, Pasadena, California.

$500 to Marie Hodgin 111 Asbill St. High Pt. N C

~~HAZEL V. HODGIN~~

$500 to Bertha Toomes Teague Rt 1 Randleman

~~One Hundred Dollars (100.00) to Sarah Bates, 1305 N. Craig, Pasadena, California.~~

~~One Hundred Dollars (100.00) to Viola Kelsey, 553 Rio Grande, Pasadena, California.~~

~~The remainder of my estate to be divided equally between The American Cancer Society, Arthritis and Heart Fund Research.~~, 100 00 each

~~FUND~~

I hereby nominate and appoint ~~my husband, Clyde V. Hodgin~~, executor of this my last will and testament, with full powers to sell, mortgage, lease or in any other way dispose of the whole or any part of my estate. I direct that he be not required to give any bond or security for the performance of his as such.

Lastly, I hereby revoke any other wills by me heretofore made and declare this to be my last will and testament.

Witness my hand and seal this the 15 day of August, 1963, A.D.

500$\frac{00}{}$ ~~to Marie Hodgin 111~~ Asbill St. High Point

HAZEL V HODGIN (SEAL)

Hazel V. Hodgin

Witness:

NORMA F. EDWARDS

Witness:

BEN ANDERSON"

The changed portions of the paper writing were done by pen. Some were printed and some were written in script. The phrase "$500 to Marie Hodgin 111 Asbill St. High Pt. N C" was printed at the bottom of the first page of the paper writing and the phrase "$500 to Bertha Toomes Teague Rt 1 Randleman" was written in script. The phrase "500$\frac{00}{}$ to Marie Hodgin 111 Asbill St. High Point" was written in script immediately above the signature of Hazel V. Hodgin, and a portion of that phrase appears to have been stricken.

Upon stipulation the court peremptorily instructed the jury to answer the first issue, as to proper execution of the typewritten portion of the paper writing, affirmatively and the jury did so. The court ruled and so instructed the jury that the purported bequests to Marie Hodgin and Bertha Toomes Teague, are null and void because they fail to comply with the law with respect to holographic bequests in that they were not signed by Hazel V. Hodgin.

As to each of the other marks, the jury was asked to answer two questions—whether the pen marks through the particular portion of the paper writing were made by Hazel V. Hodgin and, if so, did she intend to revoke that particular provision. In every instance the first question was answered "Yes." The jury found that she did not intend to revoke the following: bequest to Centre Friends Church, the provision for Bob and Blanch Overman, Pleasant Garden, N. C.; bequest to Mr. and Mrs. Ray L. Cox, 659 Castana, Pasadena, California; the provi-

sion for Charles Vickrey, Pleasant Garden, N. C.; and the provision for James Vickrey, Route 1, Pleasant Garden, N. C., but did intend to revoke the following: the provision for Sarah Bates, 1305 N. Craig, Pasadena, California; the provision for Viola Kelsey, 556 Rio Grande, Pasadena, California, and the residuary provision for American Cancer Society, Arthritis and Heart Fund Research.

The Arthritis Foundation, Inc., the American Cancer Society, and the North Carolina Heart Association moved to set the verdict aside and for a new trial. This motion was denied. Appellants assign as error the failure to grant this motion, the entry of the judgment, and certain portions of the court's charge to the jury.

William A. Vaden for caveator appellee.

Robert E. Cooper and Michael D. Levine, and Coltrane and Gavin by W. E. Gavin for the North Carolina Chapter, The Arthritis Foundation, Inc., appellant.

Manning and Allen by Marcus Hudson for the North Carolina Heart Association, appellant.

Jordan, Morris and Hoke by Lucie S. Crumpler for the American Cancer Society.

MORRIS, Judge.

At trial it was stipulated that all parties were properly before the court; that testatrix died 5 December 1968; that the paper writing was executed 15 August 1963 and "that any pen markings or notations other than signatures" thereon were made subsequent to that date; that the paper writing "contained only the typewritten portions on the day of its execution and contained no pen marks or handwritten words other than the signatures of Hazel V. Hodgin, Norma F. Edwards and Ben Anderson"; that the witnesses to the signature of testatrix would so testify if present; that the paper writing was properly executed and witnessed in compliance with the provisions of G.S. 31-3.3.

In addition to introducing into evidence the paper writing, propounders offered the evidence of James O. Vickrey with

respect to the location of the paper writing when found, the fact that it was in an envelope sealed with masking tape, was in a locked cedar chest "along with some of her belongings, insurance papers, books, etc.", and had marked on the envelope to Jim and Charlie. Propounders offered no other evidence.

Caveator offered one witness, Bertha Toomes Teague, who testified in substance, except where quoted, as follows: that she and Hazel Hodgin were close friends and had been for many years; that Mrs. Hodgin discussed with her "a time or two" her will. "She did tell me she intended to have her will rewritten; that she had scribbled on it so much that she wasn't sure. She had scribbled on her will, and I took her to an attorney to have it rewritten, but she didn't let him do it. And she also called Larry Hammond from here up to my home and talked to him about rewriting her will, but she never got around to having it done as far as I know." "She said that she had included The Heart, Cancer and Arthritis Fund, but that she was going to cancel that." The witness said she did not recall any other statements Mrs. Hodgin made concerning any other dispositions in her will, but she was sure the reference to the Heart, Cancer and Arthritis Fund was in 1967. Witnesses said Mrs. Hodgin did a lot of letter writing, that sometimes she could hardly make out her letters, "and then again they were real plain." On cross-examination the witness said she had heard Mrs. Hodgin "mention about doing something in her will for the Centre Friends Church," that she had included a small amount to that Church in her will, but she never went into detail about how much she left anyone.

G.S. 31-5.1 is applicable:

> "A written will, or any part thereof, may be revoked only . . . (2) By being burnt, torn, canceled, obliterated, or destroyed, *with the intent and for the purpose of revoking it, by the testator himself or by another person in his presence and by his direction.*" (Emphasis ours.)

In the record before us there is no evidence whatever as to who made the pen marks and wrote or printed the words and numerals appearing on the particular paper writing sought to be admitted to probate. Assuming that the marks were made by Mrs. Hodgin, there is no evidence of an intent thereby to revoke her will. Certainly there is no evidence of an intent dif-

ferent with respect to residents of California than residents of North Carolina.

[1, 2] This paper writing duly executed as a last will and testament was not revoked, in whole or in part, by defacing, cancellation, or obliteration, unless Mrs. Hodgin defaced or obliterated the paper writing, or some portion or portions thereof, with the intent thereby to revoke it, in whole or in part. Defacement or obliteration, even though shown to be made by testatrix, is not alone suffifient to show revocation. *In re Will of Roediger,* 209 N.C. 470, 184 S.E. 74 (1936).

[3] Admittedly, this is an *in rem* action and the issue raised by caveat was for determination by the jury and the court may not grant a motion for directed verdict. *In re Will of Roediger, supra; In re Westfeldt,* 188 N.C. 702, 125 S.E. 531 (1924). The propounders and caveator are not parties to the proceeding to the extent that they can by consent relieve the trial judge of his duty to submit the issue involved to the jury. Nevertheless, in this jurisdiction the Supreme Court has held that the trial judge does have authority to set aside the verdict in his discretion when the verdict is against the greater weight of the evidence. *In re Will of Hiram Barfield,* 242 N.C. 308, 87 S.E. 2d 516 (1955).

[4] In the case before us, the trial judge apparently acted under the mistaken belief that he had no authority to disturb the verdict of the jury. However, where as here the verdict was so obviously against the greater weight of the evidence the court exceeded his authority and discretion in failing to set aside the verdict. The proceeding is, therefore, remanded for a new trial on the issues raised by the caveat; the trial judge, of course, exercising his judgment as to whether a peremptory instruction is proper on any issues.

Error and remanded.

Judges BROCK and VAUGHN concur.

MRS. PATRICIA ANN AUSTIN BURTON, INDIVIDUALLY AS WIDOW AND NEXT FRIEND OF GARY LEE AUSTIN, DONNA LYNN AUSTIN, AND CYNTHIA ANN AUSTIN, MINOR CHILDREN, COLAN O. AUSTIN, DECEASED v. AMERICAN NATIONAL INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY

No. 7118IC80

(Filed 24 February 1971)

Master and Servant § 60— workmen's compensation — death by drowning — fishing trip awarded as prize by district manager

Death of an insurance company debit agent by drowning while on a fishing trip awarded as a prize by the district manager and his assistant to debit agents who had a $25 combined increase for a specified period did not arise out of and in the course of the agent's employment.

APPEAL by defendants from Full North Carolina Industrial Commission Opinion and Award of 25 August 1970.

This is a proceeding under the North Carolina Workmen's Compensation Act, N. C. Gen. Stat. 97-1 *et seq.*, to recover compensation for the death of Colan O. Austin. American National Insurance Company is the defendant employer, and the carrier is Continental Casualty Company.

On 26 March 1969, Colan O. Austin was employed as a debit agent by the American National Insurance Company in Greensboro and worked out of the Greensboro office. In December of 1968 C. H. Jordan, district manager of the Greensboro office, and Lester Pleasants, the assistant district manager, decided to run a contest and to award a prize to each debit agent who had a twenty-five dollar combined increase for the period beginning 1 January 1969 and lasting until approximately 21 March 1969. Jordan and Pleasants held a meeting with the agents to determine what the agents would like to do if they had the specified increase. Since a number of the agents who worked in that office were fishermen, the group agreed by a majority vote that the prize would be a fishing trip. If one of the men who qualified did not want to go fishing, he did not have to go. Jordan and Pleasants planned to pay for this trip, including lodging and some of the food and excluding transportation and fishing equipment. The cost to both men was to be fifty dollars to which sum each contributed twenty-five dollars. At the end of this planned sales period, three of the eight

salesmen in the Greensboro office qualified—Vern Leonard, Ronald Dillingham and Colan O. Austin. Under the rules devised by Jordan and Pleasants, the manager and the assistant manager were also eligible to go.

Dillingham, Austin, Leonard, and Jordan left the Greensboro office about 10:00 a.m. Wednesday, 26 March 1969. Lester Pleasants decided on Wednesday morning not to go because he was not feeling well. Jordan left the Greensboro office in his car to which his boat was attached. Vernon Leonard rode with him. Austin and Dillingham left High Point in Dillingham's car about the same time. In South Carolina, the group stayed at Black's Fish Camp on Santee Cooper, one part of Lake Marion. The group arrived at Black's Fish Camp around 3 or 4 p.m. and checked into the lodge where all of them stayed in the same room. On Thursday morning, all of them went fishing in Jordan's boat. They returned from the lake about 5 or 6 o'clock that evening and went to dinner in Jordan's car. On Friday morning Ronald Dillingham's cousin came by; he and Dillingham rented a boat and went fishing all of Friday morning and came in around lunch time. After lunch, Ronald Dillingham and his cousin went fishing by themselves, and Friday afternoon was the last time that Ronald Dillingham saw Colan Austin alive. At that time it was approximately 2:30 in the afternoon and Austin, Jordan and Leonard were on the dock at Black's Fish Camp preparing to go fishing and they were going to use Jordan's boat. When Ronald Dillingham returned to Black's Fish Camp at approximately 7:30 p.m., there was no sign of the Jordan boat. Dillingham first learned that there had been a sinking of the Jordan boat on Saturday, at approximately 9 or 9:30 a.m. when he received a report that a boat had been found, which he later identified as being that of Jordan; he later identified two bodies which had been found floating in the lake, those of Jordan and Leonard. The body of Colan O. Austin was found in the lake eleven days later.

Subsequent to the death of Colan O. Austin, a claim was filed for death benefits pursuant to the North Carolina Workmen's Compensation Act. The matter was heard before Deputy Commissioner A. E. Leake at High Point, and an Opinion and Award was filed 16 December 1969 allowing compensation. The defendants appealed to the Full Commission which affirmed the Opinion and Award on 25 August 1970. From the Opinion and

Award of the Full Commission defendants appealed to this Court.

Morgan, Byerly, Post and Herring by William L. Johnson, Jr. for plaintiff appellee.

Perry C. Henson and Thomas C. Duncan for defendant appellants.

VAUGHN, Judge.

Defendants bring forth numerous assignments of error on appeal, but because of our disposition of the case, we need deal with only one of them. Defendants contend that the accident did not arise out of and in the course of the employment. "[U]nder the North Carolina Workmen's Compensation Act, Chapter 97 of the General Statutes, the condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and (3) in the course of employment." *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97.

Did the drowning of Colan O. Austin while on a fishing trip arise out of and in the course of his employment? Guidelines for determining that question are found in *Lewis v. Tobacco Co.*, 260 N.C. 410, 132 S.E. 2d 877:

> " . . . To be compensable the injury must spring from the employment. *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22. An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. It is not compensable if the acts are performed solely for the benefit or purpose of the employee or third person. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. The fact that a pleasure trip for the benefit of the employee is without expense to the employee does not entitle him to compensation for injury received while on such trip even if all or a portion of the expense is borne by the employer as a gesture of good will. *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97; *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294. Where an employee at the time of his injury is performing acts for his own benefit, and not connected with his employment, the injury does not arise out of his employment. This is true even if the acts are

performed with the consent of the employer and the employee is on the payroll at the time. *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680. If employee's acts are not connected with his employment but are for the benefit of himself and third persons at the time of his injury, he is not entitled to compensation even if he is injured while he is required by his employer to be away from his home and place of regular employment for a period of time on a mission for his employer. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218."

In *Lewis*, the employee was a chauffeur and valet who was paid to drive the defendant's office manager to a beach cottage and to perform other services while at the cottage. Lewis was killed while returning from a hunting trip on which his supervisor did not go, but gave him permission to go. At the time of his injury, Lewis was not performing acts connected with his employment, but performing acts for the benefit of himself. In the present case, Austin was not performing acts connected with his employment, nor did his employment require him to go fishing. He was fishing for his own pleasure at the time of his death. *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643, is another case in point. In that case, a route salesman was directed to attend a sales meeting in Greensboro. All of his expenses, including the room at the inn where the meetings were held, were paid. After attending a social hour sponsored by the employer, some of the employees, including claimant, decided to go swimming in a pool provided by the inn. Claimant was injured while diving. The Court reversed an allowance of an award under the Act, saying, "Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment." We hold that the injuries did not arise out of and in the course of Austin's employment.

This cause is remanded to the Industrial Commission for the entry of an order denying compensation.

Reversed and remanded.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM S. JESSUP

No. 7117SC125

(Filed 24 February 1971)

1. **Larceny § 4— indictment — ownership of property**

A proper bill of indictment for larceny must allege the ownership of the property stolen.

2. **Larceny §§ 1, 4— property stolen after death of the owner — allegation of ownership**

The ownership of money that was stolen after the death of the owner but before the appointment of his personal representative was properly laid in the estate of the deceased owner.

3. **Excutors and Administrators § 6— personal property — vesting in executor**

Personal property vests in the executor or administrator upon the decedent's death.

4. **Larceny § 7— larceny of father's money kept in packhouse — sufficiency of evidence**

Issue of defendant's guilt of the larceny of $20,100 from his father's locked packhouse on the morning of the father's death was properly submitted to the jury, where there was evidence that the father kept more than $20,000 in one hundred dollar bills in the packhouse; that the father was the only person who had keys to the locked packhouse; that the son had borrowed the keys three or four years prior to the father's death; that on the day of the father's death the money could not be found in the packhouse; and that when defendant was arrested eleven months later for drunken driving the arresting officer found 201 one-hundred dollar bills in the glove compartment of his car.

5. **Larceny § 6; Criminal Law § 169— larceny prosecution — testimony relating to search of car — voir dire — harmless error**

In a prosecution charging defendant with the larceny of $20,100 from his deceased father's packhouse, defendant was not prejudiced by the testimony of a highway patrolman in the presence of the jury that approximately eleven months after the larceny he stopped the defendant for drunken driving and found 201 one-hundred dollar bills in the glove compartment of the automobile, and that the search was made in connection with a recent robbery, notwithstanding there was no *voir dire* examination of the patrolman concerning the details of the search, where any prejudicial effect resulting from the mention of the robbery was removed by the patrolman's further testimony that he returned the money to defendant.

6. Larceny §§ 5, 6— larceny of money — admissibility of money found in defendant's possession — failure to show identity of money

In a prosecution charging defendant with the larceny of $20,100 in one-hundred dollar bills from his father's locked packhouse on the day of the father's death, evidence that the defendant had 201 one-hundred dollar bills in his possession eleven months after the larceny was admissible as a circumstance to be considered with other evidence in the case, particularly defendant's statement to his mother that he had taken the money, notwithstanding the State failed to identify the money found in defendant's possession as being identical to the money stolen from the packhouse.

APPEAL by defendant from *Armstrong, J.*, 28 September 1970 Criminal Session of STOKES Superior Court.

This is a criminal prosecution on a bill of indictment charging the defendant William S. Jessup with the larceny of $20,100 in cash from " . . . the estate of W. M. Jessup, deceased." Upon the defendant's plea of not guilty, the State offered evidence tending to establish the following pertinent facts: On 12 October 1967, W. M. Jessup, who resided with his wife, Mrs. Lily Jessup, on a farm in Stokes County, North Carolina, died in his bed at approximately 5:00 a.m. The deceased was known to keep large sums of cash in a box in a locked packhouse near the house. The wife testified that the box contained $3,000 of her own money, and more than $20,000 in one hundred dollar bills of her husband's money, and that the money was in the packhouse the night her husband died. So far as anyone knew, the deceased had the only keys to both the packhouse and the box. In February 1964, while W. M. Jessup was hospitalized because of a heart attack, the defendant requested and got the packhouse key from Mrs. Jessup in order to get something out of the packhouse, and returned the key the next day. Two or three hours after her husband's death, Mrs. Jessup went to the packhouse to get the money and found that the box containing the money was gone. Mrs. Jessup testified that the defendant was among the first to be notified of his father's death, but was one of the last to arrive at the home. On 6 September 1968, North Carolina Highway Patrolman W. C. Blalock stopped the defendant for driving an automobile while under the influence of an intoxicant on Highway 68 North of Walnut Cove, and found in the glove compartment of the automobile 201 one hundred dollar bills in a bank bag.

Mrs. Jessup testified that she talked to her son after she had learned that the patrolman had found $20,100 in the automobile. Mrs. Jessup testified:

"He said that he had it. And he got mad and said, I got it and you and Jamie and Wilton won't get a 'God damn' dollar.

" . . . He said yes, I got it and we wouldn't get a 'God damn' dollar. Yes, by God I got it. I will tell like he said it."

The jury found the defendant guilty as charged. From a judgment of imprisonment of not less than nine nor more than ten years, the defendant appealed.

Attorney General Robert Morgan, Assistant Attorney General William W. Melvin, and Assistant Attorney General T. Buie Costen for the State.

Hatfield, Allman and Hall by Roy G. Hall, Jr., and James W. Armentrout for defendant appellant.

HEDRICK, Judge.

[1, 2] Assignments of error one and eight present the question of whether the allegation in the bill of indictment properly laid the ownership of the subject of the larceny, $20,100, in the "estate of W. M. Jessup, deceased." A proper bill of indictment for larceny must allege the ownership of the property stolen. *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46 (1965); 5 Strong, N. C. Index 2d, Larceny, § 4.

[3] Personal property is said to vest in the executor or administrator upon the decedent's death. *Spivey v. Godfrey,* 258 N.C. 676, 129 S.E. 2d 253 (1963); *Allen v. Currie, Commissioner of Revenue,* 254 N.C. 636, 119 S.E. 2d 917 (1961). Obviously, title does not remain in the deceased since a deceased person cannot own property *(Lawson v. State,* 68 Ga. App. 830, 24 S.E. 2d 326 (1943)), nor do the heirs or legatees own or have any right to the possession of the personal property until the estate is administered. *Spivey v. Godfrey, supra;* 1 Wiggins, North Carolina Wills, Executors and Administrators, § 215.

[2] It has been held that ownership should be laid in the executor or administrator, even though the theft occurred before his qualification or appointment. *Nelson v. People,* 111 Colo. 434,

142 P. 2d 388; *Lawson v. State, supra.* We hold that when the larceny occurs after the death, but before a personal representative is appointed or qualified, then it is proper to allege title or ownership in the estate of the decedent. *Edwards v. State,* 162 Tex. Cr. 390, 286 S.W. 2d 157 (1956). Otherwise, there is a hiatus in the law where thieves might work their mischief with impunity.

[4] There is sufficient evidence in this record from which it may be inferred that W. M. Jessup owned and kept in the packhouse near his residence more than $20,000 in one hundred dollar bills, and that the defendant stole the money after his father's death in the early morning of 12 October 1967. The court correctly denied the defendant's motion for judgment as of nonsuit and his motion in arrest of judgment.

[5] Assignments of error three, four and five raise the question of whether the court committed prejudicial error in allowing the highway patrolman to testify in the presence of the jury that he stopped the defendant approximately eleven months after the larceny and charged him with driving an automobile while under the influence of an intoxicant, and that he searched the car and found 201 one hundred dollar bills. The defendant does not challenge the validity of the search, nor does he contend that the evidence regarding the 201 one hundred dollar bills was the fruit of an illegal search. The defendant argues that the court committed prejudicial error by not having the officer examined in the absence of the jury concerning the facts connected with the search. The defendant objected generally to the testimony of the officer. We are cited by the defendant to recent decisions in which it is held that a *voir dire* is "proper procedure" to determine if the fruits of a questionable search may be admitted. *State v. Basden,* 8 N.C. App. 401, 174 S.E. 2d 613 (1970); *State v. Fowler,* 3 N.C. App. 17, 164 S.E. 2d 14 (1968). Conceding that a *voir dire* would have been proper procedure in the instant case, we do not think that the failure to conduct such an examination in the absence of the jury was in and of itself prejudicial. Whether it was error for the court not to have conducted an examination of the officer in the absence of the jury is determined by whether the jury was permitted to hear incompetent and prejudicial testimony while the court was determining the validity of the search.

The defendant argues that he was prejudiced by the court's allowing the officer to testify that he stopped and arrested the defendant for driving under the influence, and that he searched the automobile in reference to a robbery that had occurred a few days earlier. Obviously, any prejudicial effect of the officer's testimony concerning another robbery was removed by his further testimony that the money found in the defendant's glove compartment was returned to him. The testimony regarding the fact that the defendant was arrested and charged with driving under the influence was the result of the officer's explaining why he stopped the defendant.

> "Where there is abundant evidence to support the main contentions of the State, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." 3 Strong, N. C. Index 2d, Criminal Law, § 169, p. 135. See also *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508 (1968).

Therefore, considering all of the evidence against the defendant, including his statements to his mother, we hold that the defendant has failed to show that he was prejudiced in any manner by the court's allowing the officer to testify in the presence of the jury as to facts connected with his search of the defendant's automobile.

[6] The defendant contends by assignments of error two and nine that the evidence that the defendant had in his possession 201 one hundred dollar bills eleven months after the date of the alleged larceny was not relevant, since the money was not identified as being the same money allegedly stolen from the packhouse, and that the court committed prejudicial error in its instructions to the jury regarding this evidence. We hold that the evidence was relevant and properly admitted as a circumstance to be considered in connection with other evidence tending to show that the deceased kept more than $20,000 in one hundred dollar bills in his packhouse; that the defendant was a part-time tobacco farmer and laborer; that the defendant admitted to his mother that he had the money; that after his father's death the defendant acquired a new pickup truck, a

new automobile, refrigerator, washing machine, lawnmower, freezer and television. The court correctly instructed the jury that evidence that the defendant had in his possession eleven months after his father's death $20,100 in one hundred dollar bills was a circumstance to be considered along with all of the other evidence.

All of the defendant's assignments of error have been carefully considered by this Court. We hold that the defendant's trial in the superior court was free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LEWIS CLARK PITTMAN, JR.

No. 7118SC104

(Filed 24 February 1971)

1. **Burglary and Unlawful Breakings § 5; Criminal Law § 60— felonious breaking case — defendant's fingerprints at crime scene — sufficiency of evidence**

In a prosecution charging defendant with the felonious breaking and entering of an automobile supply store, the State's evidence that on the morning following the break-in the defendant's fingerprints were found on a piece of glass that had been broken from a pane on an overhead sliding door, that the defendant had never worked on the premises, and that the position of the pane on the door was such that it would not have been ordinarily touched by the general public, *held* sufficient to be submitted to the jury on the issue of defendant's guilt.

2. **Criminal Law § 34— guilt of other crimes — fingerprint evidence at previous break-in**

In a prosecution charging defendant with the felonious breaking and entering of an automobile supply store, it was prejudicial error to admit testimony that the defendant's fingerprints were found at the scene of a break-in at a camera shop one and one-half months prior to the instant offense.

APPEAL by defendant from *Collier, Superior Court Judge,* 10 September 1970 Session GUILFORD Superior Court.

State v. Pittman

Defendant was charged in a 3-count bill of indictment, proper in form, with the offenses of felonious breaking or entering, felonious larceny, and feloniously receiving stolen goods. The case was tried upon the first and second counts.

Evidence for the State tended to show that the premises of Western Auto Supply Co., 300 North Elm Street, were broken into and entered during the night of 6 August 1970, or early morning hours of 7 August 1970, and property of a value of $1,277.47 stolen therefrom. State's evidence further tended to show that defendant's fingerprint was found on a piece of glass which was broken from a sliding door to the service department. The pane of glass which was broken was approximately 22 inches by 32 inches in size and was located in the lower left-hand corner of the sliding door. The sliding door is a typical garage overhead type door, which slides up and over the working area. When open the door is suspended parallel with the ground above the working area. When the door is closed, the panel from which the glass was broken is situated 4—6 inches from the floor; and when the door is open, the panel from which the glass was broken is situated approximately ten feet above the floor.

The only evidence which tended to connect defendant with the breaking or with the stolen merchandise was defendant's fingerprint on a piece of the glass which was broken from the pane of the sliding door, small spots of blood found on pieces of glass in the building, and a fresh cut on defendant's thumb at the time of his arrest on 9 August 1970.

The State was permitted, over objection of defendant, to offer evidence that defendant's fingerprints were found at the scene of a break-in of the Carolina Camera Center on 22 June 1970.

The case was submitted to the jury upon the first count (felonious breaking or entering) and second count (felonious larceny); the jury found defendant guilty on each of the two counts. Upon defendant's motion, the trial judge set aside the verdict on the second count (felonious larceny); and thereafter imposed a sentence of seven to ten years on the verdict of guilty on the first count (felonious breaking or entering). Defendant appealed.

Attorney General Morgan by Deputy Attorney General Moody for the State.

Eighteenth Judicial District Assistant Public Defender Douglas for defendant.

BROCK, Judge.

[1] Defendant assigns as error the denial of his motion for nonsuit. Defendant argues that to withstand motion for nonsuit the evidence must disclose not only that the fingerprints were found at the place where the crime was committed, but also the fingerprints must be shown to have been left only at the time of the crime's commission. Defendant cites *State v. Minton,* 228 N.C. 518, 46 S.E. 2d 296, in support of this argument.

In *Minton* the State's evidence disclosed that the premises of Coastal Lunch were broken or entered by breaking out the glass which made up the top half of the front door. State's evidence further disclosed that blood was found upon the jagged edge of a piece of broken glass left sticking in the molding of the upper half of the door, and that a print of the left thumb of defendant was found upon a piece of the glass broken from the upper half of the door. State's evidence disclosed that defendant had been a customer of Coastal Lunch on the evening of the break-in and had consumed four or five beers. State's evidence showed that when defendant was arrested the next morning he had fresh cuts in the palm of his right hand which he explained had been cut by his razor blade while trimming leather for making billfolds.

In *Minton* the Supreme Court was concerned that the fingerprint on the glass of the front door of Coastal Lunch was as likely to have been made while entering as a customer as it was to have been made at the time the offense was committed. The Court was also concerned that the State's evidence itself gave the reasonable explanation of defendant about the cuts on his hand. In its opinion the Court observed: "There is not a scintilla of evidence to negative the reasonable assumption that the left thumb print of the accused was put upon the glass when he entered the shop during business hours on the night in question for the lawful purpose of buying beer in response to the implied invitation extended to the public by the operator of the Coastal Lunch."

In the case before us the defendant's fingerprints were not found on a door used by the general public as invitees of Western Auto Supply Company. The evidence disclosed that defendant had never worked at the premises, therefore there is no reasonable assumption that his fingerprints were impressed on the glass while raising or lowering the door in the course of his employment. Also, there is no reasonable assumption that a member of the general public would have had occasion to squat or bend down to impress his prints on the glass while the door was in a closed position, nor is there a reasonable assumption that a member of the general public would have had occasion to climb or jump up to a height of ten feet to impress his prints on the glass while the door was in an open position. Obviously *Minton* is clearly distinguishable from the present case.

The evidence was sufficient to withstand the motion for nonsuit and there was no error in the trial judge's denial of defendant's motion for nonsuit.

[2] Defendant assigns as error that the State was allowed to offer evidence that defendant's fingerprints were found at the scene of a break-in of Carolina Camera Center about one and one-half months before the date of the alleged offense in this case.

The general rule excluding evidence of the commission of other offenses by the accused is subject to well established exceptions. The rule and the exceptions are fully discussed in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. See also 29 Am. Jur. 2d, Evidence, §§ 320-333, pp. 366-380, and Annot. 42 A.L.R. 2d 854. Defendant cites *McClain* as authority that under the general exclusionary rule the evidence should not have been admitted; and the State cites *McClain* as authority that the evidence was properly admitted under one or more of the exceptions to the general rule.

The State's evidence offered in this case concerning the break-in of Carolina Camera Center revealed that the glass was broken from the show window immediately to the left of and adjacent to the front door, and that defendant's fingerprints were found on a piece of the broken glass. Nothing further was shown to connect defendant with an offense of breaking or entering the premises of the Carolina Camera Center.

Cf. *State v. Minton, supra.* We fail to see how this bit of evidence can serve the purpose of any of the exceptions to the general exclusionary rule. We hold, therefore, that it was prejudicial error to admit the evidence that defendant's fingerprints were found at the scene of a break-in of Carolina Camera Center. Consequently we hold that defendant is entitled to a new trial.

We have examined defendant's remaining assignments of error and find them to be without merit.

New trial.

Judges MORRIS and VAUGHN concur.

ROBERT L. COPPLEY, ADMINISTRATOR OF G. F. COPPLEY, DECEASED v. MILES MILLARD CARTER, JR.

No. 7122SC161

(Filed 24 February 1971)

1. **Appeal and Error §§ 30, 48— failure to strike unresponsive testimony**

In this wrongful death action, the trial court did not err in the denial of plaintiff's motion to strike as unresponsive testimony by defendant regarding the reasonableness of defendant's speed when he attempted to pass decedent's car, where the unresponsiveness resulted from an argument with defendent by plaintiff's counsel during cross-examination, plaintiff not being prejudiced in any event since the jury found that defendant was negligent.

2. **Rules of Civil Procedure § 50— judgment notwithstanding verdict — sufficiency of evidence**

Upon a motion for judgment *non obstante veredicto* under G.S. 1A-1, Rule 50(b)(1), the sufficiency of the evidence upon which the jury based its verdict is drawn into question.

3. **Automobiles § 47— indisputable physical fact — testimony by defendant**

In this wrongful death action arising out of an automobile collision, defendant's testimony to the effect that the approximate distance from an intersection to the scene of the collision was 75 to 100 feet was not an "indisputable physical fact" that negated defendant's other testimony that he did not begin passing decedent's car until after he passed the intersection and was not sufficient to justify taking the case from the jury.

4. **Rules of Civil Procedure § 50— alternative motion for new trial — discretion of trial judge**

The denial of a motion in the alternative for a new trial lies within the discretion of the trial judge and will not be disturbed on appeal unless a clear abuse of discretion is shown.

APPEAL by plaintiff from *Exum, Superior Court Judge,* 5 October 1970, Civil Session, DAVIDSON County General Court of Justice, Superior Court Division.

Plaintiff, as Administrator of the Estate of G. F. Coppley, deceased, filed a complaint against the defendant seeking to recover for personal injuries, property damage, and the wrongful death of G. F. Coppley arising out of an automobile accident on 8 February 1969 between the deceased and the defendant.

Plaintiff's evidence tended to show that the deceased was driving south on N. C. Highway No. 150 about 11½ miles north of Lexington, North Carolina at a speed of 40 to 45 miles per hour. The defendant came up on the deceased from the rear and ran into the rear of the Coppley vehicle and knocked it off the highway, resulting in the damages complained of and the death of G. F. Coppley. At the time of the accident there was a light rain falling and the road was wet. The deceased had a history of heart trouble and had been in the hospital for heart failure a month prior to the accident.

The defendant's evidence tended to show that the defendant had come up on the car driven by the deceased and had been following him for 1½ to 3 miles. After he had passed the intersection of Rural Road No. 1551, the defendant attempted to pass the car driven by the deceased; but as he did so, the deceased veered into the left lane striking the defendant's car and causing him to lose control. The defendant testified that as he attempted to pass the deceased's car, he was traveling at a speed of 50 to 55 miles per hour.

The trial judge submitted the issues of negligence and contributory negligence to the jury and the jury returned a verdict finding that the plaintiff's intestate was injured and damaged by the negligence of the defendant and that the plaintiff's intestate, through his own negligence, contributed to his injuries and damage. From a judgment that the plaintiff recover nothing of the defendant, the plaintiff appeals to this Court.

Stoner, Stoner and Bowers by Bob Bowers for plaintiff appellant.

Walser, Brinkley, Walser & McGirt by Charles H. McGirt for defendant appellee.

CAMPBELL, Judge.

[1] Plaintiff's first assignment of error is directed to the denial of his motion to strike the testimony of the defendant regarding the reasonableness of the defendant's speed at the time he was attempting to pass, for that it was not responsive. This assignment of error is without merit as the record shows that the testimony was elicited by the plaintiff during cross-examination and came as a result of argument with the witness by the plaintiff and hence the unresponsiveness. Moreover, there is no showing of prejudice as the jury answered the issue of defendant's negligence in favor of the plaintiff.

[2] Plaintiff next assigns as error the failure of the trial judge to grant plaintiff's motion for judgment *non obstante veredicto* or in the alternative a new trial. Upon a motion for judgment *non obstante veredicto* under G.S. 1A-1, Rule 50(b)(1), the sufficiency of the evidence upon which the jury based its verdict is drawn into question. All of the evidence which supports defendant's claim must be taken as true and considered in the light most favorable to defendant, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in defendant's favor. *Horton v. Insurance Co.*, 9 N. C. App. 140, 175 S.E. 2d 725 (1970), *Musgrave v. Savings & Loan Assoc.*, 8 N. C. App. 385, 174 S.E. 2d 820 (1970).

[3] Here, the evidence was sufficient to carry the case to the jury. Defendant's testimony to the effect that the approximate distance from the intersection of Rural Paved Road No. 1551 to the scene of the collision was 75 to 100 feet is not an "indisputable physical fact" that will negate defendant's other testimony that he did not begin passing until after he passed the intersection. This testimony is not sufficient to justify taking the case from the jury. It was only an estimation on the part of the defendant and insofar as it creates a conflict in his testimony, it must be resolved in his favor in passing on a motion

for a directed verdict or a motion for judgment notwithstanding the verdict.

[4] The denial of the motion in the alternative for a new trial lies within the discretion of the trial judge. An action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. *Whaley v. Rhodes,* 10 N. C. App. 109, 177 S.E. 2d 735. No abuse of discretion has been shown and the denial of the motion for a new trial must be upheld.

Plaintiff's remaining assignments of error relate to alleged omissions on the charge. We have reviewed the charge and find it to be adequate and free of prejudicial error.

The evidence was conflicting and the trial court properly submitted the conflict to the triers of fact who found against the plaintiff.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges BRITT and HEDRICK concur.

KENNETH W. BREWER, ADMINISTRATOR OF THE ESTATE OF FARRELL L. BREWER v. WILLIAM P. HARRIS, ADMINISTRATOR OF THE ESTATE OF GARY RUDISILL

No. 7118SC14

(Filed 24 February 1971)

1. **Automobiles §§ 91, 94; Negligence § 7— death of automobile passenger — wilful or wanton negligence of driver**

In an action for the wrongful death of a passenger in an automobile which failed to negotiate a curve, the trial court erred in refusing to submit plaintiff's tendered issue as to the wilful and wanton conduct of the driver of the automobile where plaintiff's evidence tended to show that, despite warnings by the two passengers in the automobile to slow down for the approaching curve, the driver failed to slow down and entered the curve at a speed well over 100 mph, and that the driver had a blood alcohol content of .31 percent.

2. **Evidence § 51— blood alcohol test result**

In an action for the wrongful death of a passenger in an automobile which failed to negotiate a curve, the trial court properly admitted

evidence of blood alcohol tests performed on plaintiff's intestate and the automobile driver.

Judge BROCK dissents.

APPEAL by plaintiff from *Collier, Superior Court Judge,* 18 May 1970 Session, GUILFORD Superior Court (High Point Division).

This case arises from an automobile accident which occurred on 15 September 1968 in High Point, North Carolina, in which plaintiff's intestate, Farrell L. Brewer, was killed while riding in a 1968 Corvette automobile operated by defendant's intestate, Gary Rudisill. Issues as to the negligence of the defendant and contributory negligence of plaintiff were answered in the affirmative and plaintiff appealed.

Haworth, Riggs, Kuhn and Haworth by John Haworth for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

VAUGHN, Judge.

[1] The defendant stipulated that in the event the jury found that Rudisill was the driver of the Corvette at the time of the accident, they should answer the first issue as to his negligence in the affirmative. In apt time plaintiff tendered an issue as to the wilful and wanton conduct of Rudisill. Plaintiff assigns as error the refusal of the trial judge to submit the issue. The evidence, when considered in the light most favorable to the plaintiff, tends to show, among other things, the following: On 15 September 1968 at about 1:30 a.m. Rudisill was driving his 1968 Corvette in a northerly direction along South Main Street in High Point. The automobile was a sports car and contained only two seats. One Danny W. Carroll was in the right seat and Brewer was seated on the console located between the two seats. After stopping at the intersection of South Main Street and Fairfield Road, Rudisill suddenly depressed the gas pedal all the way to the floorboard and attained a speed of more than 100 miles per hour. The vehicle was approaching a curve near the intersection of South Main Street and Fraley Road. Brewer and Carroll each told Rudisill to slow down or he would not make the curve. Rudisill made no response, did not slow down

and entered the curve at a speed of well over 100 miles per hour. The vehicle left the street, struck two utility poles, finally returned to the street and struck a vehicle head-on in the southbound lane of South Main Street. The investigating officer was asked to describe the marks found on the highway scene of the accident and testified, in part, as follows:

> "Describing the marks that I found on the highway, the first marks I found were south of Fraley Road which in my opinion appear to be black pressure marks going into the northbound lane of travel. At this point, approximately 108 feet south of Fraley Road, these marks traveled up the west side of the highway or the southbound lane, crossed the intersection of Fraley Road up on the edge of a small traffic island in front of a business. The sliding or pressure marks continued on to another traffic island in front of the same building and at this point there was a utility pole severed from its post. This pole was 150 feet from the intersection of Fraley Road or 268 feet from where the pressure marks first began.
>
> "The marks continued on from the pole 124 feet to a second pole which was damaged. At this point the marks took another direction back in a northeasterly direction or back towards the highway and there was 70 feet from this pole to the back of the Corvette in the street. The total of those tire impressions was 474 feet, or that is the distance from the marks from the road to the car."

Brewer and Rudisill were killed. Blood samples taken immediately after the accident disclosed that Rudisill was highly intoxicated, his blood having an alcoholic content of .31 percent. The sample of Brewer's blood had an alcoholic content of .11 percent.

Our decision on this assignment of error is, we think, controlled by the opinion of the Supreme Court in *Pearce v. Barham,* 271 N.C. 285, 156 S.E. 2d 290, where we find the following:

> "There was evidence which, when considered in the light most favorable to plaintiff tends to show: On February 19, 1964, near midnight, Calvin W. Barham (Calvin), was driving his Ford car in a northeasterly direction along Rural Paved Road No. 2224. Plaintiff, seated to Calvin's right, and Dolly Barham (Dolly), seated to plaintiff's

right, were passengers. As he approached Fowler's Crossroads, the intersection of No. 2224 with Rural Paved Road No. 2308, Calvin was driving in a drizzling rain, with slick tires, upgrade, at a speed of ninety miles an hour 'or better,' moving back and forth across the road; and, although confronted by the stop sign at that intersection, failed to stop or slow down, crossed the intersection at such speed and lost control. As a result, his car left the road and overturned in a field some 288 feet from where it left the road, killing the driver and injuring the passengers. There was evidence sufficient to support a finding that Calvin's conduct was both wilful and wanton."

We are unable to say that the evidence in the present case is less indicative of wilful and wanton conduct on the part of Rudisill than it was on the part of Barham in *Pearce v. Barham, supra;* we must hold, therefore, that it was error for the trial judge to decline to submit the issue.

We have not discussed the denial of plaintiff's motion to amend his complaint. Under Rule 8 of the North Carolina Rules of Civil Procedure, the original complaint was sufficient to have entitled plaintiff to offer evidence of defendant's wilful and wanton conduct and to have that issue submitted to the jury.

[2] Evidence as to results of the blood tests of Rudisill and Brewer was admitted into evidence over plaintiff's objection and this is assigned as error by plaintiff. We hold that the evidence was properly admitted, the requirements of *Robinson v. Ins. Co.,* 255 N.C. 669, 122 S.E. 2d 801 having been met.

Since there must be a new trial, we will refrain from further discussion of the case except to say that evidence of Brewer's contributory negligence was plenary.

New trial.

Judge MORRIS concurs.

Judge BROCK dissents.

CHARLESTON CAPITAL CORPORATION, A CORPORATION v. LOVE VALLEY ENTERPRISES, INC., A CORPORATION

No. 7122SC129

(Filed 24 February 1971)

1. **Rules of Civil Procedure § 56; Venue §§ 2, 7— motion for removal to proper venue — authority to rule upon motion for summary judgment**

Mecklenburg County was not the proper venue for an action on a promissory note instituted by a foreign corporation against a domestic corporation with its principal office in Iredell County, and the Superior Court of Mecklenburg County had no authority to rule upon plaintiff's motion for summary judgment while defendant's motion for a change of venue to Iredell County was pending.

2. **Courts § 9; Rules of Civil Procedure § 60— void order of one superior court judge — authority of another judge to set aside**

Order of the Superior Court of Mecklenburg County granting partial summary judgment for plaintiff was a nullity where defendant had moved in apt time for removal of the cause to the proper venue, Iredell County, and upon removal of the cause to Iredell County for trial only on the issue of damages, the Superior Court of Iredell County had authority under G.S. 1A-1, Rule 60(b)(6) to set aside the Mecklenburg order granting summary judgment.

APPEAL by defendant from *Exum, Superior Court Judge,* 16 November 1970 Term of IREDELL Superior Court.

Plaintiff appellee filed this action to recover on a promissory note in Mecklenburg Superior Court on 11 December 1969. The complaint recited, among other things, that plaintiff is a foreign corporation.

On 9 January 1970, before the time for serving an answer had expired, the defendant appellant, a domestic corporation with its principal office in Iredell County, filed a motion for change of venue to remove the action to Iredell County. On 22 April 1970, plaintiff filed a motion for summary judgment, but no time was fixed for hearing thereon. Defendant sought a hearing on its motion for change of venue on several occasions, and on 29 April 1970, wrote to the Clerk of Mecklenburg Superior Court, saying in part: "It is the defendant's position that we have a right to be heard on our motion for change of venue prior to the plaintiff being allowed to be heard on its motion for summary judgment." On 5 May 1970, the Assistant

Clerk of Mecklenburg Superior Court wrote the following letter to counsel for the defendant:

> "This is to notify you that a hearing has been scheduled before the undersigned to hear the Motion to Remove filed in the above captioned case at 2:30 P.M. on the 15th day of May, 1970.
>
> This office regrets the delay in the hearing of this motion."

Due to the request of counsel for the plaintiff in a letter dated 12 May 1970, the hearing was not held as scheduled. On 15 June 1970, the Assistant Clerk wrote the following letter to counsel for the defendants:

> "The 1967 North Carolina Legislature repealed G.S. 1-583 effective January 1, 1970 which specifically authorized the Clerk to rule on a Motion to Remove As a Matter of Right. Consequently, this office does not believe the remaining law is sufficiently specific in this area for your motion to be heard by the Clerk.
>
> This is to notify you that the Motion to Remove filed by you in the above captioned case has been placed upon the next Non-Jury Superior Court Calendar to be heard at 11:00 A.M. on the 9th day of July, 1970."

Defendant's motion was heard on 9 July 1970 before the Mecklenburg County Superior Court. Although defendant had no actual notice that it was going to be heard then, plaintiff's motion for summary judgment was heard on the same day at the same time. The order entered by Judge Martin follows:

> "1) That Summary Judgment be entered in favor of the plaintiff for such amount as may be due it as damages;
>
> "2) That this cause be removed to the Superior Court of Iredell County and there be placed on the next Superior Court calendar for trial on the sole issue of damages; and
>
> "3) That the Clerk of Superior Court of Mecklenburg County forward to the Clerk of Court of Iredell County all pleadings, Affidavits, Orders and other documents filed in this cause."

On 4 August 1970, after the entry of the partial summary judgment and the order to remove in Mecklenburg, the defendant filed a motion in Iredell County Superior Court pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure to set aside the portion of the order granting the partial summary judgment. Defendant's motion was heard and an order denying defendant's motion to set aside was entered because the court concluded that it had "no authority to set aside Judge Martin's Order of July 9, 1970." From the denial of his motion to set aside, defendant appealed.

Casey & Daly by Hugh G. Casey, Jr., for plaintiff appellee.

Collier, Harris & Homesley by Walter H. Jones, Jr., for defendant appellant.

VAUGHN, Judge.

[1] The first question to be decided on this appeal is whether Judge Martin had the power and authority to hear plaintiff appellee's motion for summary judgment while defendant's motion for change of venue was pending. A very similar factual situation is found in *Roberts v. Moore,* 185 N.C. 254, 116 S.E. 728. In that case, plaintiff was a foreign corporation and defendants were citizens of Sampson County. Suit was filed in New Hanover County and summons issued. Before time for answering the complaint had expired, defendants moved for a change of venue to Sampson County. A notice of the motion was served on the plaintiff and time for hearing was set for 18 December 1922. On 15 December 1922, a default judgment was entered against the defendants, from which judgment they appealed. The Court held:

> "While it is clear from a perusal of section 470 that this question of venue is not in the first instance jurisdictional and may be waived by the parties, and the decisions construing the section so hold, these decisions are also to the effect that where the motion to remove is made in writing and in apt time, the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. And any such judgment entered before that should be set aside on motion or appeal as being contrary to the course and practice of the court. Assuredly so, then [*sic*]

the material facts alleged in support of the motion to remove are practically admitted."

Another case with similar facts is *R. R. v. Thrower,* 213 N.C. 637, 197 S.E. 197. There, the plaintiff, a resident of New Hanover, instituted an action in Cumberland County on an unpaid check against the defendant, a resident of Mecklenburg. Defendant filed a motion for change of venue to Mecklenburg, and plaintiff filed a motion to retain the action in Cumberland for the convenience of the witnesses. The court denied defendant's motion and retained the action in Cumberland pursuant to plaintiff's motion. On appeal, the Supreme Court quoted the above paragraph from *Roberts,* and added:

"Upon the admitted facts and the facts found by the court, to which there is no exception, Meckenburg County is the proper venue for the trial of this action. When the defendant duly and in proper time filed his motion in writing for the removal of this cause to Mecklenburg County it then became the duty of the court to pass upon and decide the question thus raised before proceeding further in the cause in any essential matter affecting the rights of the defendant. Pending a determination of this question the court was without authority to entertain the motion made by the plaintiff. On the admitted facts defendant's motion should have been allowed and an order removing the cause to Mecklenburg County should have been entered. By considering and allowing the plaintiff's motion in its discretion the court below, in effect, by the exercise of its discretion, denied the defendant a substantial right to which he is entitled as a matter of law.

"The plaintiff, if he so elects, still has the right to file its motion in the Mecklenburg Superior Court and it will then become the duty of the judge presiding to determine whether the cause should be sent back to Cumberland County for the convenience of the witnesses under the second subsection of C.S., 470."

A recent restatement of the foregoing rule appears in 1 McIntosh, N. C. Practice 2d, § 833, p. 148 (Supp. 1970):

"When the motion to remove is made in apt form and time, the question of removal then becomes a matter of substantial right; the moving party is thereupon entitled to

have the matter ruled upon before the court proceeds further in respect of essential matters; and for the court to do so prior to passing upon the removal motion is error."

Since Meckenburg was not the proper venue, the order granting summary judgment denied defendant a substantial right to which he was entitled and was contrary to the course and practice of the court; moreover, it appears that it was error for Judge Martin to hear the motion for summary judgment until the motion for change of venue was heard because he was without power and authority to do so.

[2] The next question is whether Judge Exum, sitting in Iredell, had authority to set aside the order granting summary judgment by another superior court judge upon defendant's motion under Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. Rule 60(b)(6) provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(6) Any other reason justifying relief from the operation of the judgment."

The rule applicable here is found in 2 Strong, N. C. Index 2d, Courts, § 9, p. 449:

"If a judge of the Superior Court enters an order without legal power to act in respect to the matter, such order is a nullity, and another Superior Court judge may disregard it without offending the rule which precludes one Superior Court judge from reviewing the decision of another."

We hold that the Iredell Superior Court did have authority to set aside the order entered in Mecklenburg Superior Court because that order was entered without power and authority and was a nullity.

Reversed.

Judges BROCK and MORRIS concur.

State v. Bauguess and State v. Kilby

STATE OF NORTH CAROLINA v. MARK BAUGUESS (Case No. 143)

— AND —

STATE OF NORTH CAROLINA v. KENNETH BAUGUESS (Case No. 144)

— AND —

STATE OF NORTH CAROLINA v. JOE KILBY (Case No. 145)

No. 7123SC70

(Filed 24 February 1971)

1. **Criminal Law § 112— instructions on circumstantial evidence**

Trial court's instructions on the law of circumstantial evidence was proper, especially since the court emphasized the possibility of defendant's innocence and further instructed the jury that, before they could find the defendant guilty, the circumstances must exclude every possibility of innocence.

2. **Burglary and Unlawful Breakings § 4— breaking into vending machine — value of machine and amount of damage — relevancy of evidence**

In a prosecution charging defendants with breaking into a coin-operated vending machine with intent to steal money therefrom, testimony that the machine was worth between eight and nine hundred dollars and that the damage done to the door amounted to seventy-five dollars was admissible to show the force used by defendants to carry out their intent to steal.

APPEAL by defendants from *Seay, Superior Court Judge,* Regular October 1970 Criminal Session, WILKES Superior Court.

Defendants were charged in valid bills of indictment with breaking into a coin-operated vending machine with intent to steal money therein. The cases were consolidated for trial and each of the defendants entered a plea of not guilty.

The evidence for the State tended to show that the defendants were observed driving away from the vicinity of Foster's Superette at 2:00 a.m. on 28 June 1970 by a State Highway Patrolman. The patrolman was approaching the superette at the time, and as he passed it, he noticed that the drink box machine at the superette was open. The patrolman followed the defendants for about one-half mile and then pulled them over in the parking lot of Lowe's Super Market. At the time the defendants were pulled over, there was a sheriff's department automobile in the parking lot. The deputy sheriff had a conversation with the patrolman and then went to Foster's Superette where he found that the door had been pried open and the coin box removed. Tool marks were on the door to the drink box and the lock was twisted

backward. The deputy then returned to the parking lot where the defendants were being detained by the patrolman. As he approached the defendants' car, the deputy observed the defendant Kenneth Bauguess trying to poke coins behind the seat of the car. The coins consisted of nickels, dimes, and quarters in the amount of $4.65 and were seized by the deputy. From the outside of the car the deputy could also see a tire tool and a pair of pliers.

The owner of Foster's Superette testified that the drink box had been locked that night and that all of the money had been removed earlier when the store closed for the night. He also testified that the drink boxes are used frequently, after closing hours, by patrons of a nearby drive-in. He testified that the drink machine was worth between eight and nine hundred dollars and that about seventy-five dollars worth of damage was done to the door.

The defendants did not put on any evidence.

From a jury verdict of guilty as charged and a sentence of two years as to each defendant, the defendants appeal to this Court.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Joe O. Brewer and Eric Davis for defendants appellants.

CAMPBELL, Judge.

[1] Defendants' first assignment of error is directed at the trial judge's charge to the jury relative to the law on circumstantial evidence. The court charged the jury:

> "Now, members of the jury, there is [*sic*] no eye witnesses [*sic*] in this case that the defendant [*sic*] committed the crimes charged in these two bills of indictment. The State contends that the circumstances and evidence taken together establish the guilt of the defendants, and each of them. In other words the State relies on which [*sic*] is known as circumstantial evidence. Circumstantial evidence, members of the jury, is recognized and accepted as proof in court of law. However, you must find that the defendants, that is you must find the defendant, and each of the

> defendants, not guilty unless all the circumstances considered together, excluding [*sic*] avery [*sic*] reasonable possibility of innocence and point conclusively to guilt."

We are of the opinion that this charge complies with the requirements set forth in *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64 (1965). There, the charge complained of appeared to place more emphasis on the circumstances being consistent with guilt rather than being inconsistent with innocence and amounted to the court assuming some of the functions of the jury. Here, the trial judge correctly placed the emphasis on the possibility of innocence and instructed the jury that to find the defendants guilty, the circumstances must exclude every possibility of innocence. The function of the jury as the fact finder was not interfered with and the State was left with the burden to satisfy the jury beyond a reasonable doubt before finding either defendant guilty.

[2] Defendants' second assignment of error is directed at the admission of testimony regarding the value of the drink box and the amount of damage done to the door. This evidence was relevant as to the force used by the defendants to carry out their intent to steal and was relevant to establish such intent. Furthermore, it is incumbent upon the defendant to show that its admission resulted in prejudice to him. *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206 (1967). Defendants have not made an affirmative showing of prejudice by the admission of this testimony and this assignment of error is overruled.

For the reasons stated, in the trial below there was

No error.

Judges BRITT and HEDRICK concur.

FORD MOTOR CREDIT COMPANY v. HENRY A. HAYES AND NORA ELLEN HAYES

No. 7118DC105

(Filed 24 February 1971)

Courts § 11.1; Jury § 1— district court — right to jury trial

Defendants were entitled to a jury trial in the district court where their demand for jury trial was contained in their answer at the time the case was transferred to the district court from the superior court. G.S. 7A-135; G.S. 7A-196.

APPEAL by defendants from *Kuykendall, District Judge,* 18 September 1970 Session of GUILFORD District Court.

Plaintiff commenced this civil action on 28 June 1968 in the Greensboro Municipal-County Court seeking to recover $636.67 alleged to be due from defendants on an automobile retail installment contract. After obtaining an extension of time to plead, defendants filed answer on 19 August 1968 denying certain material allegations in the complaint and alleging an affirmative defense. In the prayer for relief in their answer, defendants asked for a jury trial.

District courts were established in the Eighteenth Judicial District, which comprises Guilford County, on 2 December 1968. G.S. 7A-131(2). On the same date the resident superior court judge of the Eighteenth Judicial District signed and filed an order transferring this case to the district court. G.S. 7A-135.

The case was calendared for trial before District Judge Kuykendall at the 12 January 1970 non-jury session of the District Court of Guilford County. Upon receipt of the calendar, defendants' attorney wrote a letter to plaintiff's attorneys, sending a copy to Judge Kuykendall, in which he called attention to the fact that defendants had requested a jury trial in the prayer for relief in their answer, and asked that the case be removed from the non-jury calendar. Judge Kuykendall treated this letter as a motion for a jury trial and on 13 January 1970 entered an order "in the discretion of the Court, that the defendants' motion for jury trial shall be and the same is hereby denied."

The case was tried by the judge, without a jury, at the 14 September 1970 non-jury session of Guilford District Court,

and on 18 September 1970 District Judge Kuykendall entered judgment making findings of fact, conclusions of law, and adjudging that the plaintiff recover of the defendants the sum of $350.00 and the costs of this action. Defendants appealed, assigning as error the refusal of the court to grant them a trial by jury.

Jordan, Wright, Nichols, Caffrey & Hill by G. Marlin Evans and Mickey A. Herrin for plaintiff appellee.

Ottway Burton for defendant appellants.

PARKER, Judge.

The right to trial by jury in civil cases in the district court is preserved by G.S. 7A-196 provided timely demand is made in one of the ways authorized by statute. Both before and after the amendment which became effective 1 January 1970, the demand was timely if made in writing not later than ten days after the filing of the last pleading directed to the issues, and one authorized method of making the demand was by endorsement on the pleading of the party. The last pleading directed to the issues in this case was the defendants' answer in which they included the demand for trial by jury. This demand was in the answer at the time the case was transferred to the district court and remained in the answer at all times thereafter. Defendants having made timely demand in a manner authorized by statute, it was error for the district judge to deny them a jury trial.

Kelly v. Davenport, 7 N. C. App. 670, 173 S.E. 2d 600, and *Tractor & Implement Co. v. Lee,* 9 N. C. App. 524, 176 S.E. 2d 854, cited by appellee, are not controlling. In neither of those cases was any request for a jury trial made in the pleadings. Nor do we agree with appellee's further contention that because the act governing the procedures in the Greensboro Municipal-County Court, Chap. 971 of the 1955 Session Laws, provided that there should be no jury trials in that court, the request for a jury trial contained in defendants' answer must be treated as a nullity for all purposes. The demand for a jury trial was in fact contained in the answer and was present in the answer when the case was transferred to the district court. The entire answer, including the demand for jury trial, was one of the records of the Greensboro Municipal-County Court which

was transferred to the office of the clerk of superior court pursuant to G.S. 7A-135. Thus, at the very instant the case became pending in the district court, defendants' written demand for jury trial was on file in the office of the clerk of superior court as a part of the record in the case. No further filing of a demand for jury trial was required.

For the error of the court in denying defendants a jury trial, they are entitled to a

New trial.

Chief Judge MALLARD and Judge GRAHAM concur.

ROBERT E. WILLIFORD v. EDNA WOLFE WILLIFORD

No. 7119DC147

(Filed 24 February 1971)

Divorce and Alimony § 21— separation agreement — incorporation of support provisions in divorce decree — contempt proceedings

Where provisions of a separation agreement relating to support payments for the wife were incorporated in the divorce judgment, but neither party was ordered to comply with any of such provisions, the husband's obligation to pay support to the wife arises from the agreement, not the judgment, and may not be enforced by contempt proceedings.

APPEAL from *Hammond, District Court Judge,* 10 December 1970 Session of RANDOLPH County District Court.

The plaintiff husband and defendant wife entered into a written separation agreement on 25 February 1967. The agreement provided that certain of its provisions, including those provisions wherein plaintiff agreed to provide monthly support payments for defendant, would be incorporated in any court order or decree entered in an action brought by either party for divorce.

Plaintiff subsequently brought this action for absolute divorce. A final divorce judgment was entered 5 March 1969. The following portion of the judgment is pertinent here:

"AND IT IS FURTHER ORDERED that pursuant to the provisions of paragraph '12' of said separation agreement the provisions of paragraphs '5,' '6,' '7,' '8' and '9' of the separation agreement be and they hereby are incorporated into this decree and made a part hereof, to wit:

* * *

6. ALLOWANCE FOR SUPPORT OF WIFE. It is agreed that the party of the first part shall pay to party of the second part for her support and maintenance the sum of Twelve Hundred Dollars ($1,200.00) per month, payable on or before the first day of each calendar month, beginning with the month of March, 1967. . . . "

On 9 November 1970, defendant filed a motion in the cause alleging that plaintiff was in arrears in support payments and requesting that he be adjudged in contempt "for failure to comply with the prior judgment of the Court." The motion came on for hearing before District Judge Hammond. By order dated 14 December 1970, Judge Hammond denied the motion on the grounds that the judgment entered in the cause on 5 March 1969 was not enforceable by contempt proceedings. Defendant appealed.

Bell, Ogburn & Redding by John N. Ogburn, Jr. for plaintiff appellee.

Miller, Beck and O'Briant by Adam W. Beck for defendant appellant.

GRAHAM, Judge.

In *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240, Justice Sharp, speaking for the court, stated the following:

"Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of

their respective rights and obligations and orders the husband to pay the specified amounts as alimony.

A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings and, insofar as it fixes the amount of support for the wife, it cannot be changed or set aside except with the consent of both parties in the absence of a finding that the agreement was unfair to the wife or that her consent was obtained by fraud or mutual mistake. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487; *Howland v. Stitzer,* 236 N.C. 230, 72 S.E. 2d 583; *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Stanley v. Stanley, supra; Davis v. Davis,* 213 N.C. 537, 196 S.E. 819."

The judgment involved here is clearly of the first type mentioned above, and consequently, it may not be enforced by contempt proceedings. The court ordered that certain of the agreement provisions be incorporated in the divorce decree. This was accomplished when these provisions were written into the face of the judgment. Neither party was ordered to comply with any of the provisions. Thus, the court merely gave judicial approval to the separation agreement between the parties. It was their contract. *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819. Plaintiff's obligation to pay support to defendant arises from the agreement and not from the judgment. See opinion of Parker, Judge, in *Williford v. Williford,* filed this date.

Plaintiff argues strenuously that the intent of the parties was that the judgment be enforceable by contempt proceedings. However, we are bound by the language of the judgment itself. A court may not punish a husband for failing to make support payments which he has never been ordered to make.

It has often been called to the attention of the Bar that where it is desired that a judgment for the payment of support be enforceable by contempt, careful wording of the form of the judgment is important. *Bunn v. Bunn, supra; Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E. 2d 71; Note, 35 N.C.L. Rev. 405 (1957).

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT DANNY (PETE) MILLER ALIAS ROY SHUMATE

No. 7123SC91

(Filed 24 February 1971)

1. **Criminal Law § 113— defense of alibi — substantive feature of case — instructions**

The defendant's evidence of alibi is a substantive feature on which the court is required to instruct without request.

2. **Criminal Law § 113— failure to instruct on alibi**

The trial court's failure to instruct the jury on the defendant's defense of alibi was prejudicial error in this prosecution for uttering a forged instrument.

APPEAL by defendant from *Seay, Superior Court Judge,* October 1970 Regular Criminal Session, WILKES County Superior Court.

Defendant was indicted for forgery and uttering a forged instrument. Defendant was represented by counsel and entered a plea of not guilty to each count. The solicitor, before offering evidence, elected to take a nol pros as to the forgery count, and the case proceeded to trial on the count of uttering a forged instrument. The jury returned a verdict of guilty, and from judgment entered on the verdict, defendant appeals in *forma pauperis* represented by court-appointed counsel.

Attorney General Morgan by Staff Attorney Eatman for the State.

Joe O. Brewer and Eric Davis for defendant appellant.

MORRIS, Judge.

The State's evidence tends to show that sometime prior to 18 October 1969, some 32 checks were stolen from City Body Shop; that State's Exhibit 1, the check defendant was accused of uttering was one of those stolen; that the check was made payable to a Roy or Ray Shumate and bore the purported signature of Foy Raymer, the owner of City Body Shop; that the signature was not the signature of Foy Raymer; that Foy Raymer was not indebted to a Roy or Ray Shumate in the about of $98.89, the amount of the check, or any other amount; that Foy Raymer had not authorized anyone to write the check

or to sign his name; that on a Saturday afternoon approximately 17 October 1969 between two and three o'clock, defendant made some purchase in Belk's Department Store, endorsed the check in the presence of the clerk who was waiting on him, gave it to the clerk who cashed it for him, and from the proceeds of the check, defendant paid for the merchandise and retained the balance of the proceeds; that the check was returned as a forged instrument.

Defendant, his brother, and his mother all testified that defendant was not and could not have been at Belk's store on that Saturday afternoon because he was with one of them at all times on that day from about one o'clock in the afternoon until late at night.

[1] The sole defense on which defendant relied was alibi. He contends on appeal, and this is his primary contention, that the court failed to instruct the jury on the defense of alibi and this constitutes prejudicial error. The assignment of error is well taken.

It is true that the court recapitulated all the evidence for defendant and gave his contentions that he was not and could not have been in Belk's store at the time specified. The court also properly instructed the jury that the State had the burden of proving defendant's guilt beyond a reasonable doubt. However, the court failed to instruct the jury that defendant, who relied on an alibi, did not have the burden of proving it.

[2] The defendant's evidence of an alibi was substantive, and the court was required to instruct on substantive features of the case without request for special instructions. *State v. Spencer*, 256 N.C. 487, 124 S.E. 2d 175 (1962).

This case is strikingly similar to *State v. Spencer, supra,* wherein Parker, J. (later C.J.), set out an approved charge on alibi.

The failure of the court to instruct the jury as to the legal effect of defendant's evidence of alibi is prejudicial error entitling defendant to a

New trial.

Judges BROCK and VAUGHN concur.

ANNIE LONG v. METHODIST HOME FOR THE AGED, INC.

No. 7120SC158

(Filed 24 February 1971)

1. **Negligence §§ 5.1, 53— nursing home operator — duties to invitees**

Operator of a nursing home owed an invitee the duty of ordinary care to keep the premises in a reasonably safe condition so as not to expose her unnecessarily to danger and to give her warning of hidden dangers or unsafe conditions of which the operator had knowledge, express or implied.

2. **Negligence §§ 5.1, 53— duties to invitees — equal knowledge by invitee**

Operator of a nursing home was under no duty to warn an invitee of a condition of which the invitee had equal or superior knowledge.

3. **Negligence §§ 5.1, 57— action by invitee — negligence by nursing home operator — insufficiency of evidence**

In this action for personal injuries allegedly sustained as a result of a fall in defendant's nursing home, evidence of plaintiff tending to show that she had been employed as a sitter for a patient in the nursing home by the patient's family, that the commode overflowed and water ran onto the floor of the patient's room, that an orderly employed by defendant stopped the overflowing commode but did nothing about getting the water off the floor, and that plaintiff mopped a portion of the floor and slipped and fell on water in an area which she had mopped, *held* insufficient to show actionable negligence on the part of defendant, since plaintiff had as much or more knowledge as did defendant concerning the condition of the floor.

APPEAL by defendant, Methodist Home for the Aged, Inc., from *Brewer, J.*, 17 August 1970 Session of UNION Superior Court.

This is a civil action in which the plaintiff, Annie Long, seeks to recover compensation for personal injuries allegedly sustained as a result of a fall in the defendant's nursing home located in Charlotte, North Carolina, on 12 December 1966.

The plaintiff offered evidence tending to establish the following pertinent facts: The plaintiff had been employed as a sitter by the family of Mrs. Mamie Jones, a patient confined to her bed in the defendant's nursing home. On 12 December 1966, the plaintiff attempted to flush down the commode some toilet tissue she had used to clean up food that was spilled on the bed and the patient. The commode overflowed and water ran out onto the floor of the bathroom and the patient's bedroom.

After trying unsuccessfully to stop the overflow by operating the valve, the plaintiff went to the nurses' station and got an orderly, employed by the defendant, who came and stopped the overflowing commode by the use of a coat hanger. Neither the orderly nor any other employee of the defendant did anything about getting the water off the floor. The plaintiff obtained a mop and began to dry the floor, stopping occasionally to tend to Mrs. Jones. The plaintiff worked for about an hour mopping the floor, making several trips into the bathroom to wring the water out of the mop.

In describing her fall, the plaintiff testified: "When I thought I had it all up, I walked out, and it had run out from under the wardrobe, and I stepped in the water and both feet went out from under me. When I fell, I thought I had the majority of the floor dry at that time; I thought I had it dried up to the bed, but I knew there was still water under the bed. I thought I had it dried to there; I was going to finish feeding her and work with her a while, and then I was going to mop some more, and I fell and I couldn't."

The defendant's motion for a directed verdict was denied and the case was submitted to the jury on the issues of negligence, contributory negligence, and damages, which the jury answered in favor of the plaintiff and against the defendant. From a judgment entered on the verdict, the defendant appealed assigning as error the trial court's denial of its motion for a directed verdict.

Griffin & Clark by Robert B. Clark for plaintiff appellee.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellant.

HEDRICK, Judge.

The defendant contends that there is no evidence in this record of actionable negligence upon the part of the defendant resulting in the injuries to the plaintiff. We agree.

[1] Assuming, *arguendo,* that the plaintiff was an invitee in the nursing home, the defendant-owner owed her the duty of ordinary care to keep the premises in a reasonably safe condition so as not to expose her unnecessarily to danger, and to give her warning of hidden dangers or unsafe conditions of which

it had knowledge, express or implied. 6 Strong, N. C. Index 2d, Negligence, § 53; *Wrenn v. Convalescent Home,* 270 N.C. 447, 154 S.E. 2d 483 (1967).

[2] The defendant was under no duty to warn the plaintiff of a condition of which the plaintiff had knowledge equal to or superior to that of the defendant. *Wrenn v. Convalescent Home, supra.*

[3] From the evidence it is clear that the plaintiff had as much or more knowledge as did the defendant concerning the condition of the floor. Considering the evidence in its light most favorable to the plaintiff, it fails to disclose any actionable negligence upon the part of the defendant, and the defendant's motion for a directed verdict should have been allowed.

Reversed.

Judges CAMPBELL and BRITT concur.

JETTIE BRADY GALLIGAN v. HAROLD P. SMITH

No. 7119SC49

(Filed 24 February 1971)

Venue § 4— action against town policeman — proper venue

The venue of an automobile collision case against a town policeman who was driving his automobile in the performance of his official duties was properly removed to the county where the collision occurred. G.S. 1-77(2).

APPEAL by plaintiff from *Seay, Superior Court Judge,* 7 August 1970 Session of RANDOLPH Superior Court.

Plaintiff appeals from the granting by the Superior Court of Randolph County of the defendant's motion to have the action removed from Randolph County to Orange County for trial. The action out of which this motion arises is one for personal injury and property damage brought by the plaintiff against the defendant in Randolph County, which is the place of residence of the plaintiff. The accident occurred in Orange County. Plaintiff alleges that the cause of the accident was the negligent

operation of an automobile by the defendant, which caused said automobile to strike the automobile owned by plaintiff. At the time of the collision, plaintiff's car was being operated by her son and she was a passenger therein. Plaintiff also alleges and defendant admits that the Town of Chapel Hill was the owner of the car which defendant was driving and that defendant was operating the car in the performance of his duties as a policeman for the Town of Chapel Hill at the time of the accident. In a previous appeal, the Supreme Court affirmed a judgment of the trial court dismissing the Town of Chapel Hill holding that the Town had not waived its governmental immunity. See *Galligan v. Town of Chapel Hill,* 5 N. C. App. 413, 168 S.E. 2d 665, and *Galligan v. Town of Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427 (1969).

Ottway Burton for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee.

MORRIS, Judge.

Appellee relies on G.S. 1-77(2) to support his motion for removal of the action to Orange County. This statute reads as follows:

> "*Where cause of action arose.*—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer."

In *Kanipe v. Kendrick,* 204 N.C. 795, 169 S.E. 188 (1933), plaintiff sought to recover from two deputies sheriff of Cleveland County for injuries received by him as a result of their negligence in handling a loaded sawed-off shotgun on a street in Shelby, N. C., "in the performance of their official duties, and by virtue of their offices." The action was brought in Mecklenburg County, the home of plaintiff, and defendants moved to have the action removed to Cleveland County where the action arose "on the ground that the defendants are public officers of

Cleveland County, to wit, deputy sheriffs, and that the acts complained of by the plaintiff were done by them in the performance of their official duties, and by virtue of their offices." The action was brought in Mecklenburg County and was heard by the Clerk of the Superior Court of Mecklenburg County on motion of defendants for removal to Cleveland County. The Clerk granted the motion and ordered that it be removed to Cleveland County. Plaintiff appealed to the Superior Court which affirmed. On appeal the Supreme Court affirmed, holding that the two deputies of Cleveland County were "public officers" for purposes of the change of venue statute. The case at bar is controlled by the Kanipe case, *supra,* since there is no distinguishable difference between the two.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES HUBERT WYATT

No. 7123SC57

(Filed 24 February 1971)

Criminal Law § 51— expert testimony — failure to qualify handwriting expert — harmless effect

Although the State's witness had not been formally tendered and accepted as an expert in handwriting analysis, his opinion testimony that the defendant had forged the signature on a check was not prejudicial to the defendant, where there was sufficient evidence establishing the witness' qualification as an expert in handwriting analysis.

APPEAL by defendant from *Seay, J.,* August 1970 Regular Mixed Session of WILKES Superior Court.

The defendant James Hubert Wyatt, an indigent, was charged in a two-count bill of indictment, proper in form, with forgery and uttering a forged instrument. The defendant pleaded not guilty. At the close of the State's evidence the court allowed the defendant's motion for judgment as of nonsuit on the count charging uttering a forged instrument. The jury found the defendant guilty of forgery as charged in the first count of

the bill of indictment. From a judgment of imprisonment of five to seven years, the defendant appealed to the North Carolina Court of Appeals.

Attorney General Robert Morgan and Assistant Attorney General R. S. Weathers for the State.

Jerry D. Moore for defendant appellant.

HEDRICK, Judge.

Defendant brings forth two assignments of error which may be considered together as presenting one question: Did the court commit prejudicial error in allowing the solicitor to refer to the witness, James R. Durham, as an expert, and by allowing him to give his opinion as an expert that the alleged forged signature was written by the defendant when he had not been formally tendered and found by the court to be an expert in the field of handwriting analysis?

Defendant, in his brief, candidly admits that our Supreme Court has held that the decision of the trial court to allow a witness to testify as an expert after the witness has been tendered by the State as such is tantamount to the trial court finding that the witness is an expert in the field of his testimony. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548 (1956); *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507 (1963).

The defendant contends, however, that these cases are inapplicable to the instant case because there was no formal tender by the State of the witness as an expert. This contention is without merit. The record on appeal is replete with testimony establishing the witness' qualifications as an expert in the field of handwriting analysis. While the better practice would have been for the State to have tendered the witness as an expert, and for the court to have ruled on the tender, we do not feel that a failure to do so under the facts of this case prejudiced the defendant in any way. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969).

We hold that there was no prejudicial error committed in the defendant's trial.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JAMES CORBET STRICKLAND

No. 7118SC151

(Filed 24 February 1971)

1. **Burglary and Unlawful Breakings § 8; Constitutional Law § 36— validity of sentence — cruel and unusual punishment**

Sentence of six to ten years imprisonment which was imposed upon defendant's conviction of felonious breaking and entering was within the statutory limits and did not constitute cruel and unusual punishment. G.S. 14-2; G.S. 14-54.

2. **Criminal Law § 161— exception to the judgment — appellate review**

An exception to the judgment presents the face of the record for review.

APPEAL by defendant from *Collier, Superior Court Judge,* 7 September 1970 Criminal Session of Superior Court of GUILFORD County.

Defendant was charged with breaking and entering and larceny and receiving. The jury returned a verdict of guilty of felonious breaking and entering. From judgment entered on the verdict, defendant appealed. He was represented at trial by court-appointed counsel, appeals in *forma pauperis,* and is represented on appeal by court-appointed counsel.

Attorney General Morgan by Staff Attorney Price for the State.

Z. H. Howerton, Jr. attorney for defendant appellant.

MORRIS, Judge.

[1] Defendant's only assignment of error is to the signing and entry of the judgment. Counsel candidly states in his brief that in his opinion the trial was free from prejudicial error but that defendant contends the court abused its discretion in imposing a sentence which was cruel and unjust punishment. This contention is, of course, without merit. Sentence imposed was imprisonment for not less than six nor more than ten years. The offense with which defendant was charged is a violation of G.S. 14-54 which denominates the offense of a felony punishable under G.S. 14-2. G.S. 14-2 provides for punishment "by fine, by imprisonment for a term not exceeding ten years, or by both, in the

discretion of the court." It has been repeatedly held that punishment within the limits authorized by statute is not cruel and unusual punishment within the constitutional prohibition. *State v. Powell,* 6 N. C. App. 8, 169 S.E. 2d 210 (1969), and cases there cited.

[2] An exception to the judgment presents the face of the record proper for review. *State v. Price,* 8 N. C. App. 94, 173 S.E. 2d 644 (1970). We have reviewed the record proper for error and find none.

Affirmed.

Judges BROCK and VAUGHN concur.

ROBERT E. WILLIFORD v. EDNA WOLFE WILLIFORD

No. 7119SC122

(Filed 24 February 1971)

Appeal and Error § 39— dismissal of appeal

The Court of Appeals dismisses an appeal for the failure of appellant to docket the record on appeal within the time allowed by the Rules of Practice. Court of Appeals Rule No. 5.

APPEAL by defendant from *Long, Superior Court Judge,* 22 June 1970 Session of Superior Court held in ROWAN County.

This action was heard on an order to plaintiff to show cause why he should not be adjudged in contempt of court for failing to make certain support payments agreed to in a separation agreement and included by consent in a judgment for absolute divorce. From an adverse ruling dated 2 July 1970, defendant gave notice of appeal. The appeal entries are dated 2 July 1970.

Williford, Person & Canady by N. H. Person for plaintiff appellee.

Miller, Beck & O'Briant by G. E. Miller for defendant appellant.

MALLARD, Chief Judge.

This case was not docketed in the Court of Appeals until 17 December 1970. Under Rule 5, absent an order extending the time (not to exceed sixty days), the record on appeal should have been docketed in the Court of Appeals within ninety days after 2 July 1970. In this record there is no order extending the time for docketing the record on appeal. For failure to docket the record on appeal within the time allowed by the rules, this appeal is dismissed.

Appeal dismissed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. BILLY FRANCIS

No. 7118SC74

(Filed 24 February 1971)

APPEAL from *Johnston, Superior Court Judge,* 24 August 1970 Criminal Session of GUILFORD County Superior Court.

The defendant was charged in a bill of indictment, proper in form, with felonious breaking and entering, felonious larceny, and receiving. He entered a plea of guilty to felonious breaking and entering. After questioning defendant extensively relating to the voluntariness of his plea, the court adjudged that the plea was freely, understandingly and voluntarily made and ordered that it be entered in the record. Judgment was thereupon entered imposing a prison sentence of not less than two nor more than five years. Defendant appealed.

Attorney General Morgan by Staff Attorney Covington for the State.

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, and R. D. Douglas III, Assistant Public Defender, Eighteenth Judicial District for defendant appellant.

GRAHAM, Judge.

Defendant's court appointed counsel has filed a brief in which he states that defendant appealed contrary to advice of counsel, and that counsel has searched the record proper and all of the proceedings and admits that he can find no error prejudicial to the defendant.

We have reviewed the record proper and find no error.

No error.

Chief Judge MALLARD and Judge PARKER concur.

ROBERT EUGENE HELMS v. JAMES BURNELL RORIE

No. 7120DC34

(Filed 24 February 1971)

APPEAL by defendant from *Crutchfield, District Judge,* 20 July 1970 Session, UNION County District Court.

This case arose out of a collision which occurred on Johnson Street in the City of Monroe on 7 September 1968. Plaintiff contends that his vehicle was damaged in the amount of $500.00 when struck by the vehicle of the defendant. Issues of negligence and contributory negligence were answered in favor of the plaintiff, and plaintiff was awarded damages in the amount of $380.00. Defendant appealed.

James E. Griffin for plaintiff appellee.

Griffin and Clark by C. Frank Griffin for defendant appellant.

VAUGHN, Judge.

Since there must be a new trial, we will avoid further discussion of the facts except to say that the trial judge did not commit error when he declined to enter a directed verdict against the plaintiff.

The other assignments of error are directed to the charge of the court to the jury. Counsel for the appellee candidly concedes that the trial judge committed prejudicial error in his charge to the jury. With this we are in full accord. In numerous instances the court failed accurately to state principles of law which were involved in the case, a seriatim discussion of which would neither be practical nor of benefit to the bench and bar.

New trial.

Judges BROCK and MORRIS concur.

IN RE: CUSTODY OF BRIAN KELLY STANCIL (69 J 206)

— AND —

IN THE MATTER OF CUSTODY OF BRIAN KELLY STANCIL (70 CVD 4024)

No. 7110DC101

(Filed 31 March 1971)

1. **Infants § 9; Parent and Child § 6— custody of child — award to grandparent — sufficiency of evidence to support award**

The custody of a ten-year-old boy whose father had died was properly awarded to the boy's paternal grandmother rather than to his mother, where (1) the boy had been living with his father under a prior custody order; (2) the boy testified that he was afraid of his mother and that he preferred to live with the grandmother; and (3) there was competent evidence that the mother was receiving medical treatment for mental disorders. G.S. 50-13.2(a).

2. **Infants § 9; Parent and Child § 6— custody of child — consideration of child's wishes**

Although a child's preference as to who shall have his custody is not controlling, the trial judge should consider the wishes of a ten-year-old child in making his determination.

3. **Appeal and Error § 57— findings of fact — sufficiency of facts to support the judgment**

The trial judge is not required to find all the facts shown by the evidence, it being sufficient if enough material facts are found to support the judgment.

4. **Infants § 9; Parent and Child § 6— custody of child — improper award of visitation rights to the custodian of the child**

In an order awarding the custody of a ten-year-old boy to his paternal grandmother rather than to his mother, it was improper for the trial court to assign to the grandmother the right to determine when, where and under what conditions the mother could visit her son; and the order is remanded with instructions that the court itself establish the visitation rights of the mother.

5. **Infants § 9; Parent and Child § 6— parent's visitation rights with child — natural and legal right — restrictions on the right**

The court should not deny a parent's natural and legal right to visit with his child at appropriate times unless the parent has forfeited the right or unless the exercise of the right would be detrimental to the child's welfare.

6. **Infants § 9; Parent and Child § 6— award of visitation rights — nondelegable judicial function**

The awarding of visitation rights is a judicial function, the exercise of which should not be assigned to the custodian of the child.

In re Custody of Stancil

APPEAL by Jacqueline I. Stancil from *Winborne, District Court Judge,* 10 August 1970 Session of District Court held in WAKE County.

On 19 March 1969 Larry Thurman Stancil (Mr. Stancil), husband of Jacqueline I. Stancil (Mrs. Stancil) and father of Brian Kelly Stancil (Brian), filed in Wake County a petition to have the court inquire into the custody of their minor child, Brian (69 J 206). On the same date the petition was filed Judge Preston, a district court judge, entered an order granting temporary custody of Brian to Mr. Stancil and directed that a copy of the order and petition be served on Mrs. Stancil.

On 5 May 1969 a hearing was held before Judge Preston, and he entered an order awarding the custody of Brian to Mr. Stancil, subject to certain visitation rights granted to Mrs. Stancil. The mother's right to visit with the child was limited to three hours on the second and fourth Sundays of each month "provided that at all times during said visits a suitable adult shall be present with Brian Kelly Stancil."

On 18 June 1969 Mrs. Stancil filed a motion in which she alleged a change in circumstances and sought an order giving her custody of Brian. Mr. Stancil filed an affidavit in answer to this motion alleging that Mrs. Stancil had violated an order dated "May 22 *(sic)*, 1969" and was in willful contempt. (Mr. Stancil was apparently referring to the order of 5 May 1969.) A hearing was held before Judge Preston on 25 June 1969, following which he entered an order continuing the custody of Brian in Mr. Stancil and required Mr. Stancil to make monthly payments for the support of his wife and gave Mrs. Stancil certain visitation rights which were again limited to three hours on the second and fourth Sundays in the month, provided that such visits be made at the home of Mr. and Mrs. B. A. Porter and provided further that at the time of these visits, either Mr. or Mrs. B. A. Porter should be present with Brian.

On 29 November 1969 Mr. Stancil was killed in a hunting accident. On 3 December 1969 Mrs. Stancil filed a motion in the original proceeding in which she asked the court to place her son in her care and custody. Mrs. B. A. Porter, paternal grandmother of Brian, filed an answer opposing the motion. This motion was heard by Judge Bason on 29 December 1969, following which he entered an order giving Mrs. B. A. Porter the temporary custody of Brian pending a hearing on the merits.

Before any further proceedings in the original cause, Mrs. Stancil instituted what purported to be a new proceeding by filing a petition on 9 July 1970 alleging she was entitled to the full custody and control of Brian and prayed that an order issue giving her complete custody and control of her son (70 CVD 4024).

The cause was set for hearing in the District Court Division of the General Court of Justice of Wake County on 12 August 1970. When the cause came on for hearing before Judge Winborne, the parties stipulated and agreed that the two proceedings might be consolidated for the purpose of the hearing, following which the parties proceeded to offer evidence. On 9 September 1970 Judge Winborne, after finding facts and stating conclusions of law, entered an order granting the custody of Brian to his paternal grandmother, Mrs. B. A. Porter, and gave to Mrs. Stancil the right to visit with Brian "at such times and at such places and under such conditions as Mrs. Bruce A. Porter may deem proper for the best interest of the child."

Mrs. Stancil appealed, assigning error.

W. A. Johnson for Jacqueline I. Stancil, appellant.

Ellis Nassif, and Boyce, Mitchell, Burns & Smith by F. Kent Burns for Mrs. B. A. Porter, appellee.

MALLARD, Chief Judge.

[1] Mrs. Stancil makes several assignments of error, among them being that the competent evidence does not support the findings of fact; that the trial judge failed to find the facts as shown by the evidence; that the conclusions of law are incorrect; that prejudicial error was committed in awarding custody of Brian to the paternal grandmother; that the trial judge committed prejudicial error in giving the grandmother the right to say when the mother could visit the child; and in entering and signing the judgment.

[2] We do not deem it necessary for decision in this case to recapitulate the evidence. Suffice it to say that Brian, who was born 15 April 1960, testified that he was scared of his mother and expressed a preference to live with his grandmother, Mrs. B. A. Porter. A child's preference as to who shall have his custody is not controlling; however, the trial judge should consider

the wishes of a ten-year-old child in making his determination. *Kearns v. Kearns,* 6 N.C. App. 319, 170 S.E. 2d 132 (1969). In *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759 (1955), the rule is stated:

> "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it. (citations omitted)
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> * * *
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> The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents, but is not controlling. Where the contest is between a parent and one not connected by blood to the child, the desire of the child will not ordinarily prevail over the natural right of the parent, unless essential to the child's welfare." (citations omitted)

Under G.S. 50-13.2(a), the trial judge, in a custody proceeding, shall award the custody of a minor 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. The statute expresses the policy of the State that the best interest and welfare of the child is the paramount and controlling factor to guide the judge in determining the custody of a child.

In *Greer v. Greer,* 5 N.C. App. 160, 167 S.E. 2d 782 (1969), Judge Morris said:

> "In upholding the order of the trial court we recognize that custody cases generally involve difficult decisions. The trial judge has the opportunity to see the parties in person and to hear the witnesses. It is mandatory, in such a situation, that the trial judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion."

[1] In the years 1969 and 1970, two different judges heard evidence on three different occasions relating to the custody of Brian and denied Mrs. Stancil custody. Mrs. Stancil contends that the trial judge committed error in not finding that she

was a fit and suitable person to have the custody of Brian. We do not agree. In the judgment appealed from, the trial judge made extensive findings of fact, among which was the finding, based on competent evidence, that Mrs. Stancil was receiving medical treatment for mental disorders. The trial judge concluded that he was not able to find that Mrs. Stancil was a fit and suitable person to have custody of the child and that it was for the best interest and welfare of Brian that his custody be placed in the grandmother, Mrs. B. A. Porter.

Mrs. Stancil contends that some of the findings of fact are not supported by the evidence. We hold that in this case the *material* facts found by the trial judge are supported by competent evidence. Immaterial findings of fact are to be disregarded. *Sudan Temple v. Umphlett,* 246 N.C. 555, 99 S.E. 2d 791 (1957). In *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967), it is said:

> "The court's findings of fact as to the care and custody of children will not be disturbed when supported by competent evidence, even though the evidence be conflicting."

[3] Mrs. Stancil argues that the trial judge did not find the facts as shown by the evidence. The trial judge is not required to find *all* the facts shown by the evidence. *Lumber Co. v. Kincaid Carolina Corp.,* 4 N.C. App. 342, 167 S.E. 2d 85 (1969). It is sufficient if enough *material* facts are found to support the judgment. 1 Strong, N.C. Index 2d, Appeal and Error, § 57, pp. 227, 228.

Mrs. Stancil contends that the conclusions of law set out in the judgment are not correct. After finding facts, a conclusion of law is a proposition arrived at by the application of rules of law to the facts. In 53 Am. Jur., Trial, § 1132, a conclusion of law is said to be "(t)he conclusions drawn by the trial court in the exercise of its legal judgment from the facts found by it * * * ." We are of the opinion that the conclusions of law stated are adequate and are supported by the evidence. These support the order awarding the custody of Brian to Mrs. B. A. Porter.

In 3 Lee, N. C. Family Law, § 224, p. 24 (3d Ed. 1963), it is said that "(w)here there are unusual circumstances and the best interests of the child justifies such action, a court may refuse to award custody to either the mother or father and

instead award the custody of the child to grandparents or others." We do not think that under the circumstances of this case, the trial judge abused his discretion in awarding custody to the paternal grandmother. No medical evidence was offered by either of the parties. It is observed that an order for the custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances. G.S. 50-13.7.

[4] Mrs. Stancil also contends (but cites no authority to support this contention) that the trial judge committed error in granting to Mrs. B. A. Porter the right to determine the times, places and conditions under which she could visit with Brian.

In 2 Nelson, Divorce and Annulment, § 15.26 (2d Ed. Rev. 1961), it is said:

> "The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. * * * But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child. * * *
>
> However, the feasible exercise of a parent's right of visitation should be safeguarded by a definite provision in the order or decree of the court awarding the custody of the child to another person. The order should not make the right of visitation contingent upon an invitation from the party having the custody of the child, or require the consent of one parent for the other to visit the child, or provide that the parent shall have the right of visitation only at such times as may be convenient to the party having the custody of the child, thereby leaving the privilege of visitation entirely to the discretion of the party having the child in custody. * * *
>
> * * * In determining the conditions under which a parent may visit a child, the age, health and best interests of the child and the convenience of the party having the custody

> of the child, as well as the nature of the relations existing between the visiting parent and the parties having possession of the child, are proper circumstances to be taken into consideration. Where it appears that difficulties and misunderstandings have arisen between the parties on account of attempts of a parent to visit a child, or that there are strong feelings of ill will existing between the parties, the court may properly require the visits to be made on neutral territory, such as the home of a third party, and may also permit the visits to be made out of the presence of the child's custodian and other persons who are unfriendly toward the visiting parent. As a further condition of retaining the custody of a child or enjoying the privilege of visitation, the court may prohibit each parent from attempting to poison the mind of the child against the other parent."

In the case of *Willey v. Willey,* 253 Iowa 1294, 115 N.W. 2d 833 (1962), the trial court, after a hearing, gave the custody of the two children born to the parties to the father and provided that the mother should only have such "rights of visitation * * * as in the father's judgment shall be reasonable and proper for the best interests of the child." The Iowa Supreme Court in Willey held that unless there was danger to the child, it was error to provide that the wife's right of visitation should be at the discretion of the husband, and said:

> "The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the *court* is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation."

In *McCourtney v. McCourtney,* 205 Ark. 111, 168 S.W. 2d 200 (1943), it was held to be error to grant the father visitation rights only with the written permission of the mother.

[5] The weight of authority seems to be and we hold that a parent's right of visitation with his or her child is a natural and legal right and that when awarding custody of a child to another, the court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child. The court should

not assign the granting of this privilege of visitation to the discretion of the party awarded custody of the child.

[6] When the custody of a child is awarded by the court, it is the exercise of a judicial function. G.S. 50-13.2. In like manner, when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child. If the court finds that the parent has by conduct forfeited the right or if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; but the court may not delegate this authority to the custodian. On the other hand, if the court does not find that the parent has by conduct forfeited the right of visitation and does not find that the exercise of the right would be detrimental to the best interest and welfare of the child, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised. In doing so, the court must be controlled by the principle that the best interest and welfare of the child is the paramount consideration in determining the visitation rights, as well as in determining the right to custody, and that neither of these rights should be permitted to jeopardize the best interest and welfare of the child. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967).

[4] In the case before us the court did not find that Mrs. Stancil by her conduct had forfeited her right of visitation. Neither did it find that it would be detrimental to the best inter-

est and welfare of Brian for the mother to be permitted to visit him. On the contrary, the court found that Mrs. Stancil should be permitted to visit with the child, and it was therefore error for the court to fail to include in the custody order a provision defining and establishing the time, place and conditions under which such visitation rights might be exercised.

The result is that the order awarding custody of Brian to the grandmother, Mrs. B. A. Porter, is affirmed, and the provision therein "and further, that Mrs. Jacqueline I. Stancil shall visit with said child, Brian Kelly Stancil, at such times and at such places and under such conditions as Mrs. Bruce A. Porter may deem proper for the best interest of the child" is ordered stricken. This cause is remanded with instructions that the court shall hear such competent evidence as the parties may offer, make such findings and conclusions relating to visitation rights as are appropriate and enter such order or orders relating to the visitation rights of Mrs. Stancil as will, in the opinion of the judge, best promote the interest and welfare of Brian.

Affirmed in part and remanded with directions.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT EDWARD HARRIS

No. 7114SC220

(Filed 31 March 1971)

1. **Criminal Law § 159— record on appeal — chronological order of proceedings**

The proceedings in a case must be set forth in the record on appeal in the order of time in which they occurred. Court of Appeals Rule 19(a).

2. **Criminal Law § 159— appeal from misdemeanor trial — arrangement of record on appeal**

Chronological arrangement of the record on appeal in an appeal from the normal trial of a misdemeanor is outlined by the Court of Appeals.

3. **Criminal Law § 157— record on appeal — disposition of case in district court — appeal to superior court**

The record on appeal must show the disposition of the cases in the district court and an appeal therefrom to the superior court where the district court had exclusive original jurisdiction of each of the misdemeanors with which defendant was charged, since the superior court had no jurisdiction to try defendant for such offenses except upon an appeal from the district court.

4. **Solicitors— record on appeal — disposition of case in district court — appeal to superior court — duty of solicitors**

Where the district court has exclusive original jurisdiction of the offense with which defendant was charged, the solicitor has a duty to make certain that the record on appeal shows the disposition of the case in the district court and an appeal to the superior court.

5. **Automobiles §§ 120, 129— drunken driving prosecution — erroneous definition of under the influence**

In a drunken driving prosecution, the trial court's instruction that a person is under the influence of intoxicants if he has consumed a sufficient amount to make him think or act differently than he otherwise would have done, regardless of the amount, and that one is under the influence if his mind and muscles do not normally coordinate or if he is abnormal in any degree from intoxicants, *held* prejudicial error.

6. **Automobiles § 3— driving while license is permanently revoked — instructions**

The trial court erred in failing to require the jury to find beyond a reasonable doubt that defendant operated a motor vehicle *upon a public highway* while his operator's license was permanently revoked in order to find defendant guilty of a violation of G.S. 20-28(b).

7. **Criminal Law § 23— guilty plea — failure of record to show voluntariness**

Defendant is entitled to have his pleas of guilty vacated and to replead to the charges against him where the record fails to show affirmatively that defendant was aware of the consequences of his pleas of guilty and that his pleas were voluntarily and understandingly entered.

8. **Criminal Law § 145.1— probation**

Order revoking defendant's probation is set aside where it was based solely on pleas of guilty which have been vacated on appeal.

APPEAL by defendant from *Godwin, Judge of Superior Court,* 12 October 1970 Session, DURHAM Superior Court.

Defendant was charged in four warrants with the commission of two offenses on each of two different days.

In 70CR10999 he was charged with operating a motor vehicle on the public highways on 14 June 1970 while under the influence of intoxicating beverages (G.S. 20-138). In 70CR10957 he was charged with operating a motor vehicle on the public highways on 14 June 1970 while his operator's license was permanently revoked (G.S. 20-28(b)). These two charges will be referred to as the 14 June 1970 charges.

In 70CR12753 he was charged with operating a motor vehicle on the public highways on 12 July 1970 while under the influence of intoxicating beverages (G.S. 20-138). In 70CR12754 he was charged with operating a motor vehicle on the public highways on 12 July 1970 while his operator's license was permanently revoked (G.S. 20-28(b)). These two charges will be referred to as the 12 July 1970 charges.

At the 22 June 1970 Session of Durham Superior Court, well before the above four charges reached the Superior Court, defendant appeared before Judge Canaday upon a plea of guilty to a charge of driving while license revoked (G.S. 20-28(a)). Judge Canaday entered a judgment of confinement for a period of six months, but suspended the confinement and placed defendant on probation for a period of two years. This is the probation which was later revoked by Judge Godwin upon the basis of the two "12 July 1970 charges" noted above.

The two "14 June 1970 charges" and the two "12 July 1970 charges" were tried in the Durham County District Court on 20 August 1970 upon defendant's pleas of not guilty. Verdicts of guilty were entered upon each of the four charges and defendant appealed to the Superior Court where he was brought to trial *de novo* upon the original warrants.

Defendant was first arraigned upon the two "14 June 1970 charges," cases numbers 70CR10999 and 70CR10957, to which he entered pleas of not guilty. He was tried by jury and found guilty as charged in each of the two "14 June 1970 charges." The cases were consolidated for judgment and a single judgment of confinement for a period of two years was entered.

Thereafter defendant was arraigned upon the two "12 July 1970 charges," 70CR12753 and 70CR12754 to which he entered pleas of guilty. Judgment of confinement for a period of two years was entered upon the pleas of guilty, and was specified to commence at the expiration of the two-year sentence imposed

in 70CR10999 and 70CR10957 (the two "14 June 1970 charges").

Thereafter defendant was brought before Judge Godwin upon an allegation of violation of the terms of his probation imposed by Judge Canaday. Upon the basis of defendant's pleas of guilty in cases 70CR12753 and 70CR12754 (the two "12 July 1970 charges") Judge Godwin found that defendant had wilfully violated the terms of the probationary sentence, and ordered that probation be revoked and commitment issued to place the six-month sentence, previously suspended, into effect.

Defendant gave notice of appeal within apt time and Judge Bickett, upon finding that defendant was indigent, appointed present counsel to perfect the appeal to this Court. Defendant was not represented by counsel in the trial court.

Attorney General Morgan by Assistant Attorney General Costen for the State.

Spaulding & Loflin by Thomas F. Loflin III for the defendant.

BROCK, Judge.

[1] Defendant's exceptions and assignments of error are lost in the confusion of the Record on Appeal which was filed in this case. Counsel could have, and should have, prepared the Record on Appeal to assist this Court in following his contentions and arguments, but he has thrown the record haphazardly together with little semblance of continuity. Our Rule 19(a) clearly provides that the Record on Appeal shall set forth the proceedings in the case in the order of the time in which they occurred. It is true that appellate counsel in this case is court-appointed, but that does not excuse a disregard of our Rules. The Rules of Practice are mandatory and a failure to comply with them subjects the appeal to dismissal by this Court *ex mero motu.*

For example, the Record on Appeal in this case is arranged partially in the following sequence: (1) Plea, judgment, and commitment dated 9 October 1970; (2) Appeal entries dated 14 October 1970; (3) order dated 12 January 1971 allowing extension of time to docket; (4) a recitation of some proceedings in court on 5 October 1970 and on 6 October 1970; (5)

the State's evidence and the charge of the Court, presumably at the 12 October 1970 Session, since the Record on Appeal says it is an appeal from the 12 October 1970 Session; (6) a recitation of some proceedings in court on 7 October 1970, on 9 October 1970, and on 14 October 1970; and (7) a transcript of proceedings in court on 17 September 1970.

[2] It seems to us that the requirement that the proceedings be set forth in the order of the time in which they occurred should not cause confusion. For example, in an appeal from the normal trial of a misdemeanor charge, the Record on Appeal should be chronologically arranged as follows:

(1) Organization and session of Superior Court
(2) Warrant, showing service
(3) Judgment in District Court
(4) Entry of Appeal to Superior Court
(5) Bill of Indictment (if not tried on original warrant)
(6) Arraignment and plea in Superior Court
(7) State's evidence
(8) Defendant's evidence
(9) Charge of the Court (if exceptions taken)
(10) Verdict
(11) Judgment and commitment
(12) Appeal entries
(13) Assignments of error
(14) Evidence of service
(15) Signature, address and telephone number of counsel for appellant
(16) Certification by the Clerk of Superior Court

If other documents or proceedings exist which are deemed necessary for an understanding of the questions raised on appeal, they should be inserted in the Record on Appeal in the order of the time in which they occurred.

With the Record on Appeal arranged as above outlined it is a simple matter for the members of this Court to follow the pre-trial, trial, and post-trial proceedings without the danger of overlooking an important item. And surely it is just as simple for appellate counsel to arrange the Record on Appeal as above

outlined. It seems to us that it would help assure counsel that he has not omitted an important item.

[3, 4] Aside from the misarrangement of the Record on Appeal, some of which is outlined above, counsel completely omitted the record of disposition of the cases in the District Court. The Attorney General filed a motion suggesting a diminution of the record and asking that the proceedings in the District Court be added to the Record on Appeal. In response to the Attorney General's motion, counsel for defendant filed answer objecting to the proceedings in the District Court being made a part of the Record on Appeal, arguing that defendant was entitled to a trial *de novo* in the Superior Court "without prejudice from the former proceedings . . . " This argument is, of course, completely without merit. The necessity for the Record on Appeal to show the proceedings in the District Court is compelling; the District Court has exclusive original jurisdiction of each of the offenses with which defendant was charged, and the Superior Court had no jurisdiction to try defendant except after a disposition in the District Court and an appeal to Superior Court. The Solicitors of the several districts would do well to make certain that the fact of a disposition, in the District Court, and an appeal to Superior Court is always shown in the Record on Appeal. The Solicitors' duty does not end with the trial of the case; they have the duty to make certain the Record on Appeal presents an accurate record of the proceeding; in the absence of agreement a solicitor should file exceptions and have the judge settle the matter.

Enough concerning the deficiencies of the Record on Appeal in this case.

The "14 June 1970 charges," 70CR10999 and 70CR10957, to which defendant entered pleas of not guilty, were tried by jury.

[5] In charging the jury in 70CR10999, the charge of operating a motor vehicle on the public highways while under the influence of alcohol, the trial judge instructed the jury: "A person would be under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and he would be under the influence if his mind and muscles did not normally coordinate, or if he was abnormal in any degree from intoxicants."

This type instruction was held to be erroneous in *State v. Hairr,* 244 N.C. 506, 94 S.E. 2d 472, and the language approved in *State v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, has been approved consistently. Only minor variations from the language of *Carroll* have been allowed. *State v. Bledsoe,* 6 N.C. App. 195, 169 S.E. 2d 520. Language almost identical to that used by the trial judge in the present case was held to constitute prejudicial error in *State v. Edwards,* 9 N.C. App. 602, 176 S.E. 2d 874, and again in *State v. Beasley,* 10 N.C. App. 663, 179 S.E. 2d 820 (filed 31 March 1971 concurrently with the filing of this opinion). We think it fair to state that the trial judge properly defined the term "under the influence" as approved in our decisions and those of our Supreme Court, but, as we have stated, we are not at liberty to speculate whether the jury applied the correct or incorrect definition.

[6] In charging the jury in 70CR10957, the charge of operating a motor vehicle on the public highways while his license was permanently revoked, the trial judge failed to require the jury to find beyond a reasonable doubt that defendant operated a motor vehicle *upon a public highway* while his operator's license was permanently revoked. This failure we hold to be prejudicial error.

Because of the error in the instructions to the jury as to each offense defendant is entitled to a new trial in case 70CR10999 and case 70CR10957.

When defendant was arraigned on the two "12 July 1970 charges," 70CR12753 (operating a motor vehicle on the public highways while under the influence of intoxicating beverages) and 70CR12754 (operating a motor vehicle on the public highways while his operator's license was permanently revoked), he entered pleas of guilty. The Record fails to disclose affirmatively that Judge Godwin explained to defendant the consequences of his pleas or conducted any examination to determine if the pleas were understandingly and voluntarily entered.

In *State v. Woody,* 271 N.C. 544, 157 S.E. 2d 108 (1967) it was held: "Though it is a good practice and it would be considered proper in all respects, it is not a prerequisite to the sustaining of a conviction based upon a guilty plea that the trial judge so examine the defendant . . . " And in the same opinion it is further stated: "Nevertheless, due to the ever-increasing burden placed upon this Court to rule upon the

countless petitions for a review of the constitutionality of criminal convictions, it would be well, though not mandatory, for every trial judge in this State to interrogate, as most of our trial judges do, every defendant who enters a plea of guilty in order to be sure that he has freely, voluntarily and intelligently consented to and authorized the entry of such plea."

The pronouncement of this advice was followed in this Court in *State v. Abernathy,* 1 N.C. App. 625, 162 S.E. 2d 114 (1968) and the warning issued by Chief Justice Parker was partially restated. In *State v. Miller,* 3 N.C. App. 227, 164 S.E. 2d 406 (1968) it was again held that the failure of the trial court to conduct an examination of the defendant before accepting a plea of guilty did not constitute reversible error. However in 1969 the Supreme Court of the United States in *Boykin v. Alabama,* 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709 (2 June 1969) held: "Several Federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth. [citation]. Second, is the right to trial by jury. [citation]. Third, is the right to confront one's accusers. [citation]. We cannot presume a waiver of these three important Federal rights from a silent record." The court further stated clearly and concisely: "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." It appears that what we had heretofore considered to be a well advised procedure to safeguard against later collateral attack, has been granted constitutional dimensions by the Supreme Court of the United States. The rulings of the Supreme Court of the United States are, of course, binding on this Court.

We held in *State v. Ray,* 7 N.C. App. 129, 171 S.E. 2d 202 (31 December 1969) that the failure of the trial judge to make inquiry of the defendant concerning his understanding and the voluntariness of his plea did not invalidate the plea. This holding coming after *Boykin* appears to be inconsistent with the application of the *Boykin* rule. However the defendant Ray entered his plea at the May 1969 session of court and according to *Halliday v. U. S.,* 394 U.S. 831, 23 L. Ed. 2d 16, 89 S.Ct. 1498, the ruling in *Boykin* is prospective only and applicable to pleas entered on and after 2 June 1969.

Therefore in accordance with the rule announced in *Boykin*, we hold that where a defendant has entered a plea of guilty, or a plea of *nolo contendere*, it must affirmatively appear in the record that he did so understandingly and voluntarily. The most obvious and acceptable way for this information to affirmatively appear in the record is for the trial judge to made an adjudication to that effect from competent evidence. Where it does not affirmatively appear in the record that the plea was understandingly and voluntarily entered, the defendant is entitled to replead.

[7] The failure of the record in this case to affirmatively show that defendant was aware of the consequences of his pleas of guilty and to affirmatively show that his pleas were voluntarily and understandingly entered entitles the defendant to have his pleas of guilty vacated and entitles him to replead to the charges.

[8] The revocation of probation ordered by Judge Godwin was based solely upon the defendant's pleas of guilty in cases 70CR12753 and 70CR12754 (the two "12 July 1970 charges"). Therefore, in view of the holding in this case that defendant is entitled to replead in cases 70CR12753 and 70CR12754, the order of Judge Godwin revoking probation is vacated and the defendant-probationer is awarded a new hearing upon the allegations of violation of the terms of his probation.

Prior to the convening of the session at which the defendant was tried and at the beginning of the session at which he was tried there was confusion relating to the indigency and the necessity for the appointment of counsel. Appellant's counsel has undertaken to raise and present these questions to us on appeal. However, in view of the state of this record and in view of the disposition of the cases, we do not feel it advisable to enter into a discussion of the questions undertaken to be raised by counsel. We presume that upon the remand of these cases to the Superior Court the trial judge will make appropriate inquiry concerning the indigency of the defendant and if found to be indigent will appoint counsel to represent him. The offense of operating a motor vehicle upon the public highways after operator's license has been permanently revoked carries a minimum sentence in excess of six months. G.S. 20-28(b).

The results are as follows:

In cases 70CR10999 and 70CR10957 (the two "14 June 1970 charges") defendant is awarded new trials.

In cases 70CR12753 and 70CR12754 (the two "12 July 1970 charges") defendant's pleas of guilty are stricken and it is ordered that he is entitled to replead.

The order entered by Judge Godwin on 9 October 1970 revoking probation of the defendant-probationer in case 70CR3366 is vacated and defendant-probationer is granted a new hearing upon the allegations of violation of probation.

Judges MORRIS and VAUGHN concur.

JUNIOR JERNIGAN, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 7014SC621

(Filed 31 March 1971)

Criminal Law § 145.5; Constitutional Law §§ 5, 9— reactivation of a parolee's original sentence — discretionary power of Paroles Board — concurrent or consecutive sentence

The statute which grants the Board of Paroles the discretionary power to determine whether the remainder of a parolee's original sentence shall be served concurrently or consecutively with a second sentence imposed for a crime committed during the parole, *held* constitutional; there is no merit to a defendant's contention that the statute fails to provide adequate guidelines or that it violates the separation of powers clause of the State Constitution. G.S. 148-60; G.S. 148-62; N.C. Constitution, Art. I, §§ 8, 17, and Art. IV, § 1.

Chief Judge MALLARD concurring.

ON Writ of *Certiorari* to review an order of *Canaday, J.*, entered in a post-conviction proceeding at the 22 June 1970 Criminal Session of DURHAM Superior Court.

Petitioner was convicted of armed robbery at the July 1960 Session of Durham Superior Court and was sentenced to prison for not less than 12 nor more than 15 years. After serving a portion of this sentence, he was released on parole. While on parole he committed another offense, for which he was brought to trial before Judge Leo Carr and a jury at the April 1967

Session of Durham Superior Court. The jury found him guilty of larceny from the person, a felony, and on 6 April 1967 Judge Carr entered judgment sentencing petitioner to prison for a term of ten years. This judgment made no reference to the prior sentence from which petitioner was then on parole. On 7 April 1967 the Board of Paroles revoked petitioner's parole and notified him that the unserved portion of the sentence from which he had been paroled would be served at the expiration of the ten-year sentence imposed on him by Judge Carr.

The present proceeding was commended in May 1970 when petitioner filed in the Superior Court of Durham County a petition for post-conviction review pursuant to G.S. 15-217 *et seq.* In this, petitioner contended that the two sentences should run concurrently and that the Board of Paroles lacked power to direct that he must serve the unserved portion of his first sentence only at the expiration of the second sentence. The petition came on for hearing before Judge Harry E. Canaday, Judge of Superior Court presiding at the 22 June 1970 Criminal Session of Durham Superior Court, petitioner being present in person and being represented by court-appointed counsel. After hearing arguments of counsel upon the question of law presented, Judge Canaday found that no relief could be granted. To review this finding, petitioner applied to the Court of Appeals for a writ of *certiorari,* which was allowed.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr. for the State.

James B. Craven III for petitioner.

PARKER, Judge.

While petitioner alleged violation of his rights occurred prior to and during the course of his 1967 trial, at the hearing on his petition for post-conviction review he offered no evidence to support these allegations, and his court-appointed attorney informed the court that he was not contending there was any error in the trial. His sole contention in the post-conviction hearing in the superior court and in this Court is that when parole of his 1960 sentence was revoked, he was entitled to serve the remainder of that sentence concurrently with service of his 1967 sentence. He attacks the constitutionality of G.S. 148-62, which reads as follows:

"§ *148-62. Discretionary revocation of parole upon conviction of crime.*—If any parolee, while being at large upon parole, shall commit a new or fresh crime, and shall enter a plea of guilty or be convicted thereof in any court of record, then, in that event, his parole may be revoked according to the discretion of the Board of Paroles and at such time as the Board of Paroles may think proper. If such parolee, while being at large upon parole, shall commit a new or fresh crime and shall have his parole revoked, as provided above, he shall be subject, in the discretion of the Board of Paroles, to serve the remainder of the first or original sentence upon which his parole was granted, after the completion or termination of the sentence for said new or fresh crime. Said remainder of the original sentence shall commence from the termination of his liability upon said sentence for said new or fresh crime. The Board of Paroles, however, may, in its discretion, direct that said remainder of the original sentence shall be served concurrently with said second sentence for said new or fresh crime."

This statute embodies two legislative declarations. The first is a mandate that service of the remainder of the original sentence of one whose parole has been revoked by the parole board after his plea of guilty or conviction of an offense committed while at liberty on parole *"shall commence from the termination of his liability upon said sentence for said new or fresh crime."* The second is the portion of the statute which grants the parole board the power, in its discretion, to direct that the remainder of the original sentence shall be served concurrently with the sentence imposed for the new crime. As to the mandate portion of the statute, no question as to constitutional validity is or can validly be raised. What was said by the Supreme Court of Rhode Island in *State v. Fazzano,* 194 A. 2d 680, is pertinent here:

"In our opinion a legislative body is not inhibited from providing that a sentence for an offense committed while at liberty on parole shall run consecutively with the unexpired portion of an original or prior term. Any such enactment is not in conflict with the inherent judicial power to impose consecutive or concurrent sentences. This is the clear implication of the cases." (Citing cases.)

And, as pointed out in the opinion of the Supreme Court of the United States in *Zerbst v. Kidwell,* 304 U.S. 359, 58 S.Ct. 872, 82 L. Ed. 1399:

> "Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the Board. Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offense committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified."

Since in our opinion the mandate portion of the statute is valid and has not been seriously attacked by petitioner in the argument before us, it is difficult to see what cause petitioner has to question the validity of a grant of discretionary power which, if exercised at all by the parole board, could only be exercised in his favor. We nevertheless will examine petitioner's contentions in that regard.

Petitioner contends G.S. 148-62 is unconstitutional insofar as it grants discretionary power to the Board of Paroles because, so he contends, (1) it assigns judicial power to the Board of Paroles in contravention of Article IV, Section 1, and the separation of powers clause (now contained in Article I, Section 8, but effective 1 July 1971 contained in Article I, Section 6) of the Constitution of North Carolina, and (2) it fails to provide adequate standards to guide the Board of Paroles in exercise of the discretionary power granted to it, thereby depriving petitioner of liberty other than by the law of the land, as prohibited by Article I, Section 17 (effective 1 July 1971, see Article I, Section 19) of the State Constitution. We do not agree with either contention.

In assessing the validity of petitioner's contentions, an examination of the history of the parole power in North Carolina may be helpful. In this State the power to grant and to revoke paroles developed originally as a function of the executive branch of the government. At one time a parole was considered by the Supreme Court of North Carolina to be a form of "conditional pardon," *State v. Yates,* 183 N.C. 753, 111 S.E. 337; *In re Williams,* 149 N.C. 436, 63 S.E. 108, and the power to grant a

parole was considered as included in the Governor's pardoning power. By amendment proposed by Chapter 621 of the 1953 Session Laws, and adopted by vote of the people at the general election held 2 November 1954, Article III, § 6, of our Constitution was amended by adding thereto the following sentences:

> "The terms reprieves, commutations and pardons shall not include paroles. The General Assembly is authorized and empowered to create a Board of Paroles, provide for the appointment of the members thereof, and enact suitable laws defining the duties and authority of such Board to grant, revoke and terminate paroles. The Governor's power of paroles shall continue until July 1, 1955, at which time said power shall cease and shall be vested in such Board of Paroles as may be created by the General Assembly."

These provisions were in effect at all times pertinent to the present case and remain in effect at the present time, the amendments to our Constitution adopted by vote of the people at the general election held 3 November 1970 not becoming effective until 1 July 1971. Since in this State the parole power has never been considered to be a judicial function, it is apparent that the placing of this power in a Board of Paroles could not be considered as depriving the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government as prohibited by Article IV, Section 1 of our State Constitution. This would be true even in the absence of the above-quoted express constitutional authorization.

In his brief petitioner does not challenge the "basic authority" of the Board of Paroles to release persons from confinement before expiration of their sentences nor does he challenge the "established principle" that a parolee who is convicted of a new crime committed while at large upon parole should have his parole revoked and be required to complete service of the sentence from which he was paroled. He challenges only the discretionary authority granted the Board of Paroles to control whether service of the first sentence be concurrent or consecutive with service of the second sentence. As applied to this case, he argues that had Judge Carr intended the two sentences to be served consecutively, he could have so specified at the time he imposed the second sentence, and that having failed to do so, it must be presumed that he intended the two sentences

to run concurrently, citing *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169. From this, he argues that the subsequent exercise by the Board of Paroles of its discretionary authority in such manner as to require that service of the first sentence should commence only after service of the second sentence was completed, necessarily resulted in depriving Judge Carr of control over the sentencing process which, so petitioner contends, was the exclusive prerogative of the trial judge.

We do not accept petitioner's argument. To begin with, we find no greater deprivation of the court's control over the sentencing process when the Board of Paroles exercises or refuses to exercise the discretion granted it by G.S. 148-62 than when it releases a prisoner on parole in the first instance, which initial power petitioner concedes. Further, *In re Parker, supra,* relied on by petitioner, holds merely that "[i]n the absence of a statute to the contrary, and unless it sufficiently appears otherwise in the sentence itself, it is *generally presumed* that sentences imposed in the same jurisdiction, to be served at the same place or prison, run concurrently, although imposed at different times, and by different courts and upon a person already serving a sentence." (Italics added.) The general presumption referred to, however, that two or more sentences shall run concurrently unless a statute or the court imposing the later sentences clearly specifies otherwise, gives rise to no ironclad constitutional right that they must in all cases do so, and under the facts presented by the present record the "general presumption" does not even arise. *In re Parker, supra,* involved a sentence imposed upon an escapee for a new crime committed by him while on escape. In such case the prisoner is subject to an active sentence at the time the second sentence is imposed, and the court imposing the second sentence has an option to make the second sentence run either consecutively or concurrently with the first. But where, as in the case now before us, the defendant is still on parole at the time he is convicted and sentenced for a new crime committed by him while on parole, he is not under an active sentence at the time the second sentence is imposed. He has been released in the discretion of the Parole Board and the second sentence cannot be made by the sentencing judge to be consecutive or concurrent to a sentence which is not then in effect. The Board of Paroles may revoke the parole in its discretion, and we find no unconstitutional deprivation of the court's sentencing power in the addi-

tional discretion granted the Board by G.S. 148-62 to determine whether the remainder of the first sentence must be served consecutively or concurrently with service of the second sentence.

Nor are we impressed with petitioner's argument that the Legislature failed to provide constitutionally adequate standards to guide the Board of Paroles in the exercise of the discretionary power granted to it. In a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves evaluation of a large number of intangibles, rigid guide lines are neither necessary nor desirable. The Legislature did specify, in G.S. 148-60, the matters to which the Parole Board should give "due consideration" in exercising its discretion at the time of granting parole. By clear implication the same matters should be considered by the Board when exercising its discretionary power under G.S. 148-62 to revoke a parole and to determine when service of the remainder of the sentence upon which parole was granted shall commence.

In our opinion G.S. 148-62 does not contravene the Constitution of North Carolina.

In the order refusing petitioner relief we find

No error.

Judge GRAHAM concurs.

Chief Judge MALLARD concurring.

I concur in the result. While I would agree that G.S. 148-62 is constitutional, in my opinion, petitioner has failed to present that question on the record before us. As far as the record discloses, no evidence was presented at the hearing before Judge Canaday on the petition for post-conviction review, no findings of fact were made, and the record does not clearly disclose on what basis Judge Canaday ruled that no relief could be granted. The ruling can be supported without passing on the constitutionality of G.S. 148-62, and I would dismiss the petition for *certiorari* as having been improvidently granted.

Cable v. Oil Co.

H. W. CABLE, INDIVIDUALLY AND H. W. CABLE, ADMINISTRATOR OF THE ESTATE OF LIZZIE W. CABLE v. HARDIN OIL COMPANY, GARLAND SMOTHERS, TOM B. SMOTHERS, P. N. HOOPER INSURANCE AGENCY, EDGAR CABLE, HARVIE CABLE, WILLIAM CABLE, RUBY CABLE LANE, MILDRED HOLIDAY, ADELL CAUDILL, NELLIE WILLIAMS, MAUDE LANDRETH, LACY CABLE, ROBERT CABLE, DILLARD WILLIAMS, AND PAUL WILLIAMS

No. 7119SC150

(Filed 31 March 1971)

1. **Wills § 67— ademption — foreclosure sale after testatrix' death**

A devise to testatrix' son was not adeemed by a foreclosure sale of the devised property after the death of testatrix, since the doctrine of ademption operates only during the lifetime of the testatrix.

2. **Wills § 67— ademption — execution of deed of trust on devised property**

Devises of a tract of land to testatrix' son and a portion of another tract to her daughter were not adeemed when testatrix executed deeds of trust on such property after the execution of her will, notwithstanding one of the deeds of trust described the two separate tracts by metes and bounds as a single tract.

3. **Wills § 35— devise of property subject to deeds of trust — time of vesting**

Devised property vested in the devisees, subject to the liens of deeds of trust on such property, at the time the will was probated; consequently, the devisees owned the equity of redemption in the devised property at the time the property was foreclosed after the death of the testatrix. G.S. 31-39.

4. **Bills and Notes § 14; Payment § 1— renewal note — continuance of original debt**

A new note not given in payment but merely in renewal does not change the original debt.

5. **Bills and Notes § 14; Mortgages and Deeds of Trust § 17— deed of trust to secure endorsements of note — default in renewal note not signed by trustor**

Where testatrix executed a $1500 deed of trust as security for the cestuis' endorsements on a $1500 note to a bank signed by testatrix and her son as makers, the son subsequently executed a renewal note, also endorsed by the cestuis but not signed by testatrix, consolidating the $1500 indebtedness with other amounts which he owed to the bank, the second note was renewed by the son's execution of a note for a larger amount, including accrued interest, which was endorsed by the cestuis but was not signed by testatrix, the cestuis paid this third note upon default, and the property secured by the $1500 deed of trust was sold upon foreclosure of a superior deed of trust after testatrix' death, leaving surplus funds, it was *held* that the $1500 indebtedness which the cestuis secured with their endorsement was

not paid until the cestuis paid the third note upon default, and that the trial court properly determined that the $1500 deed of trust was a lien upon the surplus proceeds from the foreclosure sale of the tract of land which it covered.

6. **Wills § 68— separate devises of two tracts — foreclosure sale of devised property as single tract — tracing of proceeds**

Devises of a tract of land to testatrix' son and a portion of another tract to testatrix' daughter do not fail because of the "mingling of funds" resulting from a foreclosure sale of the two tracts as a single tract after testatrix' death, since the devises were vested at the time of the sale and could not be affected by the conversion of the devisees' interest to cash.

7. **Wills § 56— devise of land — power of selection by devisee — sufficiency of description**

Devise to testatrix' daughter of a "tract of 25 acres to be selected by her" out of a specified larger tract is not void for vagueness and uncertainty.

APPEAL from *Long, Superior Court Judge,* 22 October 1970 Session of RANDOLPH County Superior Court.

Lizzie W. Cable (Mrs. Cable) executed a will on 12 January 1957. In Item II of the will she devised to her son Harvey Cable (Harvey) (also referred to in the record as H. W. Cable and Harvie W. Cable) a 73-acre tract of land conveyed to the testatrix and her late husband by deed from Everett Gambill (the Everett Gambill tract). In Item III she devised to her daughter, Ruby Cable Lane (Ruby), "a tract of 25 acres to be selected by her from the tract purchased by my husband and me from Emory Bullard [the Emory Bullard tract], which said tract contains in all 73 acres. . . . " Item IV of the will provides: "All of the rest, residue and remainder of my estate, both real and personal, I hereby will, devise and bequeath to my children other than my son, Harvey Cable, and my daughter, Ruby Cable Lane. . . . "

On 19 March 1959, Mrs. Cable executed a deed of trust to a trustee for the Federal Land Bank of Columbia to secure an indebtedness of $6,500. The deed of trust covered the tracts of land mentioned in Items II and III of the will and described them by metes and bounds as a single tract of 133 acres. (The description in the deed of trust notes that the tract conveyed to Mrs. Cable and her late husband by Emory Bullard contains 60 acres, rather than 73 acres as called for in the deed.)

Mrs. Cable's will was probated 6 February 1967. Payments under the deed of trust to the Federal Land Bank became in default and foreclosure proceedings were instituted. The property security was advertised as a single tract, and after a sale and several resales an order was entered, 27 February 1969, confirming a purchase price of $47,350. After the payment of the indebtedness under the deed of trust and costs the trustee deposited in the office of the Clerk of Superior Court the surplus funds in the amount of $39,898.78.

On 28 April 1970, Harvey, as administrator of the estate of Mrs. Cable and also individually, filed in Superior Court a petition requesting that the ownership of the surplus funds be determined and that they be ordered paid to him as administrator. Various persons claiming an interest in the funds, including all of the living children of Mrs. Cable and all of the children of her deceased children, were named parties defendant.

The matter came on for hearing before Judge Long and a jury trial was waived. In an order dated 22 October 1970, Judge Long found and concluded *inter alia* that: (1) A deed of trust, filed for registration on 28 March 1962, from Mrs. Cable to J. S. Moore, Jr., trustee for Smothers Warehouse, in the principal sum of $1,500, covers the tract of land which is referred to in Item III of the will and known as the Emory Bullard property, and that deed of trust constitutes a lien on the surplus funds remaining from the sale of that tract. (2) A deed of trust, filed for registration 3 January 1964, from Mrs. Cable, H. W. Cable, and Larry Cable to J. S. Moore, Jr., trustee for Tom B. Smothers and Garland Smothers, t/a Smothers Warehouse, in the principal sum of $7,868.84, covers the tract of land devised in Item II of Mrs. Cable's will and known as the Everett Gambill lands, and that deed of trust constitutes a lien on the surplus funds remaining from the sale of that tract of land. (3) Various other enumerated claims of judgment creditors constitute liens on the surplus funds.

The court thereupon ordered that the clerk: (1) disburse to Smothers Warehouse the sum of $1,500 plus accrued interest in full satisfaction of the deed of trust filed 28 March 1962; (2) disburse to Tom B. Smothers and Garland Smothers the sum of $7,868.84, plus accrued interest, in full satisfaction of the deed of trust filed 3 January 1964; (3) pay various sums in satisfaction of other liens which are not involved in this appeal;

(4) pay the remaining funds to the administrator who, after paying the debts of the estate, "shall disburse the remaining portion of said funds to those persons entitled thereto under the provisions of Items 2, 3, and 4 of the Last Will and Testament of Lizzie W. Cable, as he may be hereafter directed by the Court."

The proceeding was retained by the court "for further findings as to the value of the respective tracts of land from which foreclosure these surplus funds were derived."

All of the children and grandchildren named as defendants, except for Harvey Cable and Ruby Cable Lane, appealed.

H. Wade Yates for defendant appellants Edgar Cable, William Cable, Mildred Holiday, Adell Caudill, Nellie Williams, Maude Landreth, Lacy Cable, Robert Cable, Dillard Williams and Paul Williams.

McLeod and Campbell by W. F. McLeod for defendant appellees T. Garland Smothers and Tom B. Smothers.

Coltrane and Gavin by T. Worth Coltrane for petitioner appellee Harvey W. Cable, individually, and Harvey W. Cable, administrator of the estate of Lizzie W. Cable, and defendant appellee Ruby Cable Lane.

GRAHAM, Judge.

We note at the outset that the deed of trust in the amount of $7,868.84, filed for registration 3 January 1964, was determined to be a lien only on those surplus funds derived from the sale of the tract of land devised by Mrs. Cable to her son Harvey. The order contemplates that this deed of trust is to be paid out of these particular funds. Thus, unless appellants have some interest in these funds, they have no standing to attack the portion of the order having to do with this deed of trust.

[1] Appellants argue that as heirs they have an interest in the funds derived from the sale of that tract, contending that Mrs. Cable's devise to her son Harvey (and also the devise to Ruby) was adeemed when the Federal Land Bank deed of trust was foreclosed and the land sold. This argument is without merit. The doctrine of ademption operates only during the lifetime of the testator. *King v. Sellers,* 194 N.C. 533, 140 S.E. 91; *Starbuck v. Starbuck,* 93 N.C. 183. Consequently, the fore-

closure and sale, which did not take place until almost two years after the will was probated, could not have constituted an ademption.

[2] Appellants argue further that the execution of the deeds of trust on the property devised, and in particular the execution of the deed of trust which described both tracts as a single tract, constituted an ademption. We disagree. As stated in 57 Am. Jur., Wills, § 1579, p. 1081, "an ademption of a legacy or devise may result from a variety of causes or circumstances, among which may be mentioned, in the case of gifts of specific property, the nonexistence of the property at the death of the testator, or its consumption, loss, disposal by sale, gift, or other alienation, or change in form, *during the lifetime of the testator.* . . . " (Emphasis added). (For a collection of the North Carolina cases dealing with the subject of ademption and an analysis of whether ademption by extinguishment of alienation depends upon the intention of the testator or simply operates as a matter of law, see *Grant v. Banks,* 270 N.C. 473, 155 S.E. 2d 87.)

Mrs. Cable did not dispose of the property during her lifetime and at her death it remained *in specie.* The only change that occurred subsequent to the execution of Mrs. Cable's will was that the property was subjected to the liens of the various deeds of trust. Certainly these added encumbrances did not prevent the equity of redemption, which was retained by Mrs. Cable, from passing under the will. To hold otherwise would be to require a testator to make a new will on every occasion that a mortgage was placed on any property that he had previously devised. Furthermore, describing the two separate tracts by metes and bounds as a single tract is of no significance. The boundaries of the two tracts, each of which had been conveyed to testatrix and her late husband by separate deeds, remained easily ascertainable.

[3] The property devised to Harvey and to Ruby vested, subject to the liens of the various deeds of trust, at the time the will was probated. G.S. 31-39; *Hargrave v. Gardner,* 264 N.C. 117, 141 S.E. 2d 36; *Morris v. Morris,* 245 N.C. 30, 95 S.E. 2d 110. Hence, Harvey owned the equity of redemption in the 73-acre tract at the time the property was foreclosed. Appellants had no interest in that tract and therefore can make no complaint with respect to the $7,868.84 deed of trust that has been

held to be a lien against the surplus funds resulting from its sale.

Appellants, of course, do have an interest in the proceeds resulting from the sale of the Emory Bullard tract as only 25 acres of that tract were devised to Ruby. We therefore examine appellants contentions with respect to the $1,500 deed of trust, filed for registration 28 March 1962, which the court held to be a lien upon the proceeds remaining from the sale of that tract.

[5] Appellants contend the indebtedness secured by this deed of trust was paid. Evidence with respect to this deed of trust tended to show the following: Garland Smothers and Tom B. Smothers (Smothers) are engaged as partners in the operation of Smothers Warehouse. Money for farm use was loaned to Harvey Cable from time to time by the First National Bank of Reidsville and various notes were given evidencing the indebtedness. The first note, in the amount of $1,500, was signed by Harvey and Mrs. Cable as makers and was endorsed by Smothers. On 9 March 1962, Mrs. Cable executed the $1,500 deed of trust in question as security for Smothers endorsement. On 24 December 1963, the $1,500 indebtedness to the bank was consolidated with other Cable accounts and evidenced by a single note in the amount of $9,368.84. This note was signed by Harvey and his son as makers and endorsed by Smothers. On 26 December 1963, Mrs. Cable executed the deed of trust in the amount of $7,868.84 to a trustee for Smothers as further security for their endorsement of that note. The principal of this deed of trust, when added to that of the $1,500 deed of trust executed in March 1962, totaled $9,368.84, which was the total amount of Smothers' contingent liability as endorsers on the note executed to the bank 24 December 1963.

On 13 October 1965, the $9,368.84 note to the bank was renewed by the execution and delivery of a note in the amount of $10,465.78, which amount included accrued interest and insurance. This note was signed by Harvey Cable and his son and was also endorsed by Smothers. On 18 November 1966, Smothers were called upon to pay this note and they did pay it in full.

[4] Mrs. Cable never signed any note given to the bank, except for the first note in the amount of $1,500. When that

note was replaced by another note on which her signature did not appear, she was obviously released from any liability to the bank. However, the deed of trust in question did not secure the obligation to the bank, but secured Smothers against loss by their endorsement of the note given to secure the original $1,500 debt of Mrs. Cable's son. *Watkins v. Simonds,* 202 N.C. 746, 164 S.E. 363. A new note, where not given in payment, but merely in renewal does not change the original debt. 10 C.J.S., Bills and Notes, § 279, p. 770. Under the evidence in the record, the $1,500 indebtedness which Smothers secured with their endorsement was not paid until they were called upon to pay it on 18 November 1966. It was this contingent liability which was secured by Mrs. Cable's deed of trust, and this contingent liability continued uninterrupted until it became absolute on 18 November 1966. It is true that "[a]s a general rule, an extension to the principal of the time of payment or performance of the principal obligation by the creditor or obligee, without the consent of the surety, will discharge the security." 72 C.J.S., Principal and Surety, § 162, p. 647. However, no contention is made that the security of Mrs. Cable's deed of trust was discharged because Smothers, by endorsing renewal notes, acquiesced in an extension of time for the payment of the obligation to the bank. Moreover, while a renewal note ordinarily extends the time for payment, there is absolutely no evidence in the record before us as to when payment was due under the original $1,500 note. An inference arises that the renewal notes were for the purpose of consolidating debts rather than extending time for payment.

[5] It is our opinion, and we so hold, that the trial court correctly held the $1,500 deed of trust in question to constitute a lien upon the surplus proceeds from the sale of the tract of land which it covered.

[6] Appellants contend that the "mingling of funds," which has resulted from the sale of the two tracts of property, has made it impossible to trace the funds to the individual tracts and therefore the devises must fail. The devises, however, had taken effect and were vested at the time the sale occurred. Consequently, they could not be affected by the conversion of the devisees' interest to cash.

[7] Appellants also point to the special problem created by the devise to Ruby of 25 acres to be selected by her out of the

larger Emory Bullard tract. They say that this devise is void for vagueness and uncertainty. In the case of *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723, a devise of 25 acres out of an 82-acre tract was held void for vagueness and uncertainty. However, there no power of selection had been given to the devisee or to anyone else. Where, as here, the power of selection is expressly granted to the devisee, such devises are uniformly upheld. See *Freeman v. Ramsey,* 189 N.C. 790, 128 S.E. 404; *Garrison v. Eborn,* 56 N.C. (3 Jones Eq.) 228; *Harris v. Philpot,* 40 N.C. (5 Ired. Eq.) 324; Annot., 157 A.L.R. 1129. Compare, *Redd v. Taylor,* 270 N.C. 14, 153 S.E. 2d 761.

We note that this cause has been properly retained by the Superior Court for further findings concerning the value of the respective tracts of land from which the surplus funds were derived.

Appellants have brought forward numerous other assignments of error which we deem it unnecessary to discuss. Suffice to say we have carefully reviewed and overruled all asignments of error properly presented.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

CARL D. BLACKWELDER, JR. AND WIFE, FANNIE B. BLACKWELDER v. HOLYOKE MUTUAL FIRE INSURANCE COMPANY IN SALEM, MASSACHUSETTS

No. 7119SC110

(Filed 31 March 1971)

1. **Insurance § 140— action on homeowner's policy — wind damage to shed — appurtenant private structure — sufficiency of homeowner's evidence**

In a homeowner's action to recover for a wind-damaged shed under the terms of a homeowner's policy insuring his dwelling and "appurtenant private structures," the homeowner's testimony that the shed was located on his land about 400 feet from the dwelling and was used primarily for the storage of garden and lawn tools, *held* sufficient to support a jury finding that the shed was an "appurtenant private structure" within the meaning of the policy, notwithstanding there was other evidence that the maintenance and use of the shed was unrelated to the dwelling.

2. **Insurance § 139— construction of homeowner's policy — "appurtenant private structure"**

The term "appurtenant private structure" as used in a homeowner's policy requires the structure in question to be incident to the main insured building and necessarily connected with its use and enjoyment.

3. **Insurance § 139— construction of homeowner's policy — status of damaged dwelling**

The status of a shed at the time of its damage by wind determines whether or not the shed is an "appurtenant private structure" within the meaning of a homeowner's policy.

4. **Insurance §§ 6, 139— construction of policy — ambiguous terms**

If the word "premises" in a homeowner's policy is subject to two different constructions, the court must adopt the construction most favorable to the policyholder.

5. **Insurance § 139— construction of homeowner's policy — "premises" defined — shed adjacent to insured dwelling**

The word "premises" as used in a homeowner's policy was sufficiently broad to encompass a shed that was located about 400 feet from the insured dwelling and on the same tract of land.

APPEAL by plaintiffs from *Gambill, Superior Court Judge,* 7 September 1970 Session of CABARRUS County Superior Court.

Civil action to recover $3,000 for wind damage to a shed under the terms of a homeowner's insurance policy issued by defendant and insuring plaintiffs against loss or damage to their dwelling and appurtenant private structures occasioned by fire, windstorm or other enumerated perils.

At the close of plaintiffs' evidence the court allowed defendant's motion for a directed verdict, stating as grounds therefor that, "as a matter of law, the structure which was the subject matter of the law suit in question was not an appurtenant private structure within the . . . provisions of the insurance policy. . . . " Plaintiffs appealed.

Williams, Willeford & Boger by John Hugh Williams for plaintiff appellants.

Ervin, Burroughs & Kornfeld by Robert M. Burroughs and John C. MacNeill, Jr. for defendant appellee.

GRAHAM, Judge.

[1] The sole question presented is whether the policy of insurance issued by defendant failed, as a matter of law, to provide coverage to the plaintiffs' shed.

On the first page of the printed policy form the following appears: "Named Insured and P. O. Address." Typed immediately thereunder are plaintiffs' names and the address, Route 1, Box 249, Concord, Cabarrus, N. C. 28025. The printed form further provides: "The described premises covered hereunder are located at the above address, unless otherwise stated herein." Thereafter follows the description, "[o]n Roberta Road, 3 miles West of Concord, Cabarrus, N. C."

Coverage and limits of liability as designated in Section 1 of the policy include: "A. Dwelling $30,000. B. Appurtenant Private Structures $3,000."

With respect to coverage B, the printed policy states:

"COVERAGE B—APPURTENANT PRIVATE STRUCTURES.

> This policy covers *private structures appertaining to the premises and located thereon,* including materials and supplies located on the premises or adjacent thereto, intended for use in construction, alteration or repair of such structures. This coverage does not include: (a) any structure used in whole or in part for commercial, manufacturing or farming purposes; or (b) any structures (except structures used principally for private garage purposes) which are wholly rented or leased to other than a tenant of the described dwelling." (Emphasis added).

Plaintiffs' evidence, including certain stipulations, tended to show the following: The policy of insurance was issued on 12 March 1968 and was in effect on 29 June 1969 when the shed was damaged by wind. On 29 June 1969, plaintiffs were the owners of a 250-acre tract of land in Cabarrus County. They resided in a brick residence built on the property in 1967. For twenty-three years prior to moving into the brick residence, plaintiffs lived in a frame dwelling which was also located on the property. The shed, which is the subject of this action, was located about 200 feet from the old frame dwelling and about 400 feet from the new residence. Other buildings located on the 250-acre tract consisted of a shop, grain bin, barn,

chicken house and underground silo. All buildings, except the dwellings, had been constructed for use in dairying and farming. The male plaintiff ceased dairying and farming in 1964. He testified:

> "Prior to June 29, 1969, I was using the shed for my gardening tools, small tractor to mow my yard. There were a mowing machine, bush hog, and cultivators in there. There was no farming on my property at that time. I did not use any of the items in the shed for anything but my own use in the house. I did my gardening and the road banks. The garden was located right near the new house. There were a couple of junk automobiles in there which did not belong to me. There were other outbuildings, a barn, shop, and underground silo. None of those had been used since I stopped farming in 1964. The frame house was rented."

We are of the opinion, and so hold, that plaintiffs' evidence, when taken in the light most favorable to them, would permit a finding that the shed was a private structure appertaining to the premises within the meaning of the insurance policy.

We have found no cases arising in this State which define "appurtenant private structure" as that term is used in fire insurance policies. However, in the case of *Manufacturing Co. v. Gable,* 246 N.C. 1, 97 S.E. 2d 672, our Supreme Court considered the question of whether a heating system located in the basement of a building was an appurtenance to the lease of the second and third floors, within the meaning of a lease providing, "TO HAVE AND TO HOLD the same, [second and third floors] with the privileges and appurtenances thereunto in anywise appertaining. . . . " In holding the heating system to be an appurtenance, the court quoted with approval the following from 32 Am. Jur., Landlord & Tenant, § 169:

> " 'It is a settled principle of the law of property that a conveyance of land, in the absence of anything in the deed indicating a contrary intention, carries with it everything properly appurtenant to, that is, essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed, and this principle is equally applicable to a lease of premises. In leases, as in deeds, "appurtenance" has a technical signification, and is employed for

> the purpose of including any easements or servitudes used or enjoyed with the demised premises. When the term is thus used, in order to constitute an appurtenance, there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity. Moreover as in the case of conveyances, whatever easements and privileges legally appertain to the demised premises and are reasonably necessary to its enjoyment ordinarily pass by a lease of the premises without any additional words. Parol evidence is admissible to show the meaning of the term "appurtenances." ' "

The meaning of "appurtenance" adopted by our Supreme Court in the *Gable* case, is simliar to that generally attributed to the term. *Webster's Third New International Dictionary* defines an "appurtenance" as "1: an incidental property right or privilege (as to a right of way, a barn, or an orchard) belonging to a principal right and passing in possession with it 2: a subordinate part, adjunct, or accessory."

In *Beekman v. Schirmer,* 239 Mass. 265, 132 N.E. 45, the question before the court was whether a greenhouse was prohibited on a lot restricted by deed to use for a private dwelling house and appurtenances. The court stated: "We are . . . of opinion that 'appurtenances' should be construed . . . to mean that which might become necessarily connected with the full and free use and enjoyment of the dwelling house whether it took the form of a private stable, or a private garage, or a private greenhouse."

In *Brown v. Lehigh Valley R. Co.,* 108 Misc. 384, 177 N.Y.S. 618, we find the following:

> "The thing appurtenant need not be one of necessity. It may be one of convenience only, but it must be connected in use with the principal thing. In other words, a thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter."

According to the male plaintiff's testimony the shed was used primarily for the storage of tools and implements used in connection with the upkeep of his garden and yard. He stated

categorically, and without objection, that "I did not use any of the items in the shed for anything but my own use in the house." The ownership and maintenance of a mower, garden tractor, cultivator, and similar tools need not be considered consistent only with farming operations and may indeed be incidental to the use and enjoyment of a rural home. Nor can we say, as a matter of law, that the location within the shed of two old cars (as an accommodation to a third party), and some old fence posts and barbed wire, destroys the "appertaining to the premises" characteristic of the shed. It is not unusual for a homeowner to accumulate and store upon the premises implements formerly used in a business that has been abandoned as well as various items generally considered useless. In fact, many consider a nearby garage, barn or shed, for storage purposes, as an essential appendage to a home.

[2] If the shed in question was an incident of the main insured building and necessarily connected with its use and enjoyment, it was a private appurtenant structure within the meaning of the insurance policy. However, its use is disputed by the defendant, and even plaintiffs' evidence would support a finding that the maintenance and use of the shed was unrelated to the main dwelling. The question of its status should therefore have been submitted to the jury under proper instructions.

[3] It should be noted further that the shed's status at the time the loss occurred is controlling. The fact that it may have been constructed for use in farming operations does not mean that it could never be converted for use in connection with the private dwelling. The case of *Brust v. National Grange Fire Insurance Company,* 198 N.Y.S. 2d 348, 10 App. Div. 2d 737, is in point. There, a building originally constructed as a cider mill, had been used for three years prior to its destruction by fire for the storage of the dismantled cider mill equipment, a car, two trucks, certain household furnishings, camping equipment and woodcarving tools, which the testimony indicated were used only for private purposes. The building was located 160 feet from a dwelling house insured under a policy which also covered private structures appertaining to the described dwelling and located on the premises. The trial court held that the building did not appertain to the house within the meaning of the policy. In reversing, the Supreme Court, Appellate Division stated: "Despite the statement in the proof of loss it is clear

that the burned building was not being used as a cider mill. Although the plaintiffs admitted it could be reassembled in a week it had not been used to manufacture cider since 1952. . . . [T]his building which was located on the same premises as the dwelling house and used in connection with it, *e.g.*, as a garage and for storage, was a private structure appertaining to the dwelling house."

Defendant contends the judgment should stand for the reason that plaintiffs' evidence conclusively established that the shed was used, at least in part, for farming operations. (As pointed out previously, the policy expressly excludes buildings used, even in part, for farming purposes.) Plaintiffs' evidence was expressly to the contrary. The male plaintiff testified clearly that he had not engaged in farming or dairying since 1964; and also, that no farming was being conducted on the property at the time the shed was damaged.

Defendant's final contention is that the shed was not located on the premises as required by the policy.

In its brief defendant states:

> "It would seem, in the situation at hand, that the word 'premises' is susceptible to at least two entirely different meanings. First of all, the word 'premises' might encompass the entire 250 acre tract of land of the plaintiffs. This would include land on which there are structures, land which is now idle but once was used for farming purposes, land which is now being subdivided by the plaintiffs for homesites, and land which contained the original frame dwelling house and its out buildings that supported the dairy operation. The word 'premises,' as used in the policy of insurance, could be construed to mean only the immediate area which is used by the plaintiffs for dwelling purposes, that is to say, that portion of the entire tract which contains a dwelling house, a yard, and which is used as the plaintiffs' residence."

[4] If, as defendant apparently concedes, "premises" as used in the policy of insurance is subject to two different constructions, we are bound to adopt the construction most favorable to plaintiffs. Where, as here, the insurance company has selected the words used in the policy, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder

and against the company. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518; *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102; *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410.

[5] We are of the opinion, however, that whatever reasonable construction is applied, "premises" as used in the policy is sufficiently broad to encompass the property on which the shed was located. The 250 acres was a single undivided tract. It was located at the address given in the policy as the location of the "premises covered hereunder." While there was evidence that a portion of the 250 acres had been subdivided for residential lots, there was no evidence that that portion on which the shed was located had been severed. It remained a part of the tract on which the house was located. The meaning of "premises" as used in the policy is obviously not restricted to the principal dwelling, for if it were, the extended coverage of appurtenant structures would be of no value. Where then does the premises end? Defendant argues that it ends somewhere before it reaches the shed and suggests that it is limited to "that portion of the entire tract which contains a dwelling house, a yard, and which is used as the plaintiffs' residence." The record does not indicate whether plaintiffs' yard encompassed the portion of the property on which the shed was located. However, plaintiffs' evidence was that the shed was used in connection with the residence. It was located on the same tract of land and within a convenient distance from the residence. Under these circumstances, we think the limit of the "yard" not controlling.

In *Norfolk Dedham Mut. Fire Ins. Co. v. Hamilton*, 52 So. 2d 495 (Mississippi, 1951), a servant's quarters, located 1198 feet from the insured dwelling, but on the same 95-acre tract of land, was held to be an appurtenant structure. The shed here in question was only 400 feet, approximately, from the insured dwelling.

Defendant cites *Bowlin v. Fed. Mut. I. & H. Ins. Co.*, 210 Tenn. 205, 357 S.W. 2d 337. The structure there in question was a barn located across the street from the dwelling and on a separate tract of land. The court held that the barn was not located on the premises described in the policy, noting that to decide otherwise would mean that a barn used for storage by the owner of the insured dwelling, could be situated blocks away from the insured dwelling and still be covered by the policy.

The opinion makes it clear that the controlling feature in that case was the location of the barn on a completely separate tract of land. The case is therefore distinguishable from the case at hand.

Here the shed in question was on the same tract of land as the dwelling. A conveyance of the tract intact would have carried with it the shed as well as the house. The approximate 400-foot distance from the house to the shed was not so great as would prevent the shed's convenient use in connection with the use and enjoyment of the dwelling. Plaintiffs' evidence was that it was so used. Under these circumstances, we think the shed was clearly located on the premises within the meaning of the insurance policy.

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

ERNEST WELLS v. STURDIVANT LIFE INSURANCE COMPANY

No. 7118DC117

(Filed 31 March 1971)

1. **Trial § 10; Witnesses § 7— judge's examination of witness**

A judge may ask a witness clarifying questions.

2. **Insurance § 37— action on life policy — evidence — premium-collecting practices of the insurer**

In a beneficiary's action to recover on a life insurance policy, it was proper for the trial judge to examine the witnesses on the premium-collecting practices of the insurer and its agents, where the issue in the action was whether the insured had paid the initial premium on the policy.

3. **Rules of Civil Procedure § 41— motion for involuntary dismissal — sufficiency of plaintiff's evidence**

The defendant's motion for an involuntary dismissal of the action in a trial without a jury challenges the sufficiency of plaintiff's evidence to establish his right to relief. G.S. 1A-1, Rule 41(b).

4. **Insurance § 15— action on life policy — proof of payment of initial premium — prima facie case**

In an action to recover on a policy of life insurance, the beneficiary's evidence that a properly executed policy was delivered to the insured and that the policy explicitly stated that the initial

premium had been paid, *held* sufficient to raise a *prima facie* case that the insured had paid the initial premium in compliance with the policy terms and that the policy was in force on the date of the insured's death.

5. **Evidence § 8— prima facie case**

When the facts in evidence make out a *prima facie* case, it is one for submission to the jury.

6. **Appeal and Error § 24— broadside assignment of error**

An assignment of error which attempts to present several propositions of law is broadside.

7. **Appeal and Error § 26— exception to the judgment — question presented**

An exception to the judgment does not challenge the sufficiency of the evidence to support the findings of fact.

APPEAL by defendant from *Kuykendall, District Court Judge,* 12 October 1970 Session of District Court held in GUILFORD County.

This civil action was tried by the court without a jury. Plaintiff is seeking to recover $4,000 on a policy of life insurance.

In the face of the policy it was stated that it was issued 1 November 1968 on the life of Jerome Wells. The policy was for $2,000 with a double indemnity feature in case of accidental death. Plaintiff in this action, Ernest Wells, was the named beneficiary. Jerome Wells died accidentally on 27 November 1968. Upon demand, the defendant refused payment contending in its answer that the policy had never been "issued" and was not in force at the time of the death of Jerome Wells because the initial premium had not been paid.

At a pretrial conference it was stipulated, among other things, that:

"(a) That Jerome Wells died on November 27, 1968.

(b) That plaintiff is designated as beneficiary in policy number M33335.

(c) That plaintiff has demanded payment of the defendant in the sum of Four Thousand Dollars ($4,000.00) and the defendant has refused to pay plaintiff said money.

(d) That exhibit A as attached to the complaint is a true and exact copy of policy number M33335.

(e) It is stipulated that the agent who solicited application from Jerome Wells was licensed by the State of North Carolina as a life, accident, and health agent for Sturdivant Life Insurance Company.

(f) That Jerome Wells died by accidental means as defined in policy number M33335 and if plaintiff is entitled to anything under said policy he would be entitled to collect under the double indemnity feature of said policy."

The policy, which was introduced into evidence, showed an issue date of 1 November 1968 and that the monthly premium was "7.16." It is signed by the president and secretary of the defendant and reads in part as follows:

"CONSIDERATION. This policy is issued in consideration of the statements made in the application herefor, and the payment in advance of at least one months' premiums as stated above.

POLICY PROVISIONS. This policy is effective on the Issue Date and accepted subject to all of the conditions and provisions set forth on this and the following pages, all of which are hereby made a part of this contract.

MONTHLY PREMIUM. Payable on or before the Issue Date and on or before the first day of each successive month thereafter until the death of the Insured or until premiums for 20 years shall have been paid.

Executed at the Home Office of the Company at North Wilkesboro, North Carolina as of the Date of Issue, from which date policy years shall be computed unless otherwise provided."

Plaintiff's evidence, taken in the light most favorable to him, tended to show that Wayne Freeman (Freeman), defendant's agent, after receiving the completed policy from the defendant, delivered it to the home as directed by Jerome Wells. Sometime before Jerome Wells died, Freeman delivered "a receipt" to Patricia Ann Wells, the daughter of Ernest Wells, at her home and she gave it to Jerome Wells. After the death of Jerome Wells, the insurance policy was found among his personal effects by his sister, Flora McDonald, who is also the sister of the plaintiff. Freeman testified as plaintiff's witness that he did not receive any money for the premium on the

policy delivered to Jerome Wells which he sold during the week of 14 October 1968. Freeman's weekly reports to the defendant dated 14 October 1968 revealed that he sold insurance totaling "26.72" and included Jerome Wells in a report as one of those to whom he had sold a policy at a premium of "7.16." Freeman testified further that he reported to the defendant for the week of 14 October 1968 that he "sold insurance with monthly premiums totaling Twenty Six and 72/100 ($26.72) Dollars and I collected premiums on insurance already in force in the amount of One Hundred One and 63/100 ($101.63) Dollars. I sent One Hundred One and 63/100 ($101.63) Dollars to the company for the week of October 14, 1968, and that amount reflected a Twenty Six and 72/100 ($26.72) Dollars increase over the previous week's remittance to the company."

Defendant offered the testimony of Lynn Price (Price) that he was an assistant vice-president of the defendant and that the application records of agents working out of the Charlotte office were kept by him or under his supervision. He testified:

> "The application record of agent Wayne Freeman for the week of October 14, 1968, shows that the initial premium for the policy of insurance applied for by Jerome Wells was Seven and 16/100 ($7.16) Dollars. The record also shows that this amount was not collected. The weekly deposit slip of agent Wayne M. Freeman for the week of October 14, 1968, shows that One Hundred One and 63/100 ($101.63) Dollars was collected by agent Freeman on insurance already in force and sent in to the company. It also shows that no funds were sent in by agent Freeman for premiums on applications taken during that week. All funds sent in by agent Freeman during that week were for premiums collected on insurance already in force."

Price also testified, when questioned by the judge: "I do know that agents *often* collected the first premium when they delivered the policy." (Emphasis added.)

After hearing the evidence, the judge found, among other things, that the premium on the insurance policy was paid, that the policy was in effect at the time of the death of the insured on 27 November 1968, and that the defendant was indebted to plaintiff in the sum of $4,000. From the judgment entered that the plaintiff have and recover of the defendant the sum of

$4,000, the defendant appealed to the Court of Appeals.

Wade C. Euliss for plaintiff appellee.

E. James Moore for defendant appellant.

MALLARD, Chief Judge.

[1, 2] Defendant contends in its assignments of error numbered 1 and 3 that the trial judge committed error in questioning the plaintiff's witness Freeman and the defendant's witness Price concerning collection of premiums on other policies sold by Freeman and listed on the weekly application record of Freeman. The questions asked by the judge do not appear in the record. The answers of the witnesses appear to be made in a proper area of investigation in this case. It is well-established law in North Carolina that the judge may ask a witness clarifying questions. These assignments of error are without merit.

At the close of plaintiff's evidence and again at the close of all the evidence, the defendant moved for an involuntary dismissal of plaintiff's action under Rule 41(b) on the ground that upon the facts and the law, the plaintiff has shown no right to relief. Defendant assigns as error the failure of the trial court to allow his motions.

[3] This motion under Rule 41(b) in this action tried by the court without a jury challenges the sufficiency of the plaintiff's evidence to establish his right to relief. In determining the sufficiency of the evidence in this case, when the trial judge *denied* defendant's motion made at the close of all the evidence for dismissal under Rule 41(b) of the Rules of Civil Procedure, he was guided by the same principles expressed under our former procedure with respect to the sufficiency of the evidence to withstand the motion for nonsuit.

However, under Rule 41(b), if a trial judge *allows* the defendant's motion to dismiss made at the close of plaintiff's evidence on the grounds that upon the facts and the law the plaintiff has shown no right to relief, the court, as the trier of the facts, should *determine* the facts and render judgment against the plaintiff. The trial judge may decline to render any judgment until the close of all the evidence. Then if the trial judge renders judgment on the merits against the plaintiff, he

shall make findings as provided in Rule 52(a). G.S. 1A-1, Rule 41(b).

[4] Defendant alleges and argues that the policy was not "issued" because the premium had not been paid. The question of whether the premium had been paid was a question of fact to be decided by the trier of the facts. The defendant in its answer alleges: "A policy form bearing number M33335 * * * was *completed* by the defendant but the policy was not issued * * * ." (Emphasis added.) Therefore, the proper execution of the policy by the officials of the defendant was not at issue herein.

The word "issued" when used in connection with a policy of insurance may have more than one meaning, depending upon the manner in which it is used. In this connection, the Supreme Court of Oregon said in the case of *Stringham v. Mutual Life Ins. Co.*, 75 P. 822 (1904):

> "We will dispose first of the controversy relative to the meaning of the term 'issued,' as employed in the application, it being insisted on the part of the plaintiff that it signifies simply the completion and signing up of the policy by the secretary and its execution at the office of the company, while, upon the other hand, it is contended that it includes as well the delivery of the policy to the applicant. Among the many cases that have passed under our notice, the term seems to have been used interchangeably to denote either one or the other of these conditions, but we have been cited to no case that attempts to determine as a general rule when an insurance policy is deemed issued. We are impressed that the term has a double application, and its meaning is to be determined by the relation in which it is employed."

In the case before us no issue was raised as to the insured having actual possession of the policy at his death. Also, there was no finding and no evidence to support a finding that there was a conditional delivery of the policy. *McKerley v. Insurance Co.*, 201 N.C. 502, 160 S.E. 576 (1931).

In *Couch on Insurance 2d*, § 10:31, it is stated:

> "The insured's possession of a policy raises a presumption of proper deliver after performance of all conditions prece-

dent, or, as often stated, makes a prima facie case on the issue of delivery. So, possession of the policy after the death of the insured ordinarily raises the presumption that it has been delivered and paid for, or that credit has been extended."

In *Waters v. Annuity Co.*, 144 N.C. 663, 57 S.E. 437 (1907), the rule is stated:

"The fact that the policy in a given case has been turned over to the insured is not conclusive on the question of delivery. This matter of delivery is largely one of intent, and the physical act of turning over the policy is open to explanation by parol evidence. It does, however, make out a *prima facie case* that there is a completed contract of insurance as contained in the policy."

[5] "When the facts in evidence make out a *prima facie* case, it is one for submission to the jury. * * * The significance of '*prima facie* case' has been stated clearly and often. * * * " *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416 (1954).

The evidence from the witnesses offered by plaintiff with respect to whether the premium was paid is contradictory. However, the policy introduced into evidence was signed by defendant's president and secretary and states clearly: "This policy *is issued in consideration of* the statements made in the application herefor, and the payment in advance of at least one month's premiums as stated above." (Emphasis added.)

Applying the pertinent rules, we conclude that plaintiff's evidence made out a *prima facie* case. Defendant does not allege nor offer evidence of fraud. *Williamson v. Insurance Co.*, 212 N.C. 377, 193 S.E. 273 (1937); see also *Grier v. Ins. Co.*, 132 N.C. 542, 44 S.E. 28 (1903). Moreover, in *Murphy v. Insurance Co.*, 167 N.C. 334, 83 S.E. 461 (1914), it is said:

"It is well established in this jurisdiction that, in the absence of fraud and in so far as the contract of insurance is concerned, the delivery of an insurance policy absolute and unconditional is a waiver of the stipulation for a previous or cotemporaneous *(sic)* payment of the first premium."

Plaintiff's evidence in this case, while contradictory, did not establish the defense of the defendant. The cases cited by

defendant to support its contention that the evidence did establish its defense are distinguishable. The questions of whether the premium was paid and whether the policy was delivered conditionally related to questions of fact to be resolved as other issues of fact. The trial judge found against the defendant.

There was ample evidence and stipulations to support the material findings by the trial judge that the $7.16 premium on the insurance policy was paid, that the policy was in effect at the time of the death of the insured on 27 November 1968, and that the defendant was indebted to the plaintiff in the sum of $4,000. The trial judge correctly denied the defendant's motion for dismissal under Rule 41(b).

Defendant's fifth assignment of error asserts that:

> "The court below erred in signing the judgment in this case for that the evidence is not sufficient to support the findings of fact or the conclusions of law set forth in the judgment or to support a judgment in favor of the plaintiff and against the defendant."

[6] This assignment of error attempts to present several propositions of law and could be held to be broadside and ineffective. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970). There is no exception appearing in the record to any specific finding of fact. However, the sufficiency of the evidence has been considered under other assignments of error.

[7] Exception number 5, upon which assignment of error number 5 is based, appears in the record after the signature to the judgment and can be considered only as an exception to the judgment. "An exception to the judgment does not present for review the findings of fact or the evidence on which they are based." 1 Strong, N.C. Index 2d, Appeal and Error, § 28. Furthermore, nothing appears in the record in connection with exception number 5 to indicate that it relates to any specific finding of fact. "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. This exception and assignment of error number 5, therefore, does not present the question of the insufficiency of the evidence to support the findings of fact.

In 1 Strong, N.C. Index 2d, Appeal and Error, § 28, the rule is stated:

" * * * However, an exception that the findings of fact are not sufficient to support the judgment presents for review the question whether the court's conclusions of law from the findings of fact are unwarranted or erroneous. And even when the exceptions to the findings of fact are too general to be effective, the appeal itself constitutes an exception to the judgment and raises the question of law whether the facts found support the judgment and whether error of law appears on the face of the record proper."

See also *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729 (1966).

We hold that no prejudicial error appears on the face of the record proper, that the material findings of fact are sufficient to support the conclusions of law, and that the findings of fact and conclusions of law support the judgment rendered.

Affirmed.

Judges PARKER and GRAHAM concur.

JACK R. MANESS v. FOWLER-JONES CONSTRUCTION COMPANY

No. 7121SC137

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 50— motion for directed verdict — motion for judgment notwithstanding verdict — consideration of evidence**

In passing upon defendant's motion for a directed verdict made under G.S. 1A-1, Rule 50(a), or for judgment notwithstanding the verdict made under G.S. 1A-1, Rule 50(b)(1), all the evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in his favor.

2. **Master and Servant § 18; Negligence § 2— personal injury to subcontractor's employee — action against contractor — tort**

Action for personal injuries sustained by an employee of a subcontractor when he fell through a duct opening in the second floor of a building being constructed by defendant contractor lies in tort, and defendant's contract for construction of the building merely furnished the occasion, or created the relationship which furnished the occasion, for the tort.

3. **Negligence § 2— performance of construction contract — due care**

The law imposed on defendant contractor the obligation to perform its construction contract with due care.

4. **Master and Servant § 18; Negligence § 53— subcontractor's employee — invitee — duty of prime contractor**

A subcontractor's employee working on construction of a building was an invitee on the premises, and the prime contractor owed him the duty of due care under all the circumstances.

5. **Master and Servant § 18— personal injury to employee of subcontractor — action against contractor — sufficiency of evidence of negligence**

In this action for personal injuries sustained by an employee of a subcontractor when he fell through a duct opening in the second floor of a building being constructed by defendant contractor, plaintiff's evidence was sufficient for the jury where it tended to show that defendant knew of the existence of the hole and that its existence constituted a hazard, that there was no notice or warning of the presence of the hole other than a loose sheet of plywood placed over it with aluminum bucks or sections of dismantled scaffolding piled on top, that such a sheet of plywood is often used as a scaffold platform, and that in dismantling a scaffold the plywood is placed on the floor and the scaffold is dismantled and placed on the plywood.

6. **Master and Servant § 18— personal injury to employee of subcontractor — action against contractor — contributory negligence**

In this action for personal injuries sustained by an employee of a subcontractor when he fell through a duct opening in the second floor of a building being constructed by defendant contractor, the evidence did not disclose contributory negligence as a matter of law on the part of plaintiff in undertaking to move a loose sheet of plywood with aluminum bucks piled on top which covered the hole in order to make room for movement of a scaffold on which an employee under plaintiff's supervision was working, notwithstanding plaintiff knew that it was frequently necessary to leave such holes in concrete floors during construction, plaintiff had examined the plans for the building which showed the hole, and plaintiff could possibly have followed other safer procedures in assisting his crewman.

APPEAL by defendant from *Crissman, J.*, 5 October 1970 Session of FORSYTH Superior Court.

Civil action for personal injuries sustained by plaintiff when he fell through a hole in the floor of a building being constructed by defendant. Defendant was the prime contractor and plaintiff was the working-supervisor for a subcontractor engaged in construction of the main base facilities and offices for Piedmont Airlines at Smith Reynolds Airport in Forsyth County. On the date of plaintiff's injuries the structural steel had been erected and concrete slabs for most of the floors had

been poured. Holes had been left in the floors for elevator shafts, stairs, heating and air conditioning ducts, plumbing and other utilities. The hole through which plaintiff fell was approximately 20 inches wide and 60 inches long and had been left in the second floor of the office portion of the building in order to accommodate a duct. The hole was covered by a sheet of plywood four feet by eight feet in size on which sections of dismantled aluminum scaffolding had been piled. Plaintiff and an employee under his supervision undertook to move the plywood and dismantled scaffolding to make room for movement of a movable scafford on which the employee was working. Plaintiff and his crewman stooped down, got their fingers under one end of the plywood, lifted it about knee high, and pushed the plywood and pile of scaffold sections forward. In doing so plaintiff made one step forward and fell through the hole some 23 feet to the concrete floor below, sustaining injuries.

Plaintiff alleged defendant was negligent: in failing to erect a barricade around the hole; in failing to nail the plywood to the floor to prevent its being moved by someone who did not know what was underneath; in permitting the plywood with the scaffolding sections to remain over the hole when defendant should have known this constituted a trap for workmen like plaintiff who were ignorant of the presence of the hole; in failing to provide sufficient supervisory personnel or to place signs to warn of the presence of the hole under the plywood; and in failing to provide plaintiff with a reasonably safe place in which to perform his subcontract responsibilities. Defendant denied negligence on its part and alleged it had covered the duct opening through which plaintiff fell with the plywood "and had piled aluminum bucks on top of the plywood to act as a warning and barrier to use of the plywood surface." Defendant alleged plaintiff's injuries were caused solely by his own negligence, in that: although he knew or should have known of the presence of the hole in the floor, he deliberately removed its covering and fell through the hole; "although he knew or should have known of the general custom and practice of covering holes in floors with plywood during construction," he negligently pulled the plywood loose from the hole and moved into the uncovered hole without taking easily available steps to ascertain the presence of the hole; he pushed the plywood in front of him in such a way as to block his vision; he left a position of safety on the concrete floor and walked

forward while his vision was blocked; and he deliberately chose an unsafe method of moving the aluminum bucks by pushing the plywood, instead of by pulling it or by removing the bucks and leaving the plywood in place over the hole.

The jury answered issues of negligence, contributory negligence, and damages in favor of the plaintiff, and from judgment on the verdict defendant appealed.

Hatfield, Allman & Hall by Roy G. Hall and Weston P. Hatfield; and DeLapp, Ward & Hedrick by Hiram H. Ward for plaintiff appellee.

Deal, Hutchins & Minor by John M. Minor and William K. Davis for defendant appellant.

PARKER, Judge.

In apt time at the close of plaintiff's evidence and again at the close of all evidence defendant moved for a directed verdict in its favor on the grounds (1) that the evidence was insufficient to establish actionable negligence of the defendant and (2) that the evidence established plaintiff's contributory negligence as a matter of law. Defendant also in apt time moved that the verdict be set aside and that judgment notwithstanding the verdict be entered in accordance with its prior motions for a directed verdict. The only assignments of error brought forward by this appeal are directed to the denial of these motions and to the signing and entry of the judgment.

[1] Our Supreme Court has held that a defendant's motion for a directed verdict in a jury trial made under Rule 50(a) of the Rules of Civil Procedure presents substantially the same question as was formerly presented by a motion for judgment of involuntary nonsuit under the statute formerly codified as G.S. 1-183 (which is now repealed) namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. See opinion of Bobbitt, C.J., in *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. In determining this question, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820.

The same test is to be applied in passing on a motion under Rule 50(b)(1) for judgment notwithstanding the verdict. *Horton v. Insurance Co.*, 9 N.C. App. 140, 175 S.E. 2d 725. Thus, the only questions presented by this appeal are whether, when the evidence is viewed in the manner above prescribed, it was sufficient to sustain a jury finding of actionable negligence on the part of the defendant, and if so, whether it so clearly established plaintiff's own negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn. While the evidence was conflicting on material matters, in our opinion it was such that opposing inferences could legitimately be drawn both on the question of defendant's actionable negligence and on the question of plaintiff's contributory negligence. This makes both issues matters which should properly be decided by the jury and we find no error in the trial court's denial of appellant's motions.

Appellant does not question that it owed to plaintiff a duty to exercise due care at the time when and with respect to the premises where plaintiff was injured. Appellant stipulated that it was the Contractor for construction of the building, having contracted with the Board of Commissioners of Forsyth County. The written contract, which was admitted in evidence, contained the following:

> "The Contractor shall take all precautions necessary for the safety of employees on the work and shall comply with all applicable provisions of Federal, State and Municipal safety laws and building codes to prevent accidents or injury to persons on, about, or adjacent to the premises where the work is being performed. The Contractor shall erect and properly maintain at all times as required by the conditions, progress of the work and the Architect-Engineer, all safeguards necessary for the protection of workmen and the public and shall post danger signs warning of hazards created by construction operations."

[2-4] Plaintiff's action in the present case lies in tort and defendant's contract for the construction of the building "merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort." *Toone v. Adams*, 262 N.C. 403, 137 S.E. 2d 132; *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893. The contract established defendant's control over the premises during the progress of construction and defendant's obligations with re-

spect thereto. The law imposed on defendant the obligation to perform its contract with due care. *Toone v. Adams, supra.* Plaintiff, an employee of a subcontractor working on the building, was an invitee on the premises. Defendant's duty to plaintiff, therefore, was one of due care under all the circumstances. *Spivey v. Wilcox Company,* 264 N.C. 387, 141 S.E. 2d 808.

[5] On the issue of defendant's actionable negligence, it is clear that defendant knew of the existence of the hole and that its existence constituted a hazard; defendant admitted in its answer that it "had covered a duct opening in the concrete slab of the second floor with a sheet of plywood and had piled aluminum bucks on top of the plywood to act as a warning and barrier to use of the plywood surface." Under the evidence it was for the jury to determine whether this was a sufficient precaution to fulfill defendant's obligation to use due care. While the evidence was in certain respects conflicting, it was such that the jury could legitimately find: that defendant had failed to nail or otherwise secure the plywood in place; that no notice or warning of the presence of the hole was posted and no barricade erected around it other than the loose sheet of plywood with the aluminum bucks or sections of dismantled scaffolding piled on top; and that these did not in themselves suggest the presence of the hole or the purpose which, according to defendant's answer, they were intended to serve. (There was evidence that a four by eight foot plywood sheet is at times used as a scaffold platform and that in dismantling a scaffold the plywood is first taken off and laid on the floor and the scaffold then dismantled and placed on the plywood, "[s]o that when it is completely disassembled everything [is] laying on top of the plywood to make a pile." Plaintiff himself testified he had seen the "window wall" men working on top of this same scaffold when it was erected.) Under these circumstances the plywood with its pile of scaffolding on top may well have constituted, as appellee now argues, more of a trap than a warning or protection against danger. In any event, under the evidence it was for the jury to determine if defendant failed to exercise due care with reference to the hole and if such failure was a proximate cause of plaintiff's injuries.

[6] On the issue of plaintiff's contributory negligence, while there was certainly evidence from which the jury could have found plaintiff negligent, in our opinion the evidence was not such as to compel that finding as a matter of law. While plaintiff

had had twenty-one years' experience in the construction industry and knew that it was frequently necessary that holes be left in concrete floors during the course of construction, the evidence in this case would not compel a finding that at the time he fell he knew or in the exercise of due care should have known of this particular hole. He had previously had occasion to examine plans for the building which showed this hole, but these were included in architects' drawings consisting of approximately 50 sheets, and the work on which plaintiff and the crew under his direction were engaged at the time of his injury did not at that time require his attention to be centered on the duct openings. His crewman had just completed work on the third floor and moved down to the second floor, and there was no similar hole or opening on the floor above. While, as appellant argues, there may have been other, safer, procedures which plaintiff could have followed in assisting his crewman, this would not as a matter of law require a holding that he was negligent in doing what he did. With reference to the issue of contributory negligence, as with the issue of negligence, we cannot say that only one conclusion can reasonably be drawn. Determination of both issues was properly for the jury. *Spivey v. Wilcox Company, supra.*

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

RUSSELL C. WALTON, JR., AND WIFE, MARGIE G. WALTON v. EZRA MEIR AND WIFE, VIOLET S. MEIR

No. 7110SC99

(Filed 31 March 1971)

1. **Highways and Cartways § 11; Judgments § 37— action to enjoin obstruction of neighborhood public road — plea of res judicata — former action to establish boundary line**

A judgment in a prior action establishing the correct boundary line between the plaintiffs' and the defendants' property did not bar the plaintiffs' subsequent action to enjoin the defendants from obstructing an alleged neighborhood public road that traversed land lying within the defendants' established boundary line, since the determination of the correct boundary line in the former action had no bearing on

whether the road in the instant action was a neighborhood public road accessible to the plaintiffs. G.S. 136-67.

2. **Highways and Cartways § 11— neighborhood public road — right of use by adjacent landowners**

Landowners whose property was traversed by a neighborhood public road could not interfere with adjacent landowners' legitimate use of the road, irrespective of the fact that the road was located on property that had been judicially determined to belong to the landowners.

3. **Judgments § 37— res judicata — conclusiveness of final judgment**

No question becomes *res judicata* until settled by final judgment.

4. **Judgments § 37— matters concluded by judgment — requisites**

A judgment is not conclusive as to matters neither joined nor embraced by the pleadings.

5. **Judgments § 37— matters concluded by final judgment — issues that could have been decided but were not**

The principle that a judgment is final both as to matters actually determined and as to matters that could have been litigated and decided does not require a defendant to counterclaim for affirmative relief that would have no effect on the relief sought by the plaintiff.

APPEAL by plaintiffs from *Hall, Superior Court Judge,* 5 November 1970 Session of WAKE County Superior Court.

In complaint filed 21 November 1969 plaintiffs (Waltons) allege that they and the defendants (Meirs) own contiguous tracts of land in Wake County; that a dirt road, commonly known as Trinity Road, leads from a North Carolina secondary road across land owned by the Meirs and to the Waltons' land and occupied dwelling; that the road has been in existence and used by the public for over seventy years and is a neighborhood public road within the meaning of G.S. 136-67; that in reliance upon the road as a neighborhood public road, the Waltons built a dwelling abutting the road; that the road furnishes necessary means of ingress and egress to the dwelling; and, that the Meirs have, by various means, obstructed the road. The complaint prays for an order requiring the Meirs to remove the obstructions and to place the road in the same condition as it was prior to 5 November 1969, and for an award of money damages.

Mr. and Mrs. Meir answered, denied the essential allegations of the complaint, and pleaded a judgment entered in a former case for these parties as *res judicata* and a bar to plaintiffs'

action. The plea of *res judicata* was heard before the case was calendared for trial. In support of the plea defendants introduced briefs and records filed in this Court in a case entitled *Ezra Meir and wife, Violet S. Meir v. Russell C. Walton, Jr., and wife, Margie G. Walton.* That lawsuit was instituted on 19 October 1967. Final judgment was entered on 26 March 1969. The judgment was modified and affirmed by this Court in an opinion by Vaughn, Judge, reported in 6 N.C. App. 415, 170 S.E. 2d 166.

In that action the Meirs' complaint alleged that a boundary dispute existed between the parties; that as a result thereof an agreement was entered 21 April 1966 wherein the parties agreed to recognize and be bound by a property line to be determined by a named registered surveyor; that the boundary line was established by the surveyor, but the Waltons refused to recognize it and to execute the necessary instruments to establish the line as located; that a 10-foot dirt path, which for a distance of several hundred feet is located solely on the Meirs' property, was being used by Mr. Walton despite demands that he refrain from doing so; that Mr. Walton damaged plaintiffs' property by destroying a part of a fence located across the path; and that he threatened Ezra Meir with bodily harm. In the prayer for relief the Meirs asked that a temporary restraining order issue against Mr. Walton forbidding him from going upon their property and using the portion of the dirt path located thereon; that the restraining order be continued pending the trial of the action; that the Waltons be ordered to recognize the boundary line as established by the arbitrator and to execute the necessary instruments to implement the arbitrator's conclusions with respect to the line; for money damages, costs and other relief as to the court may seem just and proper.

The complaint was served on 28 October 1967. On 21 November 1967 the Meirs' application for a temporary restraining order was heard. The court denied their request that the Waltons be restrained from using the 10-foot soil path and specifically ordered that the parties and their invitees be allowed to use the path pending a final determination of the action. However, Mr. Walton was restrained from otherwise interfering with the use by the Meirs of their property.

On 26 April 1968, after several extensions of time for answering had expired, judgment by default and inquiry was

entered upon motion by Mr. and Mrs. Meir. The Waltons moved to vacate the judgment and attached to their motion a verified answer in which they denied any right of the Meirs to have the property line determined as contended by the Meirs and requesting that the property line be established as alleged by them and that "the lower half of the public dirt road . . . be found to be the property of the defendant. . . . " Also attached to the Waltons' motion were various affidavits attesting to the fact that the "road" or "path" referred to in the pleadings was a public road. The motion to vacate was denied on the grounds the Waltons had failed to show excusable neglect or a meritorious defense. Upon appeal this Court (2 N.C. App. 578, 163 S.E. 2d 403) agreed that the Waltons had failed to show excusable neglect in failing to file an answer and in an opinion by Morris, Judge, stated, "In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial."

On 26 March 1969 final judgment was entered wherein it was ordered, adjudged and decreed that the boundary line shown on the map prepared by the surveyor was the correct boundary line, that the parties be restrained from going upon the property of the other parties, and that the Waltons be specifically restrained from using that portion of the dirt path located on the property of the Meirs.

The Waltons appealed. This Court affirmed the portion of the judgment establishing the boundary line, but vacated the portion thereof which permanently restrained either of the parties from going on the property of the other or using the path, on the ground the complaint disclosed no demand for a permanent restraining order. *Meir v. Walton,* 6 N.C. App. 415, 170 S.E. 2d 166.

At the conclusion of evidence in the case before us on the Meirs' plea in bar the court entered a judgment providing in pertinent part the following:

> "[T]he Court finding that this is an action to establish Trinity Road as a neighborhood road within the meaning of North Carolina General Statute 136-67 and for damages for obstructing said road; and it further appearing to the Court and the Court finding that in a prior action between the same parties, the question presented was title and possession of a certain tract of land which included the roadway

which is the subject matter of this action and that in that action, a default judgment was entered giving the defendants in this action title and possession of the land in question; and it further appearing to the Court and the Court finding that in a proposed answer, a series of affidavits, and a brief filed in the former action, the plaintiffs in this action raised the defenses which are set out as claims for relief in this action; wherefore, the Court concludes that the prior action between the parties hereto and the judgment entered therein is *res judicata* as to the issues sought to be raised in this action and is a bar thereto."

Plaintiffs excepted to the order and appealed.

Jordan, Morris and Hoke by John R. Jordan, Jr. and Robert P. Gruber for plaintiff appellants.

Manning, Fulton & Skinner by Howard E. Manning and John B. McMillan for defendant appellees.

GRAHAM, Judge.

[1] The sole question involved here is whether the judgment in the former action brought by the Meirs against the Waltons, wherein the correct boundary line between the parties' property was established, operates as a bar to this action by the Waltons to prohibit the obstruction of the portion of a 10-foot wide road, alleged to be a neighborhood public road, which runs across land which was established in the former action as belonging to the Meirs. We hold that it does not.

The trial judge and the parties have treated the alleged "road" in this case as identical to what was referred to in the former case as a "10-foot dirt path." For purposes of this opinion we also treat them as identical.

[2] The sole relief afforded the Meirs by the judgment entered in the former case, as modified upon appeal by this Court, was the establishment of the correct boundary line between the parties' property and the ordering of the execution of certain instruments by the parties with respect to that boundary line. Where the correct boundary line was located had no bearing on whether the road in question is a neighborhood public road within the meaning of G.S. 136-67. "In order for a party to be barred by the doctrine of *res judicata,* it is necessary not only

that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him." *Shaw v. Eaves,* 262 N.C. 656, 138 S.E. 2d 520. If the road in question is a neighborhood public road, the Meirs may not obstruct it or interfere with the Waltons' legitimate use of it, irrespective of the fact the road is located on property, which in the prior action was determined to belong to the Meirs.

[3, 4] The Meirs argue that the status of the road was presented in the former case in that their complaint alleged that Mr. Walton had destroyed a fence constructed across it, and that he continued to use the road after having been forbidden to do so. Further, the proposed answer alleged that the road was a public road and affidavits were presented by the Waltons to support this contention. However, damages for destruction of the fence were expressly waived before final judgment was entered, and therefore no issue was presented or passed upon with respect to Mr. Walton's right to destroy the fence or use the road. The right of the Meirs to forbid the Waltons from using the road was involved only in relation to their motion for a temporary restraining order. No question becomes *res judicata* until settled by final judgment. *In re Morris,* 224 N.C. 487, 31 S.E. 2d 539. Moreover, we note that the trial court refused to temporarily restrain the Waltons from using the road and specifically permitted its use by them and their invitees pending a trial of the matter. This Court held that a permanent injunction was not warranted by the complaint. Consequently, the former lawsuit narrowed to the simple question of where the property line was located. The issue of whether the Waltons, as members of the public, have a right to use the road has not been adjudicated. A judgment is not conclusive as to matters neither joined nor embraced by the pleadings. 5 Strong, N.C. Index 2d, Judgments, § 37, p. 76.

We note with more than passing interest that the Meirs formerly shared our view as to the issue involved in the previous action. While they now argue that "the precise issue of . . . the path . . . was raised in the former action," they stated in their brief which was filed in this Court in the former suit: "The sole question involved in this lawsuit relates to the location of the boundary line of the plaintiffs' property and the property of the defendant, Russell C. Walton, Jr. . . . "

[5] The Meirs contend that even if the issue now presented were not decided in the former case, it could have been raised there by the Waltons, and their failure to raise it operates as a bar to this action. We are not unaware of the well-settled principle that a judgment is final, not only as to matters actually determined, but as to every other matter which the parties might litigate in the cause, and which might have been decided. *Garner v. Garner,* 268 N.C. 664, 151 S.E. 2d 553; *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206; *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909; *Mason v. Highway Comm.,* 7 N.C. App. 644, 173 S.E. 2d 515. However, this principle simply means that a defendant must assert any defense that he has available, and that he will not be permitted in a later action to assert as an affirmative claim, a defense, which if asserted and proved as a defense in the former action, would have barred the judgment entered in plaintiffs' favor. It does not mean that a defendant must pursue as a counterclaim, affirmative relief that would have no effect on the relief sought by the plaintiff. The rule as to when a claim for relief must be pursued as a counterclaim is set forth in opinion by Justice Ervin in the case of *Cameron v. Cameron,* 235 N.C. 82, 86, 68 S.E. 2d 796, 799:

> "[T]he pendency of the prior action abates the subsequent action when, and only when, these two conditions concur: (1) The plaintiff in the second action can obtain the same relief by a counterclaim or cross demand in the prior action pending against him; and (2) a judgment on the merits in favor of the opposing party in the prior action will operate as a bar to the plaintiff's prosecution of the subsequent action."

For the reasons heretofore expressed we hold that the judgment entered in the prior action between these parties only established the location of the boundary line between the parties' property and did not determine or foreclose a future determination of whether the road in question is a neighborhood public road.

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

GENE BAKER v. INSURANCE COMPANY OF NORTH AMERICA

No. 7111SC84

(Filed 31 March 1971)

1. **Aviation § 1— federal regulation of aircraft**

Operation of aircraft in this country is governed by Federal law.

2. **Aviation § 3.5; Insurance § 147— aviation insurance — loss of plane — requirement that the pilot be "properly certified" — lack of medical certification**

A pilot who at the time of his airplane crash did not have in force a current medical certificate as required by the Federal Aviation Agency was not a "properly certificated" pilot within the meaning of an insurance policy providing coverage for the plane while it is being commanded by a properly certificated pilot; consequently, the pilot was properly denied recovery under the policy for the loss of the plane.

3. **Insurance § 3— policy as contract**

An insurance policy is a contract.

4. **Insurance § 147— aviation insurance — loss of plane — insurer's burden of proof**

The insurer of an airplane was not required to show any causal connection between the crash of the plane and the insured's breach of an exclusionary clause, where the language of the policy explicitly rendered such proof unnecessary.

APPEAL by plaintiff from *Bailey, J.*, 30 September 1970 Civil Session of HARNETT Superior Court.

Plaintiff seeks recovery under an aircraft insurance policy issued by defendant for loss incurred on 15 March 1969 when plaintiff's airplane crashed. The parties waived jury trial and submitted the case on agreed facts, which were in substance as follows:

Plaintiff obtained his private pilot's license in the late 1950's, since which time it has remained in full force and effect. In October 1966 plaintiff renewed his medical certificate, third class, which by its terms became void after 24 calendar months. Plaintiff, owner of a Maule M4 aircraft, insured his airplane with defendant under a policy which expired on 18 October 1968. On 10 January 1969, while plaintiff's medical certificate was expired, defendant issued to plaintiff a new policy of insurance on the aircraft on plaintiff's written application dated 8 January 1969, and plaintiff paid defendant the required pre-

mium for the policy. On 15 March 1969 the aircraft was damaged when plaintiff was piloting the same and was attempting to land. On the date of the crash plaintiff was apparently in good health, and thereafter, on 18 April 1969, plaintiff renewed his medical certificate.

The insurance policy provided, in a "Pilot Endorsement," that coverage provided by the policy for the aircraft described therein "shall not apply while such aircraft is in flight unless the pilot in command of the aircraft is properly certificated and rated for the flight and the aircraft." The parties stipulated that "[t]he only question to be determined is whether the lapsing of plaintiff's medical certificate excluded coverage of the defendant's policy to the plaintiff."

After hearing, the court entered judgment making findings of fact in conformity with the stipulation of the parties and concluding as a matter of law that at the time of the crash plaintiff was not properly certificated and rated for the flight in that he did not have a current medical certificate, that the exclusion in defendant's policy suspends application of the insurance while the aircraft was being piloted by someone who was not "properly certificated," and no coverage was afforded plaintiff by defendant's policy with respect to the crash of plaintiff's airplane on 15 March 1969.

From judgment dismissing plaintiff's action with prejudice, plaintiff appealed.

Bryan, Jones, Johnson, Hunter & Greene by James M. Johnson for plaintiff appellant.

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

PARKER, Judge.

[1, 2] Operation of aircraft in this country is governed by Federal law. Title 49 U.S.C., §§ 1301 *et seq.* By 49 U.S.C., § 1421, the Administrator of the Federal Aviation Agency is authorized to prescribe such reasonable rules and regulations, or minimum standards, as he may find necessary to provide adequately for safety in air commerce. By § 1422(a) the Administrator is empowered "to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen

in connection with aircraft." Pursuant to authority granted him by Congress, the Administrator has promulgated Federal Aviation Regulations. Part 61 of those Regulations (14 C.F.R., §§ 61.1 *et seq.)* prescribes the requirements for issuing certificates and ratings for aircraft pilots. Included in Part 61 is § 61.3, which contains the following:

> "§ 61.3 *Certificates and ratings required.*
>
> "(a) *Pilot certificate.* No person may act as a pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of U.S. registry unless he has in his personal possession a current pilot certificate issued to him under this part. . . .
>
> * * * * *
>
> "(c) *Medical certificate.* Except for glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under Part 67 of this chapter. . . . "

Part 67 of the Federal Aviation Regulations prescribes the medical standards and procedures for issuing medical certificates for airmen. Provision is made for examination of applicants by medical examiners under the supervision of the Federal Air Surgeon or his authorized representatives. Three classes of medical certificates are provided for. First-class medical certificates are valid for six months; second-class medical certificates are valid for twelve months; and third-class medical certificates are valid for twenty-four months. The reason for requiring periodical examination and certification as to continued physical fitness of airmen is apparent.

Even though plaintiff held a valid *pilot* certificate as referred to in subparagraph (a) of § 61.3 of the Federal Aviation Regulations quoted above, by the clear and express prohibition contained in subparagraph (c) of that section, *he could not lawfully act as pilot in command under that certificate,* since at the time of the crash he did not have the appropriate current medical certificate. Under these circumstances it is our opinion, and we so hold, that plaintiff cannot be considered to have been "properly certificated" at the time of the crash within the

meaning of those words as contained in the policy exclusionary endorsement.

[2-4] The fact that at the time of the crash plaintiff was in apparent good health and shortly thereafter was able to renew his medical certificate is not controlling. An insurance policy is a contract. In this one the parties expressly "agreed that coverage provided by this policy with respect to any aircraft specifically and individually described therein shall not apply while such aircraft is in flight unless the pilot in command of the aircraft is properly certificated. . . ." The clear meaning of this language is not that the risk is excluded if damage to the aircraft is *caused* by failure of the pilot to be properly certificated, but that risk is excluded if damage occurs *while* the aircraft is being flown by a pilot not properly certificated. Under such circumstances coverage under the policy simply did not exist, and it was not necessary for the insurer to show any causal connection between the breach of the exclusionary clause and the insured's loss. Our conclusion in this regard is supported by the decision in *Bruce v. Lumbermens Mutual Casualty Company,* 222 F. 2d 642 (4th Cir. 1955). In that case recovery was sought under an aircraft liability policy which excluded from coverage any liability for bodily injury to a passenger caused by operation of the aircraft "during flight . . . in violation of any government regulation for civil aviation." It was conceded that there was no causal connection between the death of plaintiff's intestate and the violation of government regulation shown. Judgment for the insurance company was affirmed nevertheless, the court saying (p. 645):

> "The second contention of the appellant, that the judgment must be reversed because no causal connection between the violation of the regulations and the accident was shown, must also be rejected. The clear meaning of the policy is not as the appellant suggests that the risk is excluded if the injury is caused by a violation of the regulations, but that the risk is excluded if the injury is caused by the operation of the plane *while* it is being used in violation of the regulation. It is established by the great preponderance of authority in the decisions of this and other courts that an insurer need not show a causal connection between the breach of an exclusion clause and the accident, if the terms of the policy are clear and unambiguous, since the rights of the insured flow from the contract of insurance and not from a claim arising in tort."

In *Underwriters at Lloyd's of London v. Cordova Airlines,* 283 F. 2d 659 (9th Cir. 1960) a policy of aircraft insurance was issued which excluded coverage for a loss "arising from . . . any flying in which a waiver . . . is required." The aircraft crashed while carrying dynamite, for which a waiver was required but was not obtained. The dynamite did not explode and its presence on the aircraft had nothing to do with the crash. The court held that verdict should have been directed for the insurer, since as a matter of law the insured's breach of the policy "suspended its coverage during the flight which resulted in the loss."

Two United States District Court cases relied on by plaintiff are distinguishable from the case before us. In *Royal Indemnity Co. v. John F. Cawrse Lumber Co.,* 245 F. Supp. 707, the policy provided that it applied to aircraft in flight only while being operated by a pilot holding a valid and current private or commercial *pilot* certificate, and the court held this language did not require that the pilot hold both a pilot certificate and a medical certificate; the policy in the case before us did not distinguish between the pilot certificate and the medical certificate, but required that the pilot be "properly certificated," which in our view necessitates both certificates. In *Insurance Co. of North America v. Butte Aero Sales & Serv.,* 243 F. Supp. 276, the policy was similar to the one involved in the present case except that it contained a second endorsement which excluded coverage unless the pilot was "Jack Elderkin or any other pilot who is properly certificated." The court held that the only logical construction is that the second endorsement was attached to the policy to make the insurance effective when Jack Elderkin was pilot in command, regardless of his certification or rating, but to require that others who might pilot the plane be properly certificated and rated. No similar second endorsement was attached to the policy in the case before us.

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

FIRST-CITIZENS BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF A. B. CURRIN v. HELLEN D. CURRIN CARR, BARBARA D. CURRIN SMETZER, AND CONTINGENT HEIRS-AT-LAW OF A. B. CURRIN, JR., DECEASED

No. 7111SC53

(Filed 31 March 1971)

1. **Parties § 3; Rules of Civil Procedure § 20— action to interpret testamentary trust — dismissal of action as to one trust beneficiary — harmless error**

In a trustee's action seeking an interpretation of a testamentary trust as to the manner and form of the distribution of land constituting the trust corpus to testator's wife and daughter upon termination of the trust, the daughter was a permissive and necessary party, and while the trial court erred in allowing the daughter's motion to dismiss the action as to her under G.S. 1A-1, Rule 41(b), such dismissal was not prejudicial to the wife. G.S. 1A-1, Rule 20.

2. **Appeal and Error § 47— burden of showing prejudicial error**

In order to have a judgment set aside, the appellant must show that a ruling complained of is erroneous, that it was material and prejudicial, and that a different result likely would have ensued if it had not been for the error.

3. **Trusts § 10— termination of trust — distribution of trust real estate — conveyance of undivided interests — construction of trust**

The trustee of a testamentary trust was authorized but not compelled under the terms of the trust to make an actual partition of lands comprising the trust corpus when, upon termination of the trust, it distributed a life estate in half the corpus to testator's wife and fee simple title in the other half to testator's daughter, and the trustee did not abuse its discretion in conveying undivided interests in the land to the wife and daughter.

4. **Trusts § 10— trustee's deed — sufficiency to convey interest conferred by trust**

Deed tendered by trustee of a testamentary trust to testator's wife was a sufficient conveyance of the interest conferred on her by the terms of the trust.

Judge GRAHAM dissents.

APPEAL by defendant Hellen D. Currin Carr from *Canaday, Superior Court Judge,* 1 August 1970 Session of Superior Court held in HARNETT County.

The facts necessary for an understanding of this appeal were stipulated as follows:

"1. First-Citizens Bank & Trust Company is a banking

corporation and is authorized to transact business as a fiduciary and trustee in the State of North Carolina.

2. Defendant Hellen D. Currin Carr is a citizen and resident of Harnett County, North Carolina.

3. Defendant Barbara D. Currin Smetzer is a citizen of the State of North Carolina.

4. Gerald Arnold is the duly appointed and acting Guardian *Ad Litem* of the contingent beneficiaries under the Last Will and Testament of A. B. Currin, Jr.

5. A. B. Currin, Jr., died on June 3, 1958, while a resident of the State of North Carolina.

6. 'Exhibit A' to the Complaint is a true and correct copy of the Last Will and Testament of A. B. Currin, Jr., Deceased, dated October 15, 1956, which was admitted for probate in the office of the Clerk of Superior Court of Harnett County, North Carolina as appears of record in Will Book 9, Page 245, on file in said Office.

7. First-Citizens Bank & Trust Company is the duly qualified executor of the Estate of A. B. Currin, Jr.

8. First-Citizens Bank & Trust Company is the duly qualified and acting trustee of the trust created under the provisions of the Last Will and Testament of A. B. Currin, Jr., Deceased, (which trust is referred to herein as the 'A. B. Currin Trust')

9. Defendant Hellen D. Currin Carr is the surviving spouse of A. B. Currin, Jr., Deceased.

10. Defendant Barbara D. Currin Smetzer is the surviving daughter of A. B. Currin, Jr., Deceased, and has reached the age of Thirty-five (35) years.

11. 'Exhibit B' to the Complaint is a true and correct copy of a Trustee's Deed, dated November 1, 1968, heretofore executed and delivered by First-Citizens Bank & Trust Company, as Trustee of the A. B. Currin Trust, to defendant Barbara D. Currin Smetzer. Such Trustee's Deed recites that it conveys to said defendant:

> '(A) one-half undivided interest in and to those certain tracts or parcels of land situate in Black River Town-

ship, Johnsonville Township, and Neill's Creek Township, Harnett County, North Carolina, and White Oak Township, Wake County, North Carolina' (Five tracts of land are specifically described).

And the said Trustee's Deed further recites:

'TO HAVE AND TO HOLD a one-half undivided interest in and to the aforesaid tracts or parcels of land together with all privileges and appurtenances thereunto belonging unto the party of the second part forever in as ample a manner as authorized by the terms of the Testamentary Trust established by the terms of the Last Will and Testament of A. B. Currin as it appears of record in Will Book 9, Page 245, in the Office of the Clerk of Superior Court of Harnett County.'

The said Trustee's Deed was accepted by the defendant Barbara D. Currin Smetzer.

12. 'Exhibit C' to the Complaint is a true and correct copy of a Bill of Sale, dated January 16, 1969, executed and delivered by First Citizens Bank & Trust Company, as Trustee of the A. B. Currin Trust, to defendant Barbara D. Currin Smetzer. Such Bill of Sale recites that the said Trustee quitclaims and conveys to Hellen D. Currin Carr and Barbara D. Currin Smetzer, as tenants in common, certain described farm machinery and equipment. The said Bill of Sale was accepted by the defendant Barbara D. Currin Smetzer. A separate Bill of Sale in form identical to that set forth under 'Exhibit C' to the Complaint was executed and tendered by the said Trustee to defendant Hellen D. Currin Carr and such tender was rejected by said defendant.

13. 'Exhibit D' to the Complaint is a true and correct copy of a Trustee's Deed, dated January 16, 1969, executed and tendered by First-Citizens Bank & Trust Company, as Trustee of the A. B. Currin Trust, to the defendant Hellen D. Currin Carr. Such Trustee's Deed recites that it conveys to said defendant:

'For and during the term of her natural life, but no longer, and upon her death to the heirs at law of A.B. Currin in fee simple absolute, a one-half undivided

> interest in and to those certain tracts or parcels of land situate in Black River Township, Johnsonville Township, and Neill's Creek Township, Harnett County, North Carolina, and White Oak Township, Wake County, North Carolina' (The five tracts of land identified in the Trustee's Deed to defendant Barbara D. Currin Smetzer are specifically identified).

Such Trustee's Deed further recites:

> 'TO HAVE AND TO HOLD a one-half undivided interest in and to the aforesaid tracts or parcels of land together with all privileges and appurtenances thereunto belonging unto the party of the second part for and during the term of her natural life, but no longer, and upon her death to the heirs at law of A. B. Currin in fee simple absolute in as ample a manner as authorized by the terms of the Testamentary Trust established by the terms of the Last Will and Testament of A. B. Currin as it appears of record in Will Book 9, Page 245, in the Office of the Clerk of Superior Court of Harnett County.'

The tender of said Trustee's Deed was, and all subsequent tenders of the said Trustee's Deed have been, rejected by the defendant Hellen D. Currin Carr.

14. The Defendant Hellen D. Currin Carr has made repeated demands of First-Citizens Bank & Trust Company, Trustee of the A. B. Currin Trust, that it make an actual partition and division of the five tracts of land described in the Trustee's Deed tendered by First-Citizens Bank & Trust Company, as Trustee under the A. B. Currin Trust, into two parts of equal value, and that the said Trustee execute and deliver to her a Trustee's Deed which would convey to her a life estate interest in the real estate allocated to one of such parts. The said Trustee has refused to make a partition or division of such real estate, and has further refused to execute and deliver to the defendant Hellen D. Currin Carr a Trustee's Deed for a life estate interest in any specific parcel or parcels of real estate owned by the A. B. Currin Trust.

15. Under the terms of the Last Will and Testament of A. B. Currin, Jr., deceased, it is provided that the A. B.

Currin Trust will terminate when the defendant Barbara D. Currin Smetzer becomes thirty-five (35) years of age. Under ITEM VIII First-Citizens Bank & Trust Company, as Trustee, shall distribute the trust property in accordance with the terms of the following provision:

> 'B. To my daughter, Barbara D. Currin, if she and my wife are both living upon the termination of this trust, one-half of said trust estate, absolutely and in fee simple, and the other one-half to my wife to be held and enjoyed by her as life tenant for and during the term of her natural life, but no longer, and upon her death the title to the property in which she has a life estate under the terms hereof shall pass to and vest in my heirs at law, absolutely and in fee simple, according to the North Carolina Statute of Descent and Distribution. It is my wish and desire (but my trustee shall not consider it mandatory) that my trustee shall, in distributing such trust assets between my wife and daughter, allot to my wife in her share as much of my real estate as my trustee shall deem practical and feasible and in no event shall the trustee allot to my wife less than one-half, in value, of the real estate then held in the trust estate.
>
> * * *
>
> 'D. In settling with any beneficiary hereunder the trustee may make such settlement in kind or in money, or partly in kind and partly in money. The trustee shall have the full power to determine the value of any property delivered to any beneficiary in making settlement of such beneficiary and the value of such property as fixed and determined by the trustee shall be conclusive and binding on all beneficiaries hereunder and shall not be subject to question by any person.'

16. At the termination of the A. B. Currin Trust on the date that Defendant Barbara D. Currin Smetzer reached the age of thirty-five (35) years, the five parcels of land described in the Trustee's Deed tendered to and rejected by the Defendant Hellen D. Currin Carr represented the corpus of said Trust.

The parties hereto, by and through their respective counsels of record, do hereby further stipulate that this cause be

construed as a petition for a declaration of rights under the Declaratory Judgment Act codified as General Statutes 1-253 regarding the interpretation of the Last Will and Testament of A. B. Currin, Jr., deceased, as to the duties and responsibilities of plaintiff First-Citizens Bank & Trust Company, as Trustee of the A. B. Currin Trust, in the manner and form of its distribution of the real estate owned by the said Trust to the defendants Hellen D. Currin Carr and Barbara D. Currin Smetzer.

And it is further stipulated that on the basis of the admissions in the pleadings, this Stipulation of counsel, and the argument of counsel, the Court shall be authorized to sign and enter an appropriate judgment thereon, out of term and out of the County and District in which this action is instituted.

It is understood and agreed that Barbara D. Currin Smetzer, by and through her attorney, W. A. Johnson, does not consent to the last two unnumbered paragraphs of Paragraph 16, but insists that the action as to her should be dismissed as prayed for in her answer."

After hearing the matter, Judge Canaday entered the following judgment:

"THIS CAUSE coming on to be heard before the Honorable Harry E. Canaday, on Saturday morning, August 1, 1970, by consent of all parties, and being heard upon the plaintiff's motion for summary judgment, upon the defendant's motion for summary judgment and upon stipulation of facts signed by counsel for all parties and it appearing to the Court and the Court finding as follows:

FACTS

The facts in this case are as set forth in the Stipulation of Facts entered into by all parties and filed of record on July 31, 1970 in the Office of the Clerk of Superior Court of Harnett County.

CONCLUSIONS OF LAW

1. That Item VIII B of the Last Will and Testament, which contains the Trust Agreement, does not require the trustee to make an actual partition of the lands held by the trust

between the surviving widow and the daughter of the testator. The testamentary trust only requires the trustee to convey an equal share to each beneficiary named in the trust agreement.

2. That the deed to Barbara D. Currin Smetzer, attached to the Complaint and marked Exhibit 'B', and the deed to Hellen D. Currin Carr, attached to the Complaint and marked Exhibit 'D', comply with all the terms of the Trust Agreement. The trustee has discharged its duty as to the real estate by the execution and delivery of the deeds to the beneficiaries named in Item VIII B of the Trust.

3. That the Bill of Sale for the personal property owned by the trust and purchased from the income of the trust should be distributed to Barbara D. Currin Smetzer and Hellen D. Currin Carr as tenants in common, each owning a one-half undivided interest; that the Bill of Sale attached to the Complaint, marked Exhibit 'C', is a proper instrument for the trustee to distribute the personal property owned by the trust.

4. That the trustee is entitled to record the deed heretofore tendered to Hellen D. Currin Carr and to forthwith proceed to disburse all of the assets of the trust estate and to file a final account terminating the trust.

IT IS THEREUPON ORDERED, ADJUDGED AND DECREED as follows:

1. First-Citizens Bank & Trust Company, Trustee under the will of A. B. Currin, shall forthwith record the deed to Hellen D. Currin Carr, copy of which is attached to the Complaint as Exhibit 'C', in the Register of Deeds Office of Harnett County.

2. That First-Citizens Bank & Trust Company, Trustee under the Will of A. B. Currin, shall immediately disburse all assets of the estate to the beneficiaries named in the trust and file its final account with the Court as provided by law.

3. That upon completion of its duties imposed by paragraphs 1 and 2 above the trustee shall be discharged from any further duties as trustee under trust established by the Last Will and Testament of A. B. Currin, deceased."

From the judgment entered, Mrs. Carr appealed.

Edgar R. Bain for plaintiff appellee.

Poyner, Geraghty, Hartsfield & Townsend by Arch E. Lynch, Jr., for defendant appellant, Hellen D. Currin Carr.

MALLARD, Chief Judge.

Upon motion of Barbara D. Currin Smetzer (Mrs. Smetzer), under Rule 41(b) of the Rules of Civil Procedure and after the hearing, Judge Canaday dismissed the action as to her with prejudice by order dated 1 August 1970 and filed 21 August 1970. Appellant, Hellen D. Currin Carr (Mrs. Carr), contends that this was error.

[1] The trust created under the terms of the last will and testament of A. B. Currin, Jr., was to terminate when Mrs. Smetzer reached 35 years of age. Mrs. Carr and Mrs. Smetzer (wife and daughter, respectively of A. B. Currin, Jr., deceased) were the main beneficiaries under the trust. It was alleged by plaintiff trustee and stipulated by the parties that Mrs. Smetzer had reached the age of 35 years. Questions of law and fact were raised by the complaint which were common to all of the named defendants. When the facts alleged and stipulated are considered together, a justiciable controversy is asserted between the parties. Rule 20 of the Rules of Civil Procedure. See also McIntosh, N. C. Practice 2d, § 650; *Haley v. Pickelsimer,* 261 N.C. 293, 134 S.E. 2d 697 (1964). When liberally construed, we hold that the complaint in this case alleges that Mrs. Smetzer's legal relation to the trust estate was involved and that she was a permissive and necessary party in this action seeking an interpretation of the testamentary trust involved herein. *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654 (1964); *Trust Co. v. Barnes,* 257 N.C. 274, 125 S.E. 2d 437 (1962); *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404 (1949). The trial judge committed error in allowing the motion of Mrs. Smetzer to dismiss the action as to her under Rule 41(b) of the Rules of Civil Procedure. However, Mrs. Smetzer did not and could not properly contend under the doctrine of invited error that the court committed error in granting her motion. 1 Strong, N. C. Index 2d, Appeal and Error, §§ 7, 52.

[1, 2] Mrs. Carr appealed and assigned this dismissal as error but in her brief does not indicate how this error on the part of

the trial judge was prejudicial to her. Judgments are not set aside for mere error. The appellant must show that the ruling complained of is erroneous, that it was material and prejudicial, and that a different result likely would have ensued if it had not been for the error. *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482 (1958). "The burden is upon appellant to show error amounting to a denial of some substantial right." *Rubber Company v. Distributors, Inc.,* 256 N.C. 561, 124 S.E. 2d 508 (1962). We hold that the error in dismissing the action as to Mrs. Smetzer was not prejudicial to Mrs. Carr.

[3] Mrs. Carr contends that under the trust the trustee was bound to make an actual partition in distribution of the five tracts of real estate comprising the trust corpus between Mrs. Carr and Mrs. Smetzer. In Item Five of the will, the powers and authority of the trustee were set out in detail. Subsection (n) of Section 1 of Item Five of the will is pertinent and reads as follows:

> "(n) To divide and allot the trust estate in accordance with the terms of this agreement either in kind or in money or partly in kind and partly in money and to *include undivided interests in the property so devised or allotted,* and the judgment of the Trustee concerning the relative values of the properties so divided or allotted shall be final and conclusive upon all persons interest in the trust estate." (Emphasis added.)

The trustee did not make an actual partition of the lands but included undivided interests in the property allotted. From the language used in the trust, we hold that the trustee was authorized but not compelled to make an actual partition. An abuse of discretion on the part of the trustee is not shown on this record. *Kuykendall v. Proctor,* 270 N.C. 510, 155 S.E. 2d 293 (1967); *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951).

[4] Mrs. Carr also contends that the deed tendered to her by the trustee was not a sufficient conveyance of the interest conferred by the terms of the trust. We do not agree.

The result is that the order dated 1 August 1970, filed 21 August 1970, allowing Mrs. Smetzer's motion to dismiss as to her is reversed, and the judgment herein dated 1 August 1970, filed 11 September 1970, is affirmed.

Affirmed.

Judge PARKER concurs.

Judge GRAHAM dissents.

FIRST-CITIZENS BANK AND TRUST COMPANY v. ACADEMIC ARCHIVES, INC.

No. 7110SC218

(Filed 31 March 1971)

1. **Uniform Commercial Code § 22— seller's remedies — insolvency of the buyer — recovery of goods sold — secured creditor's right in buyer's inventory**

Certain schools were not entitled to recover from an insolvent microfilming firm the bound volumes of periodicals that they had sold to the firm pursuant to a contract whereby the schools would receive microfilmed equivalents of the volumes in exchange for the bound volumes, the firm having failed to complete its delivery of the microfilmed volumes, where a secured creditor of the firm, upon the firm's default in the payment of its indebtedness, had timely intervened to protect its security interest in the inventory of the firm, which included the bound volumes. G.S. 25-2-702(2); G.S. 25-2-702(3).

2. **Uniform Commercial Code § 4— "good faith purchaser" — holder of perfected security interest**

The holder of a perfected security interest in after-acquired property qualifies as a "good faith purchaser" under the code. G.S. 25-1-201(19); G.S. 25-1-201(32), (33); G.S. 25-1-201(44)(b)(d).

3. **Uniform Commercial Code §§ 16, 22— seller's remedies — rights of secured creditor of buyer — buyer's transfer of voidable title**

The secured creditor of an insolvent microfilming firm had superior rights over certain schools in the firm's inventory, which included bound volumes of periodicals that the schools had delivered to the firm in exchange for the microfilmed equivalents of the volumes, notwithstanding the firm's title to the volumes might have been voidable as a result of the firm's misrepresentations to the schools concerning its solvency. G.S. 25-2-403(1)(d).

4. **Uniform Commercial Code § 70— secured transactions — classification of goods — inventory**

The "inventory" of a microfilming firm included bound periodical volumes that had been sold to it for microfilming. G.S. 25-9-109(4).

5. Uniform Commercial Code § 21— buyer's remedies — rights to the goods of an insolvent seller

In order for a buyer to recover goods which are in the possession of an insolvent seller, the seller must have become insolvent within ten days after the receipt of the first installment of the purchase price. G.S. 25-2-502(1).

APPEAL by claimant-intervenors from *Clark, J.*, 16 November 1970 Session, WAKE Superior Court.

This action was instituted by plaintiff to recover on a series of promissory notes executed by defendant (Archives) to plaintiff between 7 June 1968 and 19 February 1970, and for the appointment of a temporary and permanent receiver over Archives' assets. Plaintiff alleged that Archives was indebted to it in the sum of approximately $185,000 and that the indebtedness was past due. As security for the payment of the notes, plaintiff and Archives had entered into a security agreement whereby Archives granted plaintiff a security interest in "equipment, fixtures and furniture, all present and future inventory, products of debtor, present accounts receivable and all future accounts receivable." These items were described in a financing statement properly filed on 11 June 1968.

In addition to this suit, plaintiff, on another series of promissory notes, sued Micropress, Inc., a North Carolina corporation, (Micropress) which was commonly owned and managed from the same principal place of business in Raleigh as Archives. The security involved in the Micropress suit is not pertinent to a determination of this appeal.

Both actions were begun on 27 August 1970 and on the following day both defendant corporations were placed in temporary receiverships which were made permanent on 21 September 1970. Thereafter Augustana College, Sioux Falls, South Dakota; University of San Diego, San Diego, California; Westmar College, Le Mars, Iowa; and La Verne College, Pomona, California, filed motions and crossclaims in intervention. The motions were allowed and all claims were consolidated. These institutions alleged that they had been approached by a representative of Archives who made each a proposal whereby they would exchange certain bound volumes of periodicals for microfilmed equivalents of these volumes plus other periodicals reduced to microfilm to complete or enhance their library holdings.

The exchange plan was explained in a pamphlet which read in part as follows.

> *"Exchange Plan:*
>
> In order to acquaint you with Academic Archives Exchange Plan and to facilitate your taking the first step *now* towards alleviating your maintenance and storage problems, we will *without cost or charges to you,* consider exchanging your physical volumes of periodicals for their counterpart on microfilm. We will provide (upon request) the services of our experienced consultant to evaluate and recommend the most effective micro form apparatus for your personalized needs and possibly supply this equipment at a reduced cost to you—or at no cost."

The final agreement was reduced to a document prepared by Archives entitled "Proposal" which stated the number of volumes each college was to turn over to Archives and the number of microfilmed equivalents each was to receive. The dates of the agreement were from 9 March 1970 to 6 July 1970, and on or about those dates the volumes were turned over to Archives. The exchange agreement stated that "we hereby transfer unconditionally the above list of periodicals to Academic Archives, Inc." None of the schools reserved any security interest in the volumes nor requested a statement of solvency from Archives.

Subsequent to this transfer of volumes by claimant-intervenors they individually received anywhere from none of the promised microfilmed volumes to half of them, and in the crossclaim in intervention and motion for summary judgment they request return of the volumes given over to Archives.

In its consolidated Order and Judgment, the court found that there was no genuine issue as to any of the material facts, and that the facts were as stated above. It also made conclusions of law that the transfer of the volumes by each claimant-intervenor to Archives was a sale of goods; that title to the volumes passed to Archives upon their being turned over to it; that G.S. 25-2-702 was the section applicable to determination of the right of claimant-intervenors; that since time was allowed to Archives to make payment for the bound volumes Archives had received the volumes on credit; that no demand was made to reclaim the bound volumes within ten days after receipt by

Archives; that none of the writings tendered by Archives amounted to a written misrepresentation of solvency; that Archives had become insolvent prior to any attempted cancellation by any of the claimant-intervenors; that plaintiff is a secured creditor by virtue of its security agreement and financing statement and is a "good faith purchaser" whose rights to subject the goods formerly owned by the schools to a claim are superior to those of the schools. The court denied the claimant-intervenors the right to reclaim the volumes and left the cause open for further proceedings as to their respective damages. The claimant-intervenors appealed.

Hatch, Little, Bunn, Jones & Liggett by William P. Few for plaintiff appellee.

Allen, Steed and Pullen by Arch T. Allen III for claimant-intervenors, appellants.

BRITT, Judge.

The rights of the respective parties are determined by the provisions of the Uniform Commercial Code, Chapter 25 of the General Statutes of North Carolina.

[1] Appellants contend that under G.S. 25-2-703(f) they could cancel their agreement with Archives and reclaim their bound volumes and that it was error for the court to conclude that G.S. 25-2-702 was the applicable Code section. G.S. 25-2-703(f) is entitled "Seller's Remedies in General" and states that:

> "Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (section 25-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
>
> *
>
> (f) cancel."

G.S. 25-2-702(2) entitled "Sellers' Remedies on Discovery of Buyer's Insolvency" states that:

> "(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if

misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the 10 day limit does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay."

Official Comment 2, G.S. 25-1-106(2) states that "any right or obligation described in this Act is enforceable by court action, even though no remedy may be expressly provided, *unless a particular provision specifies a different and limited effect.* Whether specific performances or other equitable relief is available is determined not by this section but by *specific provisions* and by supplementary principles." (Emphasis added.)

Hawkland, a leading authority on the UCC, aids in the determination of the situation in which a seller who has already made delivery of the goods to the buyer seeks to recover the goods delivered.

> "Normally, after the seller has delivered the goods to an accepting buyer, the remedy is an action for the price, and it is too late to retrieve the goods. The remedy of reclamation is an exception to this rule. * * * Subsection 2-702(2) provides a remedy of reclamation for cases of fraud based on misrepresentation of solvency." 1 Hawkland, *A Transactional Guide to the Uniform Commercial Code,* § 1.60 at 299.

The exclusiveness of G.S. 25-2-702(2) is very clear when the last sentence of that section is read. "Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay."

[2] Appellants' contention is that Archives received their books at a time when it was insolvent and that Archives made written representations of solvency within three months prior to delivery of the books. Appellants are bound by the Code section under which their factual situation belongs and in this case that section is G.S. 25-2-702(2). A determination of whether the written proposals of exchange made by Archives to the various appellants was a misrepresentation of solvency is not necessary for the reason that even if the conditions to bring appellants within G.S. 25-2-702(2) were present, it is clear that the rights

of third parties have intervened to cut off their right to reclaim the property. G.S. 25-2-702(3) states that:

> "(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (Sec. 25-2-403). Successful reclamation of goods excludes all other remedies with respect to them."

It is evident from a reading of Sections (2) and (3) that the rights of certain people can intervene and cut off those of a seller who desires to reclaim his former property. It must be considered whether plaintiff's after acquired property clause in its security agreement results in its having priority over the seller of the goods in question. The favored category that plaintiff best fits is that of a "good faith purchaser." The good faith of plaintiff is not questioned by appellants; the Code describes "good faith" as "honesty in fact." G.S. 25-1-201(19). A "purchaser" is one who takes by purchase, and a "purchase" includes "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." G.S. 25-1-201(33) (32). To the extent that "value" is important as a concept necessary to determine whether one is a "good faith purchaser," it is clear that one gives value for rights if he acquires them "as security for or in total or partial satisfaction of a preexisting claim" or for "any consideration sufficient to support a simple contract." G.S. 25-1-201(44) (b) (d). Therefore, the holder of a perfected security interest in after acquired property qualifies as a "good faith purchaser" so far as the definitions go.

[3] Appellants' contention that plaintiff's security interest could not have attached because Archives did not have "rights in the collateral" is without merit. It is true that Archives might have had a voidable title, if it had made fraudulent representations of solvency, but one with voidable title can transfer better title than he had. G.S. 25-2-403(1) (d). Several commentators have also concluded that the holder of a perfected security interest in after acquired property was a "good faith purchaser" whose rights were superior to a seller of the after acquired goods under G.S. 25-2-702(2). *The Marriage Of Sales To Chattel Security In The Uniform Commercial Code: Massachusetts Variety,* 38 B.U. Law Review 571, 580-581; Hawkland, *A Transactional*

Guide To The Uniform Commercial Code, p. 304; *Selected Priority Problems In Secured Financing Under The Uniform Commercial Code,* 68 Yale L.J., 751, 758.

[4] Appellants' contention that the court erred in its conclusion that the bound volumes in question were "inventory" rather than "equipment" is also without merit. According to G.S. 25-9-109(4) goods are " 'inventory' if they are held by a person who holds them for sale or lease * * * or if they are raw materials, work in process or materials used or consumed in business. Inventory of a person is not to be classified as his equipment." Official Comment 3, G.S. 25-9-109 states that the principal test to be used to determine whether goods are "inventory" is whether or not they are held for *immediate or ultimate sale.* The parties to this action stipulated that Archives "engaged in the business of microfilming books, journals, records, and other like material and in buying and selling both microfilm records and printed material." It is manifestly clear that the bound volumes appellants sold to Archives are "inventory" in the hands of Archives.

[5] Appellants contend that they are "buyers" of the microfilm equivalents offered to be exchanged by Archives for the bound volumes and that as such they are entitled to recover any microfilm which was intended for them but which is now being held by the receiver. G.S. 25-2-502(1) is the applicable section and states that:

> "(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price."

In order for the buyer to be able to recover the goods which remain in the possession of the seller after the seller has become insolvent, the several elements of G.S. 25-2-502 must be present. One of these is that the seller must become insolvent within ten days after receipt of the first installment of the purchase price.

> "Presumably, the seller cannot become insolvent prior to the receipt of the first installment of the purchase price or

eleven days after receipt of the first installment of the purchase price or on the very date of its receipt. He has to become insolvent within the given ten day period. * * * The language of Section 2-502 is rather explicit on this point and does not leave much room for interpretation. That is why * * * this right is rather illusory as far as practical application is concerned." 3 *Benders Uniform Commercial Code Service,* Sec. 14.03(2) at 14-34.

In the case at bar the insolvency of the defendant occurred prior to the appellants' deliveries and not within ten days after delivery of the bound volumes; therefore, appellants cannot take advantage of the provisions of this section.

For the reasons stated the order and judgment appealed from is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND UNITED LIMESTONE PRODUCTS, INCORPORATED, APPLICANT v. KENAN TRANSPORT COMPANY, EAST COAST TRANSPORT COMPANY, INC., PETROLEUM TRANSPORTATION, INC., O'BOYLE TANK LINES, INC., EAGLE TRANSPORT CORPORATION, PROTESTANTS

No. 7110UC30

(Filed 31 March 1971)

1. **Utilities Commission § 3; Carriers § 2; Gas § 3— granting of contract carrier permit — delivery of LP gas — sufficiency of evidence**

The Utilities Commission properly granted a contract carrier permit to an applicant who sought to carry liquified petroleum gas in eastern North Carolina, notwithstanding the protest of existing carriers that they could make deliveries of LP gas in the same territory upon 12-to-24 hours' notice, where the applicant offered evidence that, during the peak demands of the tobacco curing season, the applicant's prospective customers needed deliveries of LP gas within 12 hours, oftentimes sooner; that it was the customers' experience that three out of ten deliveries by existing carriers would be late; and that the applicant's equipment would be devoted solely to meeting the needs of its customers. G.S. 62-262(i).

2. Carriers § 2— contract carrier permit — requisites

An applicant for a permit as a contract carrier must show that one or more shippers or passengers have a need for a specific type of service that is not otherwise available by existing means of transportation. G.S. 62-31.

3. Utilities Commission § 9— findings of fact

Findings of fact by the Utilities Commission are conclusive and binding when supported by competent, material, and substantial evidence in view of the entire record.

APPEAL by protestants from Order of North Carolina Utilities Commission entered 3 July 1970.

This proceeding was initiated by an application filed with the Commission by which applicant, United Limestone Products, Inc. (Limestone), seeks authority to transport liquefied petroleum gas (LPG) in bulk tank trucks as a contract carrier over irregular routes from a terminal at Apex, N. C., to the eastern North Carolina towns of Bridgeton, Pollocksville, Richlands, Jacksonville and Swansboro. A Protest and Motion for Intervention was filed by protestants all of whom are common carriers with authority to transport LPG in bulk in tank trucks in intrastate commerce in North Carolina.

In their Protest and Motion for Intervention, protestants alleged that the proposed service of Limestone did not conform with the definition of a contract carrier within the meaning of the North Carolina Public Utilities Act and the rules of the Utilities Commission in that the transportation requirements of LPG are not such as would require any special type of service or equipment not available through the protestants or any other authorized common carrier with LPG authority; that the proposed service of Limestone would unreasonably impair the efficient public service of the protestants and other existing common carriers of LPG and that the proposed contract carrier operation would be inconsistent with the public interest and the transportation policy as declared in the Public Utilities Act.

Pertinent evidence submitted at the hearing is summarized as follows: Five separate but commonly owned corporations (hereinafter called Jenkins Gas) are engaged in the business of buying and selling LPG in the areas of eastern North Carolina in which they are located, particularly the five towns named above. Most of the gas purchased and sold by these companies is transported by tank truck from the terminal facilities of the

major oil companies in Apex to the storage tanks owned by each of the five. At present Martin Transport (Martin), a common carrier, which owns one tank truck that is suitable for LPG transportation, uses it exclusively to carry the requirements of the five corporations except during the peak seasons. The major peak season is during July and August when tobacco is cured in the area served by Jenkins Gas. At such times other common carriers including rail have been used. Martin has decided to discontinue the business of hauling LPG. The principals of Jenkins Gas have incorporated Limestone, a separate corporation but having common stock ownership with that of Jenkins Gas, the primary purpose of which is to buy the truck of Martin and to enter into contracts with Jenkins Gas to carry their major LPG requirements. The same person who has been driving for Martin would be hired by and drive for Limestone.

There was testimony for Limestone showing that the offices of the five Jenkins Gas Corporations ranged in distances from 92 to 130 miles from the terminal at Apex where the gas was loaded onto the tank trucks; that the storage facilities at the various branches of Jenkins Gas varied in capacity and that in at least two locations the capacity was so small that during the peak seasons they required almost constant refilling; and that if propane gas was not available within a relatively short time at any of the five different locations the Jenkins Gas customers would go elsewhere. There was also evidence to indicate that on occasions as little as three to four hours notice would be all that could be given to a carrier to bring more gas. In addition it was stated that during the peak seasons, when other common carriers had been used, it was the experience of Jenkins Gas that three out of every ten loads of LPG carried by the common carriers other than Martin were late. Since competition in the area of the Jenkins Gas operation is very keen it is necessary for them to have a rapid refilling service assured, and Limestone felt that this service could not be provided by protestants. Martin had been hauling gas for Jenkins Gas exclusively, the Martin truck had been available to them at any time, and during the duration of this arrangement there had been no late deliveries.

Evidence for the protestants tended to show that they were common carriers authorized to carry LPG within the State of North Carolina; that several of protestants had carried gas for Jenkins Gas during the peak seasons; that the Jenkins Gas operation was very similar to that of certain other customers of

protestants. An officer of one of the protestants testified that it owned equipment designed to haul propane gas but that it could not keep such equipment utilized all year. There was testimony which indicated that protestants could haul gas to a customer within 12 to 24 hours after notice of a need for the gas was given. Service by the common carriers is on a first come first serve basis. One of the protestants indicated that it would like to enter into an arrangement with Jenkins Gas, allowed under the common carrier tariffs, whereby certain equipment would be "dedicated" exclusively to the use of Jenkins Gas. This service requires a minimum tender of $575 a week each week of the year regardless of whether gas hauling charges during the week equal that sum. If hauling charges exceed that amount in a given week then the shipper would pay the extra.

Both parties admitted that the business of hauling and selling LPG was very cyclical and one of the protestants stated that equipment which was necessary to handle demand for hauling it during the peak seasons was idle much of the year, because the equipment was unsuitable for other types of hauling. Protestants contended that the hauling of gas for Jenkins Gas was of a type that could be handled by a common carrier authorized to haul LPG.

The application for a contract carrier's permit was allowed and protestants appealed.

Everette L. Wooten, Jr., for United Limestone Products, Inc. plaintiff appellee.

Edward B. Hipp and William E. Anderson for North Carolina Utilities Commission, plaintiff appellee.

Allen, Steed & Pullen by Thomas W. Steed, Jr., for defendant appellants.

BRITT, Judge.

[1] Protestants contend that Limestone failed to meet the statutory criteria and the rules and regulations of the Utilities Commission in its application for a contract carrier permit. We disagree with the contention.

G.S. 62-262(i) sets forth the criteria to be used by the Utilities Commission in determining whether a permit is to be granted authorizing an applicant to operate as a contract car-

rier. This section states that the Commission shall give due consideration to:

"(1) Whether the proposed operations conform with the definition in this chapter of a contract carrier,

"(2) Whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, or rail carriers,

"(3) Whether the proposed service will unreasonably impair the use of the highways by the general public,

"(4) Whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier,

"(5) Whether the proposed operations will be consistent with the public interest and the policy declared in this chapter; and

"(6) Other matters tending to qualify or disqualify the applicant for a permit."

Rule R2-10 of the North Carolina Utilities Commission, adopted pursuant to G.S. 62-31, requires that the proposed service conform to the definition of a contract carrier as defined in G.S. 62-3(8) which states that a " 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation * * * by motor vehicle of persons or property in intrastate commerce for compensation * * * ." Rule R2-15(b) of the Commission provides as follows:

> "(b) 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 required; 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 services." (Emphasis added.)

[2] Under the quoted rule it appears that an applicant for a permit as a contract carrier must show that one or more

shippers or passengers have (1) a need for (2) a specific type of service and (3) that it is not otherwise available by existing means of transportation.

[1] There is sufficient evidence in the record to indicate that due to Jenkins Gas' shortage of storage space it needed a hauling service that could deliver LPG in less than 12 hours; that the equipment that Limestone contemplated buying from Martin was to be used solely for the benefit of Jenkins Gas thereby meeting the test for a specific type of service; and that from the testimony of a representative of protestants it was evident that protestants would be unable to make delivery to Jenkins Gas within the time period needed. It is apparent from the evidence which indicates the cyclical nature of the gas business that a "dedication" of certain equipment to Jenkins Gas' use by a common carrier is not the answer to its needs; under that arrangement Jenkins Gas would have to pay $575 a week for a service that it would be unable to use for a large part of the year. The use of "dedicated" equipment is not mandatory and does not preclude Limestone from complying with other provisions of the act and receiving a permit as a contract carrier. There was sufficient proof that "one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation." The Commission made the other statutory findings of fact necessary for the granting of the permit and the findings are supported by competent evidence.

Protestants strongly rely on the case of *Utilities Commission v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526 (1968). The case at hand is clearly distinguishable. In the cited case the applicant for a permit to operate as a contract carrier for a specified shipper offered no proof that the shipper had a need for a specific type of service not otherwise available by existing means of transportation; applicant's evidence showed that the only purpose in obtaining the permit was to increase the profits of the applicant; this court held that a finding by the Utilities Commission that the applicant met the test of a contract carrier was not supported by the evidence and the permit was improperly granted. In the case at hand the *need* for the specialized services by Limestone was shown.

[3] It is well established that the Commission's findings of fact are conclusive and binding when supported by competent, material, and substantial evidence in view of the entire record

as submitted. *Utilities Commission v. Carolina Coach Company*, 269 N.C. 717, 153 S.E. 2d 461 (1967). We hold that there was sufficient evidence to support the findings of the Utilities Commission in this case and the order appealed from is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

GLENN I. HODGE AND IDA N. HODGE v. FIRST ATLANTIC CORPORATION

No. 7110SC123

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 50— directed verdict for party having burden of proof**

A directed verdict in favor of the party upon whom rests the burden of proof is proper only when there is no conflict in the evidence, or when all the material facts are admitted by the adverse party.

2. **Usury § 6— construction loans — sufficiency of evidence to show that defendant was the lender**

In this action to recover the statutory penalty for usury allegedly paid on construction loans wherein defendant contended that it had merely acted as a broker for the actual lender, the evidence was sufficient to support a verdict finding that defendant was the lender in respect to the construction loans made to plaintiffs where it tended to show that plaintiffs believed defendant was the lender, that plaintiffs dealt only with defendant, that the promissory notes named defendant as payee and that the construction loan agreement referred to defendant as the lender. G.S. 24-2.

3. **Usury § 6— burden of proof**

Upon the trial of an action to recover for usury, the burden of proof is on plaintiff throughout the trial to establish his cause of action.

4. **Usury § 1— elements of usury**

The elements of usury are: (1) a loan or forbearance of money; (2) an understanding that the money loaned shall be returned; (3) payment or an agreement to pay a greater rate of interest than that allowed by law; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned.

5. **Usury § 6— "service charge" or "construction loan fee" — failure to show services not rendered for fee**

In this action to recover the statutory penalty for usury allegedly paid on construction loans, plaintiffs' evidence was insufficient to be

submitted to the jury on the issue of whether a one percent "service charge" or "construction loan fee" was part of the interest charged on the construction loans and was received with corrupt intent, where it failed to show that defendant did not in fact render services for the one percent fee.

6. Usury § 6 — "discount" or "points" on permanent loans — alleged usurious interest on construction loans — jury verdict in lender's favor

In an action to recover the statutory penalty for usury allegedly paid on construction loans, the evidence fully supported the jury's verdict answering negatively an issue as to whether a "discount" or "points" received by defendant mortgage company from plaintiff subdivision developers in connection with permanent loans on homes built by plaintiffs constituted part of the interest charged on the construction loans and was received by defendant with corrupt intent.

APPEAL by plaintiffs and defendant from *Clark, J.*, 21 September 1970 Regular Civil Session, WAKE Superior Court.

This is a civil action wherein plaintiffs seek to recover pursuant to G.S. 24-2 the penalty for usurious interest allegedly paid by them to defendant or its predecessor, Goodyear Mortgage Corporation (Goodyear), in connection with certain construction loans which they contend were made to them by Goodyear. The transactions in question were between plaintiffs and Goodyear; defendant is a successor corporation to Goodyear, assuming all of Goodyear's rights and liabilities. The allegedly usurious charges were denominated a "service charge" or "construction loan fee" and certain "discounts."

Evidence for the plaintiff pertinent to this appeal is summarized as follows: In about 1963 a representative of Goodyear approached the male plaintiff (Hodge) and discussed with him the possibility that interest free loans could be made to Hodge for the construction of residential housing. Hodge had previously built individual homes for sale but had never developed an entire subdivision. Hodge located a tract of land that was acceptable to Goodyear and the parties entered into an oral agreement to develop it. Hodge acquired the land, had the streets constructed, water and sewer lines installed, and began constructing homes in the spring of 1964. Thereafter, on 4 October 1965 Hodge entered into a written construction loan agreement with Goodyear wherein he agreed to pay interest at the rate of 6% per annum on the loan balance outstanding, all taxes, assessments, and charges against the premises, a service charge of 1% of the total amount to be advanced under each construction loan, and the actual costs incurred in connection with the making of construction

loans. He and Mrs. Hodge also signed a series of promissory notes (secured by deeds of trust) in connection with the construction loans, the dates of which range from 25 August 1964 to 2 September 1965, and which named Goodyear as payee. Hodge paid for the insurance on the homes under construction, the title examination fees, service fees, a funding fee, premiums for builder's risk insurance and certain discounts. All of these amounts were either paid for by Hodge directly or subtracted from various advances of the construction loan money. During his business association with Goodyear Hodge dealt only with Goodyear officials and understood Goodyear to be the lender of the construction money.

Plaintiffs introduced a deposition of W. E. Woollen, an officer of Goodyear, wherein he referred to Goodyear as a mortgage banking firm and explained the workings of mortgage banking with respect to construction loans and permanent loans. Woollen listed the various fees Hodge incurred in the construction of the homes which list corresponded to those items given by plaintiffs, and explained the relationship of Goodyear to Southeastern Mortgage Investors Trust (Southeastern). According to his testimony, Southeastern supplied the money by which Goodyear made the construction loans to Hodge and Goodyear was broker for Southeastern. He testified that various services were rendered plaintiffs by Goodyear's representative, Willard Croom, including inspection of subdivisions, inspection of houses under construction, and handling modifications where needed. Woollen also described the paper work performed by Goodyear in originating loans, and particularly construction loans. He testified that the service charge or construction loan fee would not compensate for the services rendered in connection with a construction loan by Goodyear; that they lost money on construction loans, their ultimate objective being to get the permanent loans which would be sold to investors and would be serviced at a profit by Goodyear.

Evidence for the defendant is summarized as follows: One or more representatives of Goodyear furnished services to Hodge in a number of respects. After Hodge obtained the land these representatives helped prepare the papers necessary to submit to the Veterans Administration and the Federal Housing Administration to obtain their agreement to back the loans; they (Goodyear's employees) helped to coordinate the activities of the various subcontractors; they inspected the homes under

construction to make sure they were being built according to requirements. "Discounts" or "points" were described as being the difference between the amount of a permanent loan and the amount that an investor would pay for it, this being determined by the prevailing market rates and was also effected by the financial condition of the home purchaser. The discount was never received by Goodyear but accrued to the benefit of the ultimate purchaser of the permanent loan note and deed of trust. Woollen testified that to the best of his knowledge there was only one specific instance in which Hodge came into contact with a representative of Southeastern.

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

"1. Was the defendant the lender in respect to the construction loans made to plaintiffs, as alleged in the Complaint?

ANSWER: Yes.

2. Was the 'service charge' or 'construction loan fee' received from plaintiffs by defendant a part of the interest charged on said construction loans and received by defendant with corrupt intent?

ANSWER: Yes.

3. Was the 'discount' received from plaintiffs by defendant a part of the interest charged on said construction loans and received by defendant with corrupt intent?

ANSWER: No."

Upon the return of the verdict, plaintiffs moved to set aside the verdict as to the third issue which motion was denied. The court also denied plaintiffs' motion for a new trial on the third issue. The defendant, having made timely motions for directed verdict, moved for judgment n.o.v. and in the alternative for a new trial on the first and second issues. The court granted the defendant's motion for judgment n.o.v. and from judgment dismissing the action plaintiffs appealed. The court made a conditional ruling denying defendant's alternate motion for a new trial, and defendant appealed therefrom.

John V. Hunter III for plaintiff appellants.

Fairley, Hamrick, Monteith & Cobb by James D. Monteith; Allen, Steed & Pullen by Thomas W. Steed, Jr.; and Jack T. Hamilton for defendant appellee.

BRITT, Judge.

[1] Plaintiffs assign as error the failure of the trial court to grant their motion for a directed verdict on all issues. The burden of proof on each of the issues was on plaintiffs. A directed verdict in favor of the party upon whom rests the burden of proof is proper when there is no conflict in the evidence and all the evidence tends to support his right to relief, or when all material facts are admitted by the adverse party. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961), *Smith v. Burleson,* 9 N.C. App. 611, 177 S.E. 2d 451 (1970). In the instant case, on no issue did all the evidence tend to support plaintiffs' right to relief, nor did defendant admit the facts as contended by plaintiffs. The assignment of error is overruled.

Plaintiffs assign as error the trial court's allowance of defendant's motion for judgment n.o.v. It will be noted that the jury answered the first and second issues in favor of plaintiffs and the third issue in favor of defendant, therefore, we will discuss each of the issues.

[2] We think the evidence was sufficient to support the verdict on the first issue. Among other things the evidence tended to show that plaintiffs believed that Goodyear was the lender of the construction money; plaintiffs dealt only with Goodyear, the promissory notes named Goodyear as payee and the construction loan agreement referred to Goodyear as the lender. While the jury verdict on the first issue is fully supported by the evidence, in order for plaintiffs to recover it is necessary that they prevail on at least one of the other issues.

[3-5] As to the second issue, we think the defendant's motion for directed verdict should have been allowed. Upon the trial of an action to recover for usury, the burden of proof is on the plaintiff throughout the trial to establish his cause of action. *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398 (1924). The elements of usury are: (1) A loan or forbearance of money; (2) an understanding that the money loaned shall be returned; (3) payment or an agreement to pay *a greater rate of interest* than

that allowed by law; and (4) a *corrupt intent* to take more than the legal rate for the use of the money loaned. *Henderson v. Finance Company,* 273 N.C. 253, 160 S.E. 2d 39 (1968), and cases therein cited. In the instant case, plaintiffs failed to show that defendant did not in fact render services for the one percent "service charge" or "construction loan fee."

[6] As to the third issue, it is not necessary for us to determine if the trial court was warranted in submitting it to the jury. Suffice to say, the answer to the third issue in defendant's favor was fully supported by the evidence.

Inasmuch as plaintiffs failed to make out their case on the second issue, and the jury on sufficient evidence answered the third issue against plaintiffs, we hold that judgment n.o.v. in defendant's favor was proper and the assignment of error relating thereto is overruled.

Plaintiffs assign as error the ruling by the trial court that a portion of plaintiffs' claim was barred by the two-year Statute of Limitations, G.S. 1-53(2). Due to our holding that the judgment n.o.v. in defendant's favor was proper, we deem it unnecessary to discuss this assignment of error as we perceive no prejudice to plaintiffs.

We have carefully considered the other assignments of error brought forward and argued in the briefs but finding each of them without merit, they are all overruled.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT BRONSON, ALIAS EARL WALLACE BATES

No. 7110SC132

(Filed 31 March 1971)

1. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

In passing upon a motion for nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference which may be legitimately drawn therefrom.

2. **Burglary and Unlawful Breakings § 2— felonious breaking and entering — elements of the offense**

Indictment properly charged the offense of felonious breaking or entering a building with intent to commit larceny therein. G.S. 14-54(a).

3. **Burglary and Unlawful Breakings § 2— nature of a felonious breaking or entering**

A felonious breaking or entering may consist of a mere pushing or pulling open of an unlocked door, or the raising or lowering of an unlocked window, or the opening of a locked door with a key.

4. **Burglary and Unlawful Breakings § 2— proof of intent**

The intent with which a defendant broke and entered, or entered, may be found by the jury from what he did within the building.

5. **Burglary and Unlawful Breakings § 5— felonious breaking or entering — sufficiency of evidence**

In a prosecution charging defendant with the breaking or entering of a tire company with intent to steal therefrom, the jury could reasonably infer that the defendant entered the building through the skylight with intent to commit larceny, where (1) the investigating officers found fresh footprints in the dew around the unlocked skylight, (2) all other doors and windows of the building were locked, (3) the defendant was discovered hiding under a desk inside the building, and (4) an automatic pistol was taken from the defendant's person.

6. **Larceny § 1— elements of felonious larceny**

The elements of felonious larceny are the taking and carrying away of the personal property of another without his consent, with felonious intent at the time of the taking to deprive the owner of his property and to appropriate it to the taker's use.

7. **Criminal Law § 2— proof of intent — what the jury may consider**

Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred; in determining the presence or absence of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged offense.

State v. Bronson

8. Larceny § 7— felonious larceny — sufficiency of the evidence

The State's evidence in a felonious larceny case was sufficient to be submitted to the jury.

9. Burglary and Unlawful Breakings § 5; Larceny § 7— proof of intent — evidence of defendant's intoxication

Evidence that the defendant was in an intoxicated condition at the time of his apprehension for felonious breaking or entering and larceny fell far short of a showing that defendant was so intoxicated that he was utterly unable to form the requisite intent of the crimes.

10. Criminal Law § 169— testimony that defendant was an escaped felon — harmless effect

An officer's testimony that defendant was an escaped felon at the time of his apprehension for larceny and for breaking or entering did not warrant mistrial in the prosecution for the two offenses, where the trial court promptly admonished the jury not to consider the improper testimony, and where there was ample competent evidence from which the jury could find the defendant guilty.

APPEAL by defendant from *Godwin, Judge of Superior Court,* 19 October 1970 Session, WAKE Superior Court.

Defendant was charged in a bill of indictment, proper in form, with (1) felonious breaking or entering, (2) felonious larceny, and (3) receiving. On defendant's pleas of not guilty he was placed upon trial only upon the first two counts.

State's evidence tended to show that at about 4:00 a.m. on Saturday, the 18th of April 1970, in response to a call that someone was in the H & H Tire Company building, two officers of the Raleigh Police Department went to investigate. They checked all of the outside doors and windows of the H & H Tire Company building and found them to be locked. They climbed the fire escape to the top of the building and observed freshly made footprints in the dew on the building roof. These footprints were around one of the skylights on the roof which the officers found to be closed but not latched or otherwise secured in a closed position. They raised the skylight, climbed down into the H & H Tire Company building, and found defendant hiding under a desk in the office. When asked what he was doing in the building, defendant said: "What does a thief do?" When the officers searched defendant they found upon him a brown wallet, one 25 cal. automatic pistol, two 12 ga. shotgun shells, several transistor radio batteries, and some keys. The State's evidence further tended to show that the above

enumerated items found on defendant's person were the property of H & H Tire Company. Defendant offered no evidence.

From verdicts of guilty of felonious breaking or entering, and guilty of felonious larceny, and judgments pronounced thereon, defendant appealed.

Attorney General Morgan by Trial Attorney Richmond for the State.

McDaniel & Fogel by L. Bruce McDaniel for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial court denied defendant's motion for nonsuit at the close of State's evidence. It is a well founded and long standing rule that in passing upon a motion for nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference which may be legitimately drawn therefrom. And, when so considered, if there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. *State v. Mayo,* 9 N.C. App. 49, 175 S.E. 2d 297.

[2-5] The elements of the offense charged in the first count are the breaking or entering of a building with intent to commit larceny therein. G.S. 14-54(a). The State is not required to offer evidence of damage to a door or window. A breaking or entering condemned by the statute may be shown to be a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. Either a breaking or an entering with the requisite intent is sufficient to constitute a violation of the statute. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297. The intent with which defendant broke and entered, or entered, may be found by the jury from what he did within the building. *State v. Tippett, supra.* The evidence of the fresh footprints in the dew around the skylight which was unlocked, the evidence that all other doors and windows were locked, and the evidence of defendant's location in the building are circumstances from which the jury might reasonably infer that defendant entered the building

through the skylight. The evidence of articles belonging to H & H Tire Company found on defendant's person would justify the jury in finding that defendant entered the building with intent to commit the crime of larceny.

[6-8] The elements of the offense charged in the second count are the taking and carrying away of the personal property of another without his consent, with felonious intent at the time of the taking to deprive the owner of his property and to appropriate it to the taker's use, the property having been so stolen from a building feloniously broken and entered, or entered. *State v. Brown, supra.* Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred. In determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense, *State v. Kendrick,* 9 N.C. App. 688, 177 S.E. 2d 345. Clearly the State's evidence was sufficient to withstand motion for nonsuit as to the second count.

[9] Defendant also argues that he was intoxicated to the extent he was unable to form the requisite intent of the first count or the second count. Intoxication which renders an offender *utterly unable* to form the required specific intent may be shown as a defense. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526. There was evidence from the State's witnesses on cross-examination that defendant was in an intoxicated condition at the time he was apprehended, but this evidence falls far short of a showing that defendant was in such an intoxicated condition that he was *utterly unable* to form the intent required in either the first or second count. Defendant's first assignment of error is overruled.

[10] Defendant next assigns as error that the trial judge denied his motion for mistrial which should have been ordered because of a statement made by one of State's witnesses. During the course of the direct examination of a State's witness the following occurred:

> "Q. How did you determine later that his name was Robert Bronson, if you did?

"A. Through fingerprints, it was later determined that his real name was Robert Bronson, and he was an escaped felon from New Hanover.

"OBJECTION; SUSTAINED.

"MOTION TO STRIKE ALLOWED.

"COURT: You ladies and gentlemen will ignore completely and banish from your minds and give no consideration to the statement of the officer that he learned that the defendant was an escaped felon. It has no part in this case, and you may not consider it.

"MR. MCDANIEL: Your Honor, I'd like to move for a new trial on that grounds. It's awfully hard to un-ring a bell. I appreciate the admonition of the court, and that's all the court can do, but you can't un-hear something and I'd like to move for mistrial.

"COURT: The motion is taken under advisement. We will reconsider the rule on it at a subsequent time."

It can be seen from the above that the trial judge promptly admonished the jurors not to consider the objectionable statement, and not to let it influence their decision. Immediately following this witness' testimony the State rested its case and the trial judge inquired of each individual juror if there was "the slightest question" in his or her mind regarding his or her "capacity to completely and absolutely disregard the officer's testimony" to which the objection had been sustained. To this inquiry each juror individually answered that he or she could disregard the officer's statement.

Ordinarily, when evidence is withdrawn by the court and the jury instructed not to consider it, any error in its admission is averted. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297. The power of the court to withdraw incompetent evidence and instruct the jury not to consider it has been recognized and approved for many years. The exception to this method of procedure is where it appears from the entire record that the prejudicial effect of the evidence was not or probably could not be removed from the minds of the jury by the court's instruction. *State v. Brown, supra.* However, in this case there was ample evidence, exclusive of that stricken, from which the jury could be satisfied beyond a reasonable doubt as to defend-

ant's guilt, therefore we perceive no prejudicial error in the refusal of the trial judge to order a mistrial. "On a trial for a felony below a capital offense, whether a judge will sustain a motion for a mistrial is ordinarily within his discretion." *State v. Brown, supra.* Defendant's second assignment of error is overruled.

Defendant next assigns as error four excerpts from the instructions given by the court to the jury. Defendant does not make it clear in what respect he contends these four portions of the instructions constitute prejudicial error. In any event, we have carefully reviewed the entire instructions and in our opinion the jury was clearly instructed upon the applicable principles of law. We find no error prejudicial to defendant. Defendant's third assignment of error is overruled.

Defendant's fourth, and final, assignment of error is formal, and, in view of what has heretofore been said, is overruled.

In our opinion defendant has been given a fair and impartial trial. To the credit of the Raleigh Police Department defendant was caught "red-handed."

No error.

Judges MORRIS and VAUGHN concur.

WAVON ATKINSON v. J. FELTON WILKERSON

No. 7111SC116

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 56— partial summary judgment**

The granting of plaintiff's motion for partial summary judgment was appropriate where it appeared from the items in support of the motion that the plaintiff was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56.

2. **Mines and Minerals § 1; Contracts § 27— contract to remove sand and minerals from land — action to declare contract null and void**

The trial court properly set aside, upon the motion of plaintiff landowner, a contract conveying to defendant the right to remove dirt, gravel, and minerals from the land described therein, where (1) the defendant gave no consideration for the contract; (2) the contract was silent as to time of performance; and (3) the defendant

regarded the contract as nothing more than a mining lease and royalty agreement and did not consider himself bound to regularly remove sand and minerals from the land.

3. **Contracts § 16— time of performance — silence of contract**

The silence of a contract as to the time of its performance will not by itself render the contract unenforceable.

4. **Contracts § 17— duration of contract**

Where the duration of a contract is not specified, it will continue for a reasonable time, taking into account the purposes of the parties, and is terminable at will by either party upon reasonable notice.

5. **Seals— action in equity — effect of sealed instrument**

In an action seeking equitable relief, the presence of a seal on the instrument in question does not prevent the court from looking behind the seal for the consideration.

APPEAL by defendant from *Bailey, Superior Court Judge,* September 1970 Session of JOHNSTON County General Court of Justice, Superior Court Division.

Plaintiff instituted this action against the defendant seeking a declaration that a purported contract giving the defendant the right to enter upon plaintiff's land and remove sand, dirt and gravel therefrom is null and void and that it should be stricken from the Johnston County Registry. Plaintiff also sought damages for the sand, dirt and gravel removed from his land.

Defendant's answer denied the material allegations of the plaintiff's complaint and contended that the agreement for the removal of the sand, dirt and gravel from the plaintiff's land was valid in all respects.

Plaintiff moved for partial summary judgment on the issue of the validity of the contract, and in support of the motion submitted the contract and answers of the defendant to interrogatories served upon the defendant by the plaintiff. The trial judge granted the motion for partial summary judgment, finding as a fact that no past consideration existed nor was any present consideration given by the defendant to the plaintiff at the time of execution, that the instrument is vague and indefinite as to time of performance, and that the instrument is vague and indefinite as to the area involved. He then concluded as a matter of law that the instrument was null and void and ordered it stricken from the Johnston County Registry.

From the granting of plaintiff's motion for partial summary judgment, the defendant appeals to this Court.

Britt and Ashley by Wallace Ashley, Jr., for defendant appellant.

L. Austin Stevens for plaintiff appellee.

CAMPBELL, Judge.

[1] Defendant's sole assignment of error is directed against the granting of plaintiff's motion for partial summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 56. Therefore, it must appear from the items submitted in support of plaintiff's motion for partial summary judgment that the plaintiff was entitled to judgment as a matter of law.

[2] The contract, which is the basis of this action, reads as follows:

"NORTH CAROLINA

JOHNSTON COUNTY

THIS deed, contract and agreement, made and entered into this the 29th day of September, 1966, by and between Wavon Atkinson and wife, Arletha M. Atkinson of Johnston County, North Carolina, parties of the first part, and J. Felton Wilkerson, of Person County, North Carolina, party of the second part;

WITNESSETH:

THAT parties of the first part have bargained and sold, and by these presents do bargain, sell and convey unto the party of the second part, his heirs and assigns, the right to mine, dig and remove all or any part of the soil, ore, gravel, sand, dirt or mineral situate on their land and property located in Selma Township, Johnston County, North Carolina, and adjoining the land of E. G. Hobbs and others, and fully described as follows:

BEING farm lot #6 in the subdivision of the Frances Green, Inc. farmlands in Selma Township, Johnston County, surveyed and platted by C. B. Fulghum, Surveyor, a plat of which is recorded in plat book 4, page 209, Registry of Johnston County.

SAVE AND EXCEPT one-half (½) acre tract deeded to W. Leon Williams, dated February 16, 1962, said deed being recorded in Book 600, page 527, and also less and except a one acre tract deeded to Oscar L. Newsome and wife, deed dated October 12, 1961, said deed being of record in Book 598, page 155, Registry of Johnston County, North Carolina.

But this conveyance is made subject to and together with the following provisions:

The party of the second part shall have the right of ingress and egress over any part of said tract of land for the purpose of digging and removing from said property any part or amount of the soil, gravel, sand, dirt, ore or mineral as he, the said party of the second part, may desire or wish to remove;

It is expressly understood and agreed between the parties that the parties of the first part shall not have any supervision or control over the party of the second part, his servants or employees, but that the party of the second part shall pay to the parties of the first part one-half, or 50% of the sale price of the soil, gravel, sand, dirt or mineral, said sale price to be figured for said materials as they are found on the land and in the pit and before they are moved from the site;

It is agreed between the parties that the party of the second part shall clear up an equal amount of land on another part of the said described land for any cropland taken up by new pits or for extending the present pit;

It is agreed between the parties that the party of the second part shall have the exclusive management for selling gravel, sand and top soil from the pits and the exclusive right to make new pits or extend the present pit boundaries;

It is expressly understood and agreed between the parties hereto that the parties of the first part do not have

any supervision or control of the party of the second part, his servants, or employees over the removal of said soil, ore, gravel, sand, dirt or mineral, and is only interested in the result of the party of the second part, and his employees and in being paid for said material in accordance with the terms of this agreement;

The party of the second part agrees that he will not commit any unnecessary waste in digging and removing said soil, ore, gravel, sand, dirt or materials, and will truly and faithfully perform all the conditions and terms of this contract according to the best of his ability and judgment;

TO HAVE AND TO HOLD said soil, ore, gravel, sand, dirt, or mineral, to him, the party of the second part and his heirs and assigns forever.

And the said parties of the first part covenant that they are seized of all things herein granted in fee and have the right to convey the same in fee simple, and that the same are free and clear of all encumbrances and that they will warrant and defend the title herein granted against the lawful claims of all persons whomsoever.

IN TESTIMONY WHEREOF, said parties of the first part have hereunto set their hands and seals, the day and year first above written.

/s/ X Wavon Atkinson (SEAL)

/s/ X Arletha Atkinson (SEAL)"

The instrument, on its face, appears to be a deed for the sand, dirt, gravel and mineral rights to the land described. But it is clear, from the complaint and the answers to the interrogatories served upon the defendant, that both parties considered the agreement to be nothing more than a mining lease and royalty agreement.

Defendant, in his answers to the interrogatories, states that he considers the instrument a mining lease and royalty agreement; that he paid no cash consideration to the plaintiff at the time of the execution of the instrument; and that at the time the instrument was signed he did not consider himself to be obligated to regularly mine and remove sand, gravel and other minerals from the land.

[3, 4] The instrument is silent as to time of performance, but this by itself will not render it unenforceable. Where the duration of a contract is not specified, it will continue for a reasonable time, taking into account the purposes of the parties, and is terminable at will by either party upon reasonable notice. *Hardee's v. Hicks,* 5 N.C. App. 595, 169 S.E. 2d 70 (1969); *Fulghum v. Selma,* 238 N.C. 100, 76 S.E. 2d 368 (1953).

[2, 5] But it also appears that no consideration was given for the contract. Defendant stated in the answers to interrogatories that he did not consider himself bound to regularly mine and remove the sand, gravel, and other minerals from the land. Further, he stated that he was the one who determined the price that the plaintiff was to receive for the minerals that were removed from the plaintiff's land. "Where there is no consideration for a contract, except the mutual promises of the parties, such promises must be *binding* on both parties. In such agreements, only a *binding promise* is sufficient consideration for a promise of the other party." (Emphasis added.) *Smith v. Barnes,* 236 N.C. 176, 72 S.E. 2d 216 (1952). This being an action seeking equitable relief the presence of a seal on the instrument does not prevent the court looking behind the seal for the consideration. *Cruthis v. Steele,* 259 N.C. 701, 131 S.E. 2d 344 (1963).

We hold that the evidence adduced through the pleadings and the answers to the interrogatories adequately support the findings of fact of Judge Bailey and that those findings of fact support the judgment entered.

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CHARLES RAY BERRYMAN, SAMUEL JONES, TERRY M. LUSE, HAROLD McRAE, JOHN RUTH AND JUDGE BUSTER BOBBITT

No. 7114SC102

(Filed 31 March 1971)

1. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

A defendant who offers no evidence in his behalf is entitled to have his motion for nonsuit passed upon on the basis of the facts in evidence when the State rested its case. G.S. 15-173.

2. **Robbery § 5— robbery of jailor — sufficiency of evidence**

In a prosecution charging that the defendant, together with his fellow cellmates, robbed a jailor of his money during a jailbreak, the State's evidence was sufficient to support a jury finding that the defendant was present and actively aiding and abetting a cellmate who removed the jailor's wallet from his pocket and carried it away, notwithstanding defendant's contention that the State failed to establish his intent to steal the money.

3. **Criminal Law § 9—aiding and abetting**

One who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator.

4. **Criminal Law § 166— the brief — abandonment of assignment of error**

An assignment of error not discussed in the brief is deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

APPEAL by defendant from *Fountain, J.*, 7 September 1970 Special Session of DURHAM Superior Court.

Defendant, Charles Ray Berryman, and five others, Samuel Jones, Terry Marshall Luse, Harold McRae, John Ruth, and Judge Buster Bobbitt, were jointly tried upon charges contained in two bills of indictment charging them with (1) armed robbery of J. M. Crabtree and (2) felonious assault upon J. M. Crabtree and upon E. H. McPherson. Defendant Berryman pleaded not guilty to both charges.

Witnesses for the State testified in substance as follows:

J. M. Crabtree, a jailor at the Durham County jail, testified on direct examination that about 9:00 a.m. on Saturday morning, 1 August 1970, he went to the cellblock where the six defendants were in custody, for the purpose of delivering a change of linen. He unlocked the door, and when he had opened it about twelve inches, defendant Berryman grabbed him by the arm and jerked him inside the cell. All six defendants jumped him, one holding

a knife under his throat and the rest twisting his arm behind him and gagging him. After he was gagged, two of the defendants took his keys, a ten-dollar bill, and a pocket knife from his front pocket and a billfold containing $535.00 from his back pocket. The defendants then led him, with his arms still twisted behind him and with the knife under his throat, down the steps to the door leading to the jailor's office. One of the defendants took his key and opened the door. Three of the defendants went into the office toward Mr. McPherson, while three remained with Crabtree, two holding his arms and one holding the knife. McPherson was sitting in a chair at his desk in front of the main door to the jail. All that Crabtree saw when the three defendants approached McPherson, was that McPherson fell out of his chair. Crabtree was told not to holler; that if he did, they were going to cut his head off.

On cross-examination Crabtree testified that he was not able to see which particular defendant laid hands on him but "all six had a hand in it, doing something." Jones took his pocketbook from his back pocket and Berryman took his keys and knife from his front pocket. Berryman laid the keys and knife on the bench or eating table and Crabtree did not see Berryman touch them after that. One of the defendants did pick up the knife and keys.

E. H. McPherson, a Durham County jailor, testified that sometime after 9:00 a.m. on 1 August 1970 he was sitting at his desk in the jailor's section of the jail when he heard a commotion. About then Ruth grabbed him from behind with his hand across his mouth. Luse had something (later determined to be a broom handle) in a pillowcase and was holding it like a gun. Luse said, "If you move, I'm going to blow your G.D. head off." Luse hit McPherson across the head and knocked him out of the chair. Jones had Mr. Crabtree's knife open and Luse told Jones to cut McPherson's "G.D. head off." While McPherson was lying on the floor, Jones struck at him twice with the knife. All six defendants then rushed out the door carrying Crabtree with them, still tied and gagged.

A. L. Parham, a detective for the Durham Police Department, testified that on the morning of 1 August 1970 he and another officer apprehended Jones in a house at 507 Mobile Street. They found Jones lying under a bed. They arrested him and on searching his person found Crabtree's knife in his right

front pocket and Crabtree's billfold with $535.00 in it in Jones' left rear pocket. They arrested Jones about thirty or forty-five minutes after the jailbreak.

At the close of the State's evidence, defendant's motion for nonsuit as to the charge of armed robbery was denied. Motion for nonsuit of the charge of felonious assault was allowed, and that charge was reduced to a charge of assault with a deadly weapon as to each victim.

The only defendant to testify was defendant Jones. Insofar as pertinent to this appeal, Jones testified that when he was upstairs and before he left the cellblock, defendant Berryman handed him Crabtree's pocketbook and knife. He denied having the knife open at any time he was in the jail and testified he did not know the knife was in with the wallet until he got on the outside.

Defendant Charles Ray Berryman did not testify and offered no evidence. His motions of nonsuit renewed at the close of all evidence were denied. The case was submitted to the jury on the charge of armed robbery of Crabtree and on the reduced charge of assault with a deadly weapon upon McPherson. (The charge of assault on Crabtree was included within the armed robbery charge.)

The jury returned verdict finding defendant Berryman guilty of common-law robbery and guilty of simple assault. (The verdicts and judgments as to the other defendants are not involved in this appeal.) On the verdict finding Berryman guilty of common-law robbery, judgment was imposed sentencing him to prison for a term of ten years, the sentence to commence at the expiration of a sentence which had been imposed in Superior Court of Durham County in case No. 70-Cr-10485 wherein defendant had been sentenced to seven to ten years for auto larceny. On the verdict finding Berryman guilty of simple assault, prayer for judgment was continued for two years.

Defendant Charles Ray Berryman appealed.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

Lina Lee S. Stout for defendant appellant.

PARKER, Judge.

[1] Appellant assigns no error with respect to his trial and conviction on the charge of simple assault. He does assign as error the denial of his motion for nonsuit in the robbery case. In this regard, appellant Berryman, not having offered evidence, is entitled to have his motion for nonsuit passed upon on the basis of the facts in evidence when the State rested its case. G.S. 15-173; *State v. Frazier* and *State v. Givens,* 268 N.C. 249, 150 S.E. 2d 431. Hence, we do not consider the testimony of the codefendant Jones to the effect that Berryman had handed Crabtree's pocketbook and knife to Jones.

[2, 3] Appellant's contention is that when the State's evidence alone is looked to, it is insufficient to support a jury finding as a fairly logical and legitimate deduction that defendant had any intent permanently to deprive Crabtree of any of his property and that the State therefore failed to introduce sufficient evidence from which the jury could legitimately find an intent to steal, which is one of the essential elements of the crime of robbery. In support of this contention, appellant points particularly to Crabtree's testimony to the effect that Berryman, after taking Crabtree's knife and keys from his pocket, placed these articles on the bench or table and that Crabtree did not thereafter see Berryman touch these articles.

It is elementary that in passing upon a motion for nonsuit in a criminal case the evidence must be considered by the court in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. When the State's evidence in the present case is so considered, the jury could legitimately find that Berryman was present and was actively aiding and abetting Jones when the latter removed Crabtree's wallet from his pocket and carried it away. "It is well settled that one who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator." *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63. There was no error in the denial of appellant's motion for nonsuit, and this assignment of error is overruled.

[4] The only other assignment of error noted in the record is directed to the trial court's denial of a motion "for further instruction regarding aiding and abetting." Appellant's brief contains no reason stated or authority cited in support of this as-

signment and it is deemed abandoned. Rule 28 of the Rules of Practice in the Court of Appeals. Nevertheless, we have carefully examined the entire record, including the instructions to the jury given by the able trial judge, and in the judgment appealed from we find

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM T. HUTSON

No. 719SC202

(Filed 31 March 1971)

1. **Criminal Law § 169— exclusion of testimony — failure of record to show witness' 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 he been permitted to testify.

2. **Criminal Law §§ 87, 88— defense witness — restrictions on direct examination — latitude on cross-examination**

Defendant's contention that the court erred in unduly restricting defendant's direct examination of a defense witness and in allowing the State too much latitude in cross-examination of the witness, *held* without merit.

3. **Criminal Law §§ 73, 169; Embezzlement § 5— exclusion of testimony as hearsay — harmless error**

In this prosecution for embezzlement of a hydraulic jack, the record justified the trial court's action in striking as hearsay testimony by defendant's wife that the jack had been held by defendant as security for a loan to the prosecuting witness, and the exclusion of such testimony was not prejudicial to defendant where defendant's wife was thereafter permitted to give similar testimony after she stated that she had heard the transaction over a telephone extension.

4. **Criminal Law § 102— exclusion of testimony — argument by defense counsel — failure to require retirement of jury**

The trial court did not err in failing to require the jury, at defense counsel's request, to retire while counsel addressed the court with reference to the court's action in striking as hearsay testimony by a defense witness.

5. **Embezzlement § 1; Bailment § 3— embezzlement by bailee — enactment of G.S. 14-168.1**

Enactment of G.S. 14-168.1, which makes fraudulent conversion or concealment by a bailee a misdemeanor, did not remove bailees from the provisions of the felonious embezzlement statute. G.S. 14-90.

6. **Statutes § 5— statutes in pari materia — construction**

Statutes in *pari materia* should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each, but if there is an irreconcilable conflict, the latest enactment will control or will be regarded as an exception to or qualification of the prior statute.

7. **Criminal Law § 114; Embezzlement § 6— instructions — expression of opinion**

The trial court did not express an opinion on the evidence when it instructed the jury that defendant was accused of embezzlement, which occurs when a bailee, "as in this case," rightfully receives property as bailee and fraudulently uses it for some purpose other than that for which he received it.

APPEAL by defendant from *Brewer, J.*, 2 October 1970 Session, VANCE Superior Court.

Defendant was charged with felonious embezzlement of a Heines & Warner hydraulic transmission jack valued at $180, the property of one Joseph K. Bowen. The offense was alleged to have occurred on 1 June 1970 and the indictment was pursuant to G.S. 14-90. Defendant pleaded not guilty and was represented at his trial by court appointed counsel.

Pertinent evidence for the State is summarized as follows: Bowen and defendant were auto mechanics in Henderson, N. C., and Bowen loaned the jack in question to defendant pursuant to a telephone call from defendant. Defendant's wife picked up the jack around 1 June 1970. Thereafter Bowen asked defendant to return the jack but defendant gave various excuses for not doing so. His last excuse was that the jack had been stolen. Bowen later found the jack at an auto parts place of business in another town and the owner of the business told Bowen that he bought the jack and a used air compressor from defendant for $115. Bowen had loaned the jack to defendant once before and denied borrowing money from defendant or that he owed defendant anything. The owner of the auto parts business testified that he knew the defendant and bought the jack in question from him on 25 May 1970 for $65 and also bought a used air compressor for $50.

Defendant's principal evidence was the testimony of his wife which is referred to in the opinion.

The jury returned a verdict of guilty and from an active prison sentence of not less than 12 nor more than 24 months, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Richard N. League for the State.

James C. Cooper, Jr. for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends that the court erred in excluding testimony offered by him to show the prior course of dealings between Bowen and defendant together with the debtor-creditor relationship between them. A review of the record discloses that the defendant's counsel asked his witness several questions, that the solicitor objected and the court sustained the objections, but the record failed to disclose what the answers would have been had the witness been allowed to answer. It is well settled in this jurisdiction that 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. 1 Strong, N.C. Index 2d, Assignment and Error, Sec. 49, p. 200, and cases therein cited. The assignment of error is overruled.

[2] By his second assignment of error defendant contends that the court erred in unduly restricting defendant's attorney in his direct examination, and allowing the State too much latitude in its cross-examination, of defendant's witness Faye Hutson. We find no merit in this contention. It is the duty of the court to supervise and control the trial to prevent injustice to either party, and in discharging that duty the court has large discretionary powers. 7 Strong, N.C. Index 2d, Trial, Sec. 9, pp. 266-267. A review of the record pertinent to this assignment fails to disclose an abuse of discretion on the part of the trial judge, therefore, the assignment of error is overruled.

[3] Defendant assigns as error the striking by the court of certain testimony given by defendant's wife. The record reveals that Mrs. Hutson on direct examination testified that she heard defendant and Bowen make an agreement regarding the jack;

that Bowen wanted to borrow $90 from defendant and agreed for defendant to hold the jack until the money was repaid; that she knew that defendant loaned the $90 to Bowen and he had never been repaid; that defendant made several requests of Bowen to repay the money and finally sold the jack after Bowen failed to repay. Following this testimony the record discloses:

> COURT: Now, the question he asked you was how you came about this knowledge relating to the agreement pertaining to the ninety dollars and the pawning of the jack.
>
> A. Well, William told me—
>
> EXCEPTION No. 37
>
> STATE OBJECTS, MOVES TO STRIKE IT ALL.
>
> COURT: The objection is sustained, the motion to strike is allowed. Members of the jury, you will disregard the statements made by this witness as relates to the testimony pertaining to any agreement or any knowledge relating to the ninety dollars or the purpose of the ninety dollars. It is hearsay and therefore, incompetent.
>
> EXCEPTION No. 38

The assignment of error is without merit. A review of Mrs. Hutson's testimony on direct examination and on cross-examination reveals many contradictions and we think the record justifies the trial judge's conclusion that her testimony above summarized was hearsay. Furthermore, immediately thereafter Mrs. Hutson testified that she overheard, by way of an extension, a telephone conversation between defendant and Bowen in which Bowen said he wanted to borrow $90 from defendant and agreed that defendant would hold the jack until the money was repaid. In reviewing the testimony in his charge to the jury, the trial judge fully summarized Mrs. Hutson's testimony relative to the telephone conversation. Even if the court improperly struck the initial testimony, we hold that the defendant was not prejudiced thereby.

[4] In connection with this assignment of error, defendant contends the trial judge erred in not requiring the jury, at defense counsel's request, to retire while counsel addressed the court with reference to striking the testimony aforementioned. As stated above, the court has wide discretion in the supervision

and control of the trial and defendant has shown no abuse of discretion in this instance. The assignment of error is overruled.

[5] Defendant assigns as error the failure of the court to allow his timely made motions for nonsuit, contending that he was charged with and tried for felonious embezzlement under G.S. 14-90 when at most he should have been charged with and tried for the offense created by G.S. 14-168.1. He contends that the effect of G.S. 14-168.1 is to remove bailee from G.S. 14-90 and make embezzlement or fraudulent conversion by a bailee a misdemeanor. We do not agree with this contention.

[6] The crime of embezzlement, unknown to the common law, was created and is defined by statute. *State v. Hill,* 91 N.C. 561 (1884); *State v. Ross,* 272 N.C. 67, 157 S.E. 2d 712 (1967). Our embezzlement statute, G.S. 14-90, has been amended many times and was amended by Chapter 31 of the 1941 Session Laws to include a bailee. G.S. 14-168.1 was enacted in 1965 and relates to fraudulent conversion or concealment by a bailee, lessee, tenant, lodger, or attorney in fact. Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are *in pari materia.* 82 C.J.S., Statutes, Sec. 366. Statutes *in pari materia,* although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each; but if there is an irreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute. 82 C.J.S., Statutes, Sec. 368; *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22 (1967); *State v. Baldwin,* 205 N.C. 174, 170 S.E. 645 (1933); *Utilities Commission v. Electric Membership Corp.,* 3 N.C. App. 309, 164 S.E. 2d 889 (1968). We do not think there is irreconcilable conflict between G.S. 14-90 and G.S. 14-168.1 as they relate to bailees. Among other things the later statute is more limited in its scope than the former statute; it appears to embrace a bailee "who fraudulently converts the same" to his own use, etc., while G.S. 14-90 covers the bailee who "shall embezzle or fraudulently, or knowlingly, and willfully misapply or convert to his own use," etc. In *State v. Foust,* 114 N.C. 842, 19 S.E. 275 (1894), it was held that the statute which is now G.S. 14-90 "renders it indictable to embezzle or fraudulently convert to one's own use; * * * that these acts are not necessarily and strictly synonymous * * * . [E]mbezzlement * * * is simply a

fraudulent breach of trust by misapplying the property entrusted to him to the use either of himself *or another,* when done with a fraudulent intent." (Emphasis added.) The State elected to indict the defendant in this case under G.S. 14-90, the broader statute, and in this we perceive no error. The assignment of error is overruled.

[7] Finally, the defendant assigns as error the following excerpt from the court's instructions to the jury:

> "So, I say to you, members of the jury, that the defendant has been accused of embezzlement, which occurs when a bailee, as in this case, rightfully receives property in his role as bailee, and then fraudulently and dishonestly uses it for some purpose other than that for which he received it.
>
> EXCEPTION NO. 70"

Defendant argues that the court expressed an opinion on the evidence thereby violating G.S. 1-180. We disagree. While the phrase "as in this case" might have been given an interpretation by the jury different from that intended by the court, we think this would be a strained interpretation. Furthermore, any tendency of the jury to have taken this as an expression of opinion should have been dispelled completely by an instruction of the court a few seconds later as follows:

> "Now, members of the jury, this court does not have an opinion as to what your verdict should or should not be, and any ruling that the court has made, or anything that the court has said in its charge, or any other phase of the duty of the presiding judge should not be considered by you as an expression of opinion as to what your verdict should or should not be, because the court has no opinion; and if it did, it would be improper for the court to express it."

We hold that any error in the instruction excepted to was completely cured by the quoted instruction which followed.

We have carefully considered all questions raised by defendant in his brief, but conclude that he received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

JOHN A. PENNY v. SEABOARD COAST LINE RAILROAD COMPANY

No. 7110SC169

(Filed 31 March 1971)

1. **Railroads § 5— railroad crossing accident — failure of train to give timely warning — sufficiency of evidence**

In a truck passenger's action to recover for personal injuries sustained in a railroad crossing accident, the passenger's testimony that as the truck approached the crossing he looked to the left and right but did not see or hear the train until the truck was on the tracks, *held* sufficient to support a jury finding that the railroad was negligent in failing to give timely and reasonable warning of the train's approach.

2. **Railroads § 5; Appeal and Error § 50— instructions in crossing accident case — assumption that crossing was obstructed — reversible error**

Trial court's instructions which assumed, in the absence of any supporting evidence in the record, that a railroad crossing was obstructed by an embankment, trees, and shrubbery, *held* reversible error.

3. **Evidence § 3— judicial notice — width of railroad right-of-way**

The court cannot take judicial notice of the width of a railroad right-of-way.

APPEAL by defendant from *Clark, J.*, at the 2 October 1970 Regular Civil Session, WAKE Superior Court.

This cause arose as the result of a collision between a beer truck owned by a Raleigh wholesaler in which plaintiff was riding as a passenger, and a train owned and operated by defendant. The collision occurred at the grade crossing of the tracks of said railroad and Highway 2044 approximately three miles south of Wake Forest. The highway runs generally east-west and the track northeast-southwest.

Plaintiff's evidence pertinent to this appeal tended to show: At approximately 12:30 p.m. on 31 December 1968, plaintiff and his brother, Charles Penny (Charles), who was driving the beer truck, were traveling west on Highway 2044 looking for a store that they were to call on. Both men worked for the owner of the truck and Charles was a regular route salesman. Plaintiff was riding with Charles as a helper and to learn the route. A few minutes before the collision the truck crossed the crossing in question and proceeded on past it for some 200 yards. Charles, then re-

calling where the store was, turned the truck around and proceeded eastward back toward the track. The day was cold, rainy and hazy and there were no electric signals at the crossing. As the truck approached the track the heater and defroster were running, the windshield wipers were operating, and the falling rain made a light noise as it struck the metal roof of the cab. Charles testified that there were trees all around the crossing and there were embankments on both sides of the road; that there was an embankment to his right in the direction that the train came from (south); that there were bushes, weeds, and trees growing on the embankment. As the front wheels of the truck crossed the nearest rail plaintiff yelled "there he is" and at that time the driver heard the train whistle and saw the train a short distance from the truck. The train hit the truck behind the cab in which the men were riding. Charles testified that as he approached the track he was traveling about five m.p.h., that he looked to the right and left, and continued to look to the right and left, but saw no train and heard no signal until the truck was on the tracks. Plaintiff testified that as they approached the track, he looked to the left and right but did not see the train or hear it until the truck was on the track; that the glass in the right door of the truck was down approximately one inch.

Evidence for the defendant tended to show: The train involved in the collision was a freight train and consisted of 115 cars and 3 diesel engines. Engineer Davis testified that the grade running from the Neuse River (some distance south of the crossing) to Wake Forest was an upgrade which had the effect of making the engine pull harder and make more noise; that as the train approached the crossing, he gave the required road-crossing signal of two longs, one short and a long; that the headlight was on and could be seen for a distance of at least 1500 feet under the conditions that existed on that day. As the train approached the crossing it was going approximately 45 m.p.h and when Davis first saw the truck both it and the train were 45 feet from the crossing and going about the same speed. At that time Davis set the emergency brake and the train stopped about 30 car lengths past the point of impact.

Issues of negligence, contributory negligence and amount of damage were submitted to and answered by the jury in favor of plaintiff. At the proper time defendant made motions for

directed verdict and judgment n.o.v. which were denied. From judgment in favor of plaintiff, defendant appealed.

McDaniel and Fogel by L. Bruce McDaniel for plaintiff appellee.

Maupin, Taylor & Ellis by William W. Taylor, Jr. for defendant appellant.

BRITT, Judge.

[1] In its first assignment of error, defendant contends that the trial court erred in refusing to grant defendant's motion for a directed verdict at the close of all the evidence and in refusing to grant defendant's motion for judgment notwithstanding the verdict or its alternative motion for a new trial for the reason that the evidence offered by plaintiff was not sufficient to be submitted to the jury on the question of defendant's negligence. Suffice to say, we think plaintiff's evidence of defendant's negligence when considered in the light most favorable to him was sufficient to be considered by the jury. *Brown v. R. R. Company,* and *Phillips v. R. R. Company,* 276 N.C. 398, 172 S.E. 2d 502 (1970). The assignment of error is overruled.

[2] In its second assignment of error, defendant contends that the trial court erred in its jury instructions to the effect that there were obstructions on defendant's right-of-way south of the crossing. In summarizing plaintiff's testimony, the court said:

> "That there was an embankment on the right-of-way consisting of dirt and rock; and there was shrubbery about waist high on the top of the embankment; that there were woods along the side of the railroad track right-of-way; that these were average North Carolina woods or trees."

Again, in that part of the charge on the issue of contributory negligence of plaintiff, the court said:

> "The evidence in this case tends to show that the time of the collision was about noon or thereabouts; that there was a drizzling rain; that there was [*sic*] some obstructions along the right-of-way of the railroad track and the highway, such as an embankment along the track and trees and bushes along the track and highway at the southwest corner of the intersection."

[2, 3] A review of the record discloses no evidence that an embankment, trees, shrubbery or other obstruction was on defendant's right-of-way and this court cannot take judicial notice as to the width of the right-of-way.

In *Supply Co. v. Rozzell,* 235 N.C. 631, 70 S.E. 2d 677 (1952), our Supreme Court said: "The applicable rule of law is, while an inaccurate statement of facts contained in the evidence should be called to the attention of the court in order that the error might be corrected, a statement of a material fact not shown in the evidence constitutes reversible error. (Citations)" In the case of *In re Will of Atkinson,* 225 N.C. 526, 35 S.E. 2d 638 (1945), the court said: "When the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, there is prejudicial error."

In 5A C.J.S., Appeal and Error, § 1766, pp. 1228-29, it is said: "Ordinarily the assumption of a material fact where the evidence with regard to it is conflicting, or where it is unsupported by any evidence, will constitute ground for reversal. * * * An instruction is erroneous and requires reversal where it is likely to mislead the jury into believing that the court had heard and remembered testimony during the trial which they had forgotten."

We hold that the court's charge regarding obstructions on the right-of-way was erroneous and we cannot assume that the erroneous instructions did not influence the jury's decision on the first or second issue. It is true that on the issue of negligence plaintiff was relying primarily if not entirely on the failure of defendant to give reasonable and timely warning as its train approached the crossing; but we think the quoted portions of the charge had the tendency to bolster the plaintiff's contentions of negligence. In like manner, on the issue of contributory negligence, we think plaintiff's contentions on that issue were bolstered by the erroneous instructions. We are aware of the line of cases which hold that the duty of the engineer of a train approaching an obstructed highway crossing to give reasonable and timely warning of the approach of the train to the crossing is the same whether the obstructions were erected or allowed by the railroad or someone else. *Brown v. R. R. Company, supra; Cox v. Gallamore,* 267 N.C. 537, 148 S.E. 2d 616 (1966); *May v. Southern Ry. Company,* 259 N.C. 43, 129 S.E. 2d 624 (1963).

We do not hold that plaintiff's case is fatally defective because he failed to introduce evidence showing that the obstructions referred to in the charge were on the railroad right-of-way; we do hold that the challenged instructions, unsupported by any evidence, were erroneous and provided strength to plaintiff's case to the prejudice of defendant. The assignment of error is sustained, entitling defendant to a new trial.

We refrain from discussing the other assignments of error brought forward in defendant's brief as they might not arise upon a retrial of this case.

New trial.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. L. C. BEASLEY

No. 7111SC154

(Filed 31 March 1971)

1. **Criminal Law § 76— admissibility of confession — voir dire — findings of fact**

Where there is no conflict in the evidence presented at a *voir dire* hearing on the admissibility of a confession, it is not essential that the trial court make specific findings of fact, although it is desirable that it do so.

2. **Criminal Law § 75— admissibility of confession — intoxication of defendant at the time of confession**

The mere fact that defendant was intoxicated when he made incriminating statements to an investigating officer does not render the statements inadmissible on trial.

3. **Criminal Law § 75— inapplicability of Miranda warnings — automobile accident scene**

The requirement that a defendant be advised of his *Miranda* rights would seem to be inapplicable in a case where an officer was investigating a motorist who had driven his car into a ditch and who appeared to be under the influence of intoxicating liquor.

4. **Automobiles § 127 — drunken driving prosecution — issue of defendant's guilt — sufficiency of evidence**

Issue of defendant's guilt of driving under the influence of intoxicating liquors was properly submitted to the jury where (1) the

results of a breathalyzer test showed that defendant had a blood alcohol content of .14, (2) the investigating officers stated that they were of the opinion that defendant was under the influence, and (3) defendant stated that he had had three or four beers.

5. **Automobiles § 129— drunken driving prosecution — prejudicial instruction — misleading use of the word "presumption"**

In a drunken driving prosecution, the trial court's instruction that defendant's performance on the breathalyzer test showed a blood alcohol content of .14, "some forty (40) percent higher than the *presumption required*," *held* reversible error, since the jury might have understood that the test results raised a presumption which the defendant had the burden to rebut. G.S. 20-139.1.

6. **Automobiles § 129— drunken driving prosecution — prejudicial instruction**

In a drunken driving prosecution, the trial court's instruction that a defendant is under the influence of intoxicants "if he is abnormal in any degree from the consumption of intoxicants," *held* reversible error.

APPEAL by defendant from *Bailey, Superior Court Judge,* 19 October 1970 Session, JOHNSTON County Superior Court.

Defendant was charged on a North Carolina Uniform Traffic Ticket with the offense of driving under the influence of intoxicating liquor. He was tried in superior court on appeal from a conviction in the district court. The defendant entered a plea of not guilty. The jury returned a verdict of guilty, and defendant was given a 30-day active sentence.

Defendant was arrested about 1:05 a.m. on 29 November 1969, by Trooper H. M. Bullock of the North Carolina State Highway Patrol. Defendant was sitting behind the wheel of his 1966 Chevrolet on the shoulder of the road when Trooper Bullock first saw him. "He was attempting to get a 1966 Chevrolet out of the ditch. The engine was running and the lights were on. Both back wheels were in the ditch and he was behind the wheel, spinning the tires . . ." Trooper Bullock testified that defendant told him that he had been attempting to turn around and that he missed the driveway where he was attempting to make the turn and went into the ditch. The officer also testified that defendant told him he had "three (3) or four (4) beers at the Tavern, starting about 5 o'clock." The officer testified that "the defendant was cooperative and polite, answered all questions and gave me no trouble. He swayed and staggered when he walked and had the odor of some intoxicating beverage."

Defendant was given various tests of coordination and did poorly on these. He was given a breathalyzer test and the results showed a blood alcohol content of .14. Both Trooper Bullock and the officer who administered the breathalyzer test testified that they felt that defendant was "under the influence."

Defendant did not put on any evidence.

Attorney General Morgan by Assistant Attorneys General Melvin and Costen for the State.

T. Yates Dobson, Jr., for defendant appellant.

MORRIS, Judge.

Defendant's first assignment of error is that the court erred in overruling defendant's objection to the testimony of Trooper H. M. Bullock as to statements made to the witness by the defendant, for want of proof on behalf of the State that such was the result of an intelligent waiver of the constitutional rights of the defendant. He contends that the court should have found facts with respect to whether the statements of defendant were understandingly and voluntarily made and further that any statements made by defendant were rendered inadmissible by virtue of the fact that defendant, according to the officer's testimony on *voir dire,* was under the influence of intoxicating liquor. The contentions of defendant are without merit.

The officer testified on *voir dire* that the defendant could stand without help and could answer all his questions. He advised him of his constitutional rights. Defendant appeared to understand what he was saying and gave intelligent answers. In the officer's opinion defendant was under the influence. The officer asked defendant what had happened. Defendant told the officer that he went to turn around and backed into the ditch, that he was the driver of the car, that he was coming from a beer joint and was headed home. The defendant offered no evidence on *voir dire* and the court overruled his objection.

[1] Since there was no conflict in the evidence on *voir dire,* it was not essential that the court make specific findings of fact, though it was desirable that he do so. *State v. McCloud,* 7 N.C. App. 132, 171 S.E. 2d 470 (1969), and cases there cited. Of course, voluntariness is the test of admissibility and this is for the court to decide. His ruling that the evidence was competent was necessarily based on his conclusion that the state-

ments were voluntarily made. *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965).

[2] Nor does the mere fact of intoxication render inadmissible his statements which tended to incriminate him. ". . . [T]he extent of his intoxication when the confession was made is relevant; and the weight, if any, to be given a confession under the circumstances disclosed is exclusively for determination by the jury." *State v. Isom,* 243 N.C. 164, 90 S.E. 2d 237 (1955), quoted with approval in *State v. Painter, supra.*

[3] We note that the officer gave defendant the well-known *Miranda* warnings. We do not wish to be understood as implying that his failure to have done so would have rendered the statements inadmissible. We are of the opinion that this situation comes within the exceptions to the exclusionary rule of *Miranda* barring from evidence statements of a defendant made during *in-custody interrogation* unless he has been advised of his right to remain silent and of his right to have counsel present, to be furnished if there is financial inability to hire, and has knowingly and intelligently waived such rights. The *Miranda* decision recognized at least two exceptions. One is general on-the-scene questioning as to facts surrounding a crime, and the other, statements freely volunteered without compelling influences. *Miranda v. Arizona,* 384 U.S. at pp. 477-478, 86 S.Ct. at p. 1629, 16 L. Ed. 2d at pp. 725-726 (1966). This, we think, clearly comes within the general on-the-scene questioning as to the facts, nor was this, in any sense, an in-custody interrogation. Indeed, we agree with the sound reasoning of the Supreme Court of New Jersey in *State v. Macuk,* 57 N.J. 1, 268 A. 2d 1 (1970), wherein the court said: "Now, with the problem squarely before us, we are of the opinion that, in view of the absence of any indication to the contrary by the United States Supreme Court, the rules of *Miranda* should be held inapplicable to all motor vehicle violations." As was pointed out by Justice Hall, for the court, the type of questioning involved in motor vehicle violations is not ordinarily the "lengthy, incommunicado inquisition seeking to 'sweat out' a confession at which *Miranda* was aimed." It usually consists of simple, standard inquiries necessary to complete an accident or violation police report. The fundamental reason for the *Miranda* rules simply is not present, with the possible exception of questioning about a more serious crime which may have come to light as the result of the stopping of an automobile for a motor vehicle violation. Additionally, the violations are not

usually serious enough to warrant the time consumed in following *Miranda* and, practically, it would be impossible to provide sufficient lawyers to consult with the number of violators who would request legal assistance.

[4] Defendant also contends that the evidence was insufficient to go to the jury. Even without the statements made to the officer by defendant, the evidence was plenary for submission to the jury. These assignments of error are overruled.

[5] In its charge to the jury, the court instructed: "In this case you will recall that the percentage was one-four, fourteen one-hundredths of one percent rather than ten. Some forty (40) percent higher than the presumption required." Defendant assigns this as error. We agree. Defendant did not offer evidence. We are of the opinion that this portion of the charge could have been construed by the jury as placing a greater burden on the defendant than arises from the statute. It has been held that in G.S. 20-139.1, the word "presumption" is used in the sense of a permissive inference or *prima facie* evidence. *State v. Jent,* 270 N.C. 652, 155 S.E. 2d 171 (1967). In our view the jury could have understood that the test results in this case raised a presumption with the burden on the defendant to rebut it.

[6] Additionally the court charged the jury as follows: "A defendant is under the influence of intoxicants if he has consumed a sufficient amount to make him think or act differently than he otherwise would have done regardless of what that amount is. He is under the influence if his mind and muscles do not normally coordinate, *or if he is abnormal in any degree from the consumption of intoxicants.*" (Emphasis ours.) This precise verbiage was held to be prejudicial error in *State v. Edwards,* 9 N.C. App. 602, 176 S.E. 2d 874 (1970).

For the reasons stated herein, defendant is entitled to a

New trial.

Judges BROCK and VAUGHN concur.

SAM GRAY, EMPLOYEE, PLAINTIFF v. DURHAM TRANSFER AND STORAGE, INC., EMPLOYER; U. S. FIRE INSURANCE CO., CARRIER, DEFENDANTS

No. 7114IC40

(Filed 31 March 1971)

1. **Master and Servant § 55— workmen's compensation — meaning of "accident"**

As used in G.S. 97-2(18), "accident" involves an interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences.

2. **Master and Servant § 65— workmen's compensation — accident — hernia**

A hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way.

3. **Master and Servant § 65— workmen's compensation — hernia — absence of accident**

Hernia suffered by claimant while lifting a sofa bed in the performance of his usual and customary duties as a mover of household furniture did not arise by accident where the only thing different about the incident to distinguish it from any other such lifting was the occurrence of pain in claimant's left lower abdomen.

APPEAL by plaintiff from Order of the North Carolina Industrial Commission filed 19 August 1970 denying compensation.

Plaintiff employee has worked in the furniture handling business since about 1948. He had been employed by defendant employer about one or two years as a truck driver. His duties consisted of driving the truck and loading and unloading furniture and office equipment. On 2 September 1969 he carried a shipment of furniture and household goods by truck from Jacksonvile, N. C., to a storage warehouse in Memphis, Tenn. Another shipment of furniture was removed from the storage warehouse in Memphis for delivery to a warehouse in Durham, N. C. This shipment contained a heavy sofa bed and as plaintiff and his helper were pushing up one end of the sofa bed in order to stand it on the other end plaintiff felt a sharp pain in his left side in the lower abdomen. The pain forced plaintiff to turn the sofa bed loose and to sit down in the back of the truck.

Plaintiff testified: "The only thing unusual about handling this piece of furniture on that day was that on this occasion I got some pain, whereas on previous handling of furniture I

did not. I have handled furniture that weighed that much before and I have stood sofa beds that weighed this much before on end. And on previous occasions everything was fine. On this occasion the only difference was that I got that pain in my stomach. And I had never had no pain like that before."

Findings of Fact by the Hearing Commissioner are as follows:

"1. The plaintiff is a Caucasian male approximately forty-eight years of age. As of September 2, 1969, the plaintiff had been employed by the defendant employer for approximately fourteen years. His job classification was a 'driver'; that his duties consisted of loading and unloading household articles to and from his moving van and transporting the same to destinations on the Eastern Seaboard. Sometimes plaintiff would work alone and sometimes a fellow employee would be sent to help — there is no set policy.

"2. On September 2, 1969, the plaintiff delivered a 'household move' to storage in Memphis, Tennessee, and was loading items to return to Durham and ultimately to Rhode Island. The last item loaded in Memphis was a combination sofa bed. The plaintiff hired a helper to load this item and the sofa was placed in the truck. Plaintiff and his helper proceeded to stand the sofa on its end, and as the two lifted one end of the sofa approximately four feet from the floor of the truck, plaintiff felt a pain in his left side. Plaintiff turned the sofa loose and his helper continued putting it in place and securing the load. The plaintiff loaded nothing further but did ultimately drive the truck back to Durham, when he reported the incident to the dispatcher.

"3. The next morning the plaintiff went to the emergency entrance at Watts Hospital where his difficulty was diagnosed as a left inguinal hernia. A bed was not available in the hospital at this time and plaintiff drove the truck to Rhode Island and back. The plaintiff did not load or unload the truck in Rhode Island. He drove only.

"4. Ultimately the plaintiff was hospitalized and underwent surgery on September 15, 1969, which Dr. Carver performed. The plaintiff has not worked since September 15, 1969; however, he developed another inguinal hernia on

the right side and it was repaired on December 5, 1969. Plaintiff has not worked at all since the second operation; thus, he has not worked since September 15, 1969, until now.

"5. The only thing different or unusual about the incident of lifting the combination sofa bed in Memphis, Tennessee, to distinguish it from any other such lifting was the occurrence of pain; thus, the plaintiff was not injured by accident arising out of and in the course of his employment."

From the Hearing Commissioner's Order denying compensation, plaintiff appealed to the Full Commission. The Full Commission by Order filed 19 August 1970 adopted as its own the findings and conclusions of the Hearing Commissioner and denied compensation.

Brooks & Brooks by Eugene C. Brooks III for plaintiff.

Spears, Spears, Barnes & Baker by Alexander H. Barnes for defendants.

BROCK, Judge.

[3] As can be seen from Finding No. 5 quoted above, the Industrial Commission found that plaintiff *was not injured by accident* arising out of and in the course of his employment, because the only thing different or unusual about the incident to distinguish it from any other such lifting was the occurrence of pain.

It is plaintiff's contention that this ruling is error. He contends that, where the injury itself is unexpected, it constitutes an injury by accident; and that no external, fortuitous occurrence is necessary. Plaintiff cites and relies upon *Smith v. Creamery Co.*, 217 N.C. 468, 8 S.E. 2d 231. Plaintiff argues that although the Supreme Court has made what appears to be alternative interpretations of the statute (G.S. 97-2(18)) it has not specifically overruled the holding in *Smith*. In *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289, the Court, referring to the language in *Smith* had this to say:

"*Smith v. Creamery Co.*, 217 N.C. 468, 8 S.E. 2d 231, was decided in 1940. The Court was again called upon to determine liability in hernia cases. Factually the case came within the rule announced by the Court in *Moore v. Sales*

Co., supra, [214 N.C. 424, 199 S.E. 605], and hence outside of the rule laid down in the *Slade* [209 N.C. 823, 184 S.E. 844] and *Neely* [212 N.C. 365, 193 S.E. 664] *cases, supra.* This was frankly recognized by *Justice Seawell,* who wrote the opinion. Having announced the fact, he uses language which lends support to the argument that the Court intended to adopt a new rule and hold that injury and accident were equivalent, at least in hernia and similar cases involving bodily infirmities. That the Court did not intend to abandon the rule announced in previous decisions that compensation could not be awarded unless the injury was produced by an accident seems apparent."

Regardless of how one reads the factual situation and the opinion in *Smith v. Creamery Co., supra,* the language of *Hensley v. Cooperative, supra,* decided approximately seventeen years later, makes it clear that the Supreme Court of North Carolina does not consider the law to be as contended by plaintiff. It is perfectly clear in *Hensley* that the Court interprets the statute as requiring an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine before a compensable injury arises in a hernia case. This view requiring an unusual or fortuitous occurrence was reaffirmed in *Lawrence v. Mill,* 265 N.C. 329, 144 S.E. 2d 3, and again in *Rhinehart v. Market,* 271 N.C. 586, 157 S.E. 2d 1. It therefore seems that the interpretation of the statute now proposed by plaintiff has been clearly and consistently repudiated by the Supreme Court since 1957.

[1, 2] "Accident" as used in our statute (G.S. 97-2(18)) involves the interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences. A hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. *Lawrence v. Mill, supra.*

[3] Under the findings of fact in this case we hold that plaintiff was not injured by *accident* as contemplated by G.S. 97-2(18), and therefore his injury is not compensable.

Affirmed.

Judges MORRIS and VAUGHN concur.

ALLSTATE INSURANCE COMPANY v. H. M. WEBB, JR.

No. 7110DC44

(Filed 31 March 1971)

1. **Appeal and Error § 22— improper appeal — review by certiorari**

The Court of Appeals treats as a petition for *certiorari* an appeal which failed to comply with the rules of the Court.

2. **Insurance §§ 86, 112— insurer's reimbursement under assigned risk policy — attorneys' and adjusters' fees**

In an action by an assigned risk insurer seeking reimbursement from the insured for the settlement of a claim the insurer would not have had to pay except for the requirements of the Financial Responsibility Act, the insurer was entitled to recover attorneys' and adjusters' fees that it had expended in settling the claim of a person who had been intentionally assaulted with an automobile operated by the insured. G.S. 20-279.21(b); G.S. 20-279.21(h).

3. **Insurance § 80— construction of Financial Responsibility Act**

The public policy embodied by the Financial Responsibility Act controls over an exclusionary provision in a policy issued pursuant to the Act.

Chief Judge MALLARD dissenting.

APPEAL by defendant from *Preston, District Judge,* 1 July 1970 Session of WAKE County District Court.

Action by plaintiff insurer to recover payments made and expenses incurred in settling a claim made against defendant insured.

On 3 January 1960 plaintiff issued and delivered to defendant's wife an assigned risk policy of automobile liability insurance. The policy was certified to the Department of Motor Vehicles as proof of financial responsibility under the Motor Vehicle Safety and Financial Responsibility Act (Financial Responsibility Act). One of the vehicles insured under the policy was a 1959 Oldsmobile automobile. On 20 February 1960, defendant, while operating the Oldsmobile with the consent of his wife and as an insured within the terms of the policy, intentionally assaulted a Federal Alcohol and Tobacco Tax officer with the automobile.

The officer made a claim against defendant for damages for personal injuries sustained in the assault. Defendant made written demand on plaintiff that the claim be settled within the

policy limits. On 21 March 1962, defendant was advised by letter that except for the terms of the North Carolina Financial Responsibility Act, plaintiff would not be obligated to pay the claim and that plaintiff reserved its rights to reimbursement by defendant for any payments made in settlement of the claim, which plaintiff would not have been obligated to make except for the provisions of the Financial Responsibility Act. Defendant made no reply to the letter and thereafter settlement was effected by the payment of $3,500 by plaintiff to the claimant.

The cause was heard by the court without a jury and judgment was rendered for plaintiff in the amount of $3,500, the amount paid claimant in satisfaction of the claim, plus $203.10 paid to an independent adjusting firm for services in investigating and adjusting the claim and $467.60 paid to a firm of attorneys for services in connection with the settlement of the claim. Defendant appealed.

John E. Aldridge, Jr. for plaintiff appellee.

Stewart & Hayes by Gerald W. Hayes, Jr. for defendant appellant.

GRAHAM, Judge.

[1] The record on appeal was not docketed within the time prescribed by the rules of this Court, and the record as docketed fails in several respects to comply with our rules. However, rather than dismissing the appeal, we have elected to treat it as a petition for *certiorari,* allow it and consider the appeal on its merits.

[2] Defendant brings forward a single assignment of error which encompasses an exception only to that portion of the judgment which allows the recovery of expenses.

The insurance policy in question provides insurance coverage with respect to damages caused by accident and arising out of the ownership, maintenance or use of the described automobile. Under the policy terms, assault and battery shall be deemed an accident, "unless committed by or at the direction of the insured."

Under this provision, and also under decisions of the Supreme Court, plaintiff would have had no liability in the present case if the policy in question were an entirely voluntary

one. *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654; *Jackson v. Casualty Co.,* 212 N.C. 546, 193 S.E. 703.

[3] However, the public policy embodied by the Financial Responsibility Act controls over an exclusionary provision in a policy issued pursuant to the Act. The provisions of G.S. 20-279.21(b) extend coverage to include liability for injuries intentionally inflicted by the use of an automobile. *Insurance Co. v. Roberts, supra.* The Act also provides, that "[a]ny motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this article." G.S. 20-279.21(h).

The policy in question, as authorized by G.S. 20-279.21(h), contained the following provision:

> "When this policy is certified as proof of financial responsibility for the future under the provisions of the motor vehicle financial responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. *The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.*" (Emphasis added).

Defendant concedes his liability to plaintiff for the sum paid claimant in settlement of the claim. He denies, however, that he is also liable for expenses paid in adjusting and settling the claim.

The unchallenged findings of the trial court lead to the conclusion that the expenses were reasonably necessary in the disposition of the claim. Defendant contends that he was entitled to these services under the terms of the policy even though there would have been no liability on the part of the plaintiff to pay the claim, except for the provisions of the Financial

Responsibility Act. In support of this contention defendant points to Item II of the policy, which provides:

> "With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall:
>
> (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient. . . . "

The fallacy of defendant's argument is that it overlooks the fact that the agreement to defend is only with respect to "such insurance as is afforded by this policy. . . . " The insurance "afforded by this policy" is against liability "caused by accident. . . . " The injury to claiment here resulted from an assault and battery committed by defendant and was not an "accident" within the meaning of the policy. Consequently, the policy provided no insurance aside from that arising from the provisions of the Financial Responsibility Act. Therefore, any duty plaintiff had to defend the claim, or to adjust and settle the claim, resulted from the Financial Responsibility Act and not from any agreement to defend contained in the policy.

We are of the opinion and so hold that the payment of the expenses in question were payments which plaintiff would not have been obligated to make except for the Financial Responsibility Act. The judgment of the trial court must therefore be affirmed.

Affirmed.

Judge PARKER concurs.

Chief Judge MALLARD dissents.

Chief Judge MALLARD dissenting.

Plaintiff, by its policy, contracted with the insured to do two things. First, it contracted to pay on behalf of the insured all sums for the payment of which the insured became legally liable, because of bodily injuries sustained by any person

arising out of the use of an automobile described therein, to the extent that its liability did not exceed the limit fixed by its policy. Secondly, plaintiff contracted to defend, at its expense, on behalf of its insured, any suit, even though groundless, brought against him, alleging bodily injury and seeking damages payable under the terms of the policy. *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1967).

The second obligation assumed by plaintiff in its policy is absolute and does not depend upon the liability of its insured. It is my opinion that plaintiff had the duty to defend the claim under the express terms of the policy and that it may not recover from plaintiff expenses incurred with respect to investigating, adjusting or settling the claim. It is my further opinion that the portion of the policy wherein the insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of the policy except for the Financial Responsibility Act, refers only to payments in satisfaction of insured's liability. I do not interpret the language to include also the right to recover incidental expenses incurred in connection with the defense or settlement of such claim. If that is not the meaning of the language in the policy, the language is ambiguous and it is elementary that provisions of an insurance policy, if ambiguous, are to be construed in favor of the insured. *Insurance Co. v. Insurance Co., supra; Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966); *Walsh v. Insurance Co.*, 265 N.C. 634, 144 S.E. 2d 817 (1965).

For the reasons herein stated, I feel the portion of the judgment which allows recovery of expenses paid to the adjusting firm and to the attorney should be reversed.

CHARLES B. NYE v. UNIVERSITY DEVELOPMENT COMPANY

No. 7114SC214

(Filed 31 March 1971)

1. **Appeal and Error § 24— duty of appellant — preparation of case on appeal**

It is not the function of the appellate court to search out possible errors which may be prejudicial to an appellant; it is the appellant's duty, acting within the rules of practice, to point out to the appellate court the precise error of which he complains.

2. **Appeal and Error § 24— grouping of exceptions**

All exceptions which present the same single question of law must be grouped together and assigned as error. Court of Appeals Rule of Practice No. 19(c).

3. **Appeal and Error § 24— assignment of error — single question of law**

An assignment of error must present a single question of law; where the assignment attempts to present more than one question of law, it is broadside and ineffective.

4. **Frauds, Statute of § 6— oral promise to release property from deed of trust**

An oral promise to release property from the lien of a deed of trust is enforceable. G.S. 22-2.

5. **Registration § 1; Mortgages and Deeds of Trust §§ 9, 11— agreement to release property from deed of trust — recordation**

An agreement to release property from the lien of a deed of trust does not have to be recorded. G.S. 47-18.

6. **Mortgages and Deeds of Trust § 37— wrongful foreclosure — measure of damages**

To recover damages for the wrongful foreclosure of a deed of trust, the plaintiff may elect to sue the *cestui* for the true worth of the property.

Judge VAUGHN concurs in the result.

APPEAL by defendant from *McKinnon, Judge of Superior Court,* 19 October 1970 Session, DURHAM Superior Court.

Plaintiff instituted this action to recover damages for wrongful foreclosure of a deed of trust and sale of plaintiff's lot.

Pertinent facts, which are not in dispute, may be summarized as follows: Defendant conveyed to one Realty Company a group of lots, including lot No. 61, Section A, Tract 1. Realty Company executed to defendant its note, secured by a deed of trust on the lots conveyed, for the purchase price. The deed of trust contained an agreement that defendant would release from the lien of the deed of trust one lot for each $1,400.00 paid to defendant by Realty Company. Plaintiff negotiated a purchase of said lot No. 61 from Realty Company, and Realty Company paid defendant $1,400.00 for release of said lot No. 61. A deed was executed by Realty Company to plaintiff, but no deed of release has been shown to have been executed by defendant to Realty Company. Realty Company defaulted on its note and

defendant caused a sale of the lots, including said lot No. 61, to be conducted by the trustee. Defendant was high bidder at the sale and later conveyed the lots, including said lot No. 61, to a third party.

Plaintiff offered evidence which tended to show that defendant accepted the $1,400.00 payment for the specific purpose of releasing lot No. 61; and that defendant's agent told plaintiff that the lot would be released upon receipt of the $1,400.00.

By stipulation the case was tried before Judge McKinnon sitting without a jury. Judgment was rendered allowing plaintiff to recover from defendant the sum of $4,250.00, based upon the fair market value of the lot on the date of the foreclosure sale. Defendant appealed.

Arthur Vann for the plaintiff.

Robinson O. Everett for the defendant.

BROCK, Judge.

[1] We are aware of the points argued by defendant in oral argument and in its brief. However, we have been considerably disturbed in undertaking to pass upon questions which defendant undertakes to present in this appeal by its assignments of error. We have probably spent more time on this case than is justified in trying to unravel and understand defendant's assignments of error. It is not the function of the appellate courts to search out possible errors which may be prejudicial to an appellant; it is an appellant's duty, acting within the rules of practice, to point out to the appellate court the precise error of which he complains.

[2] It is the duty of an appellant to have exceptions properly noted to rulings of the trial court which an appellant deems error. In the case presently before us, defendant seems to have properly noted numerous exceptions throughout the pre-trial, trial, and post-trial proceedings. However, his duty did not end with the recording of his exceptions. Our Rule 19(c) provides: "All exceptions relied on shall be grouped and separately numbered . . . . " This requirement for grouping of exceptions is designed to have all exceptions which present the same single question of law grouped together and assigned as error. Conversely, one asignment of error should have grouped under it

all exceptions which present the same single question of law. It is the grouping of exceptions (whether one or more) presenting the same single question of law, which constitutes an assignment of error.

[3] As noted above our rules require the "grouping of exceptions"; *i.e.*, the assignments of error, but any single assignment of error must present a single question of law. Clearly, more than one exception may be grouped under a single assignment of error, but this may be done only when all the exceptions relate to but a single question of law.

For further discussion of the function of assignments of error, see, *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534; *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736; *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912; *State v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785 (giving examples of proper and improper grouping of exceptions under one assignment of error); *State v. Patton,* 5 N.C. App. 501, 168 S.E. 2d 500; and *State v. Conyers,* 2 N.C. App. 637, 163 S.E. 2d 657.

In the case *sub judice* defendant has made the mistake which has so often been warned against; that of grouping under one assignment of error exceptions which present several questions of law. Where one assignment of error attempts to present more than one question of law it is broadside and ineffective. *State v. Blackwell, supra.*

For example, defendant, under assignment of error number one has grouped his exceptions numbers 1, 7, 8, 11, 12 and 13. Exception #1 was entered to the order overruling defendant's demurrer to the complaint. Exception #7 was entered to the order denying defendant's motion for nonsuit at close of plaintiff's evidence. Exception #8 was entered to the order denying defendant's motion for nonsuit at close of all the evidence. Exception #11 was entered to finding of fact number 6 in the judgment. Exception #12 was entered to the first conclusion of law in the judgment. And exception #13 was entered to the signing of the judgment. Exceptions 7 and 8 are the only two of the six exceptions which could properly be grouped together.

We do not wish to labor too long over the impropriety of the defendant's grouping of exceptions (assignments of error), but feel it might be beneficial to give one additional example. Under

assignment of error number two defendant has grouped exceptions numbers 2, 3, 5, 11 and 12. Exceptions 2, 3 and 5 were entered to orders overruling defendant's objections to testimony of witnesses, but here the similarity ends. Each of the three exceptions (2, 3 and 5) have for their basis different rules of law and evidence, and the mere fact that they all relate to testimony does not mean that they present a single question of law. Exception #11 was entered to finding of fact number 6 in the judgment. Exception #12 was entered to the first conclusion of law in the judgment. It seems clear that these exceptions do not present a single question of law.

[4, 5] We have been able to glean from defendant's exceptions that it is its contention that the statute of frauds, G.S. 22-2, prevents the enforcement of an oral promise to release property from the lien of a deed of trust, and that the recordation statute, G.S. 47-18, requires the recordation of such a release for it to be effective. It seems that this question has been conclusively answered against defendant's contention. It was held in *Stevens v. Turlington,* 186 N.C. 191, 119 S.E. 210, that an unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real estate mortgage does not come within the statute of frauds. And, it logically follows, if such an agreement is not required to be in writing to be enforceable as between the parties, certainly it is not required to be recorded.

[6] Also we have gleaned from defendant's exceptions that it is its contention that the trial judge applied an improper measure of damages. Specifically defendant contends that, if plaintiff is entitled to recover damages, the damages must be measured by the consideration paid by plaintiff for the lot ($1400.00), and not its fair market value on the date of the foreclosure sale. The question of the measure of damages for wrongful foreclosure has also been decided adversely to defendant's contention. The plaintiff had the option, which he exercised, to sue the *cestui* to recover the true worth of the property. *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Burnett v. Supply Co.,* 180 N.C. 117, 104 S.E. 137; 5 Strong, N.C. Index 2d, Mortgages and Deeds of Trust, § 37, p. 593.

No error.

Judge MORRIS concurs.

Judge VAUGHN concurs in the result.

GEORGIE JOHNSON LEGGETT, Executrix and ROY G. LEGGETT, EXECUTOR OF THE ESTATE OF ALLINE JOHNSON WIGGINS, DECEASED v. SEABOARD AIR LINE RAILROAD COMPANY AND L. E. ALEXANDER

No. 7110SC201

(Filed 31 March 1971)

1. **Railroads § 5— grade crossing accident — instructions — duty of motorist to look and listen — inference that motorist stopped**

In an action to recover for the death of a motorist resulting from an automobile-train collision at a grade crossing, the trial court did not err in instructing the jury that it is contributory negligence barring recovery for one to attempt to cross a railroad track without looking and listening when within the danger limits and when such looking and listening would be effective, and the court in its instructions gave plaintiffs the benefit of every inference fairly deducible from the evidence that plaintiffs' testate did stop before driving onto the tracks.

2. **Appeal and Error § 50— harmless error in instructions on negligence**

Where the jury found that the negligence of defendant railroad was one of the proximate causes of an automobile-train collision in which plaintiffs' testate was killed, plaintiffs could not have been prejudiced by any error committed by the court in its instructions as to the negligence of defendant.

3. **Railroads § 5— hazardous grade crossing — duties of railroad and motorist**

While the maintenance of an unusually hazardous grade crossing places upon the railroad a duty of care commensurate with the danger created, the duty of care owed by a motorist at the crossing also increases commensurately.

APPEAL by plaintiffs from *Clark, J.*, September 1970 Session, WAKE Superior Court.

This is a civil action in which the plaintiffs seek to recover damages for the wrongful death of plaintiffs' testate, Alline Johnson Wiggins, and for certain personal property damage, allegedly resulting from an automobile-train collision in the town of Wake Forest, N. C., on 27 October 1964. The evidence pertinent to this appeal tends to show: The main line of the defendant's railroad running north and south bisects the Town of Wake Forest. The collision occurred at the intersection of the defendant's main line track and Sycamore Street. At this intersection there were three tracks, with the center track being the main line. Mrs. Wiggins approached the intersection from the east, traveling in a westerly direction, while the train ap-

proached from the north, traveling in a southerly direction. Along the eastern side of the railroad tracks and to the north of Sycamore Street was a ramp and overhead chute, designed so that trucks from sawmills could back up on the ramp and dump wood chips, which were then pumped into hopper cars belonging to the railroad. At the time of the accident, a hopper car was standing on the side track near the loading mechanism. The evidence tends to show that the view of the main line track to the north, as one approaches from the east on Sycamore Street, was obstructed by the hopper car until reaching a point just east of the main line from which point there was an unobstructed view of the main line north for a distance of 750 feet. A witness for the plaintiffs, who was working in a building near the crossing, testified that while looking out his side door, he saw Mrs. Wiggins' automobile approach the crossing, that the building then blocked his view and he was unable to see the car again until he looked out a rear door when he saw the automobile and the train collide. A witness for the defendants, who was a fireman on the train riding on the left side of the engine, testified that he saw the testate's automobile close to the side track moving at a slow rate of speed, that he "looked right at that lady's head, and from the time that she came to my view, my eyes never left it. I was satisfied she would stop, but she didn't do it. . . . I did not see her head turning either to the right or to the left during the time I observed it, looking straight ahead."

The court denied the defendants' motion for a directed verdict and submitted the case to the jury upon issues of negligence, contributory negligence, and damages. For its verdict, the jury found that the collision resulting in the fatal injuries to plaintiffs' testate, and the damage to her automobile, was proximately caused by the negligence of the defendants and the contributory negligence of the plaintiffs' testate.

From a judgment entered on the verdict, the plaintiffs appealed.

Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., and John N. Fountain for plaintiff appellants.

Maupin, Taylor & Ellis by Thomas F. Ellis for defendant appellees.

HEDRICK, Judge.

[1] The plaintiffs contend that the court committed prejudicial error in instructing the jury that it is contributory negligence barring recovery for one to attempt to cross a railroad track without looking and listening when within the danger limits, and when such looking and listening would be effective.

> "It does not suffice to say that plaintiff stopped, looked, and listened. His looking and listening must be timely, *McCrimmon v. Powell, supra,* so that his precaution will be effective. *Godwin v. R. R., supra.* It was his duty to 'look attentively, up and down the track,' in time to save himself, if opportunity to do so was available to him." *Parker v. R. R.,* 232 N.C. 472, 61 S.E. 2d 370 (1950); see also *Arvin v. McClintock,* 253 N.C. 679, 118 S.E. 2d 129 (1961), and cases cited therein.

There is evidence in the record from which the jury could find that from a point just east of the defendant's main line track plaintiffs' testate had an unobstructed view to the north of 750 feet, and there is also evidence in the record from which the jury could find that plaintiffs' testate failed to stop, look, and listen before attempting to cross the main line track.

[1] The plaintiffs next contend that the court denied "to the plaintiff appellants the benefit of the reasonable inference on all of the evidence that the plaintiff had stopped prior to placing herself in a position of peril." There is no direct testimony in the record that plaintiffs' testate stopped her automobile before driving upon the tracks. The plaintiffs insist that the inference arises from consideration of all of the evidence that she did stop. With respect to this evidence, the court, in its instructions to the jury, stated: "Defendants contend and say that all of the evidence, even the evidence from the plaintiff's own witnesses, particularly of the person who operated the electric shop that she failed to stop. . . ." In challenging this portion of the instructions, the plaintiffs in their brief argue that "the Court incorrectly stated that the operator of the electric motor shop . . . had testified that Mrs. Wiggins failed to stop." In the challenged portion of the instructions, it is clear that the court was not stating that Mrs. Wiggins did not stop, but was merely stating one of the contentions of the defendants, and when the charge is considered as a whole it is clear that the plaintiffs were given

the benefit of every inference fairly deducible from the evidence that she did stop.

[2, 3] The plaintiffs' third contention is that the trial court committed prejudicial error in failing to instruct the jury, as requested, that the defendant railroad had a duty to maintain a public crossing in a reasonably safe condition, and in failing to state that the conduct of Mrs. Wiggins "should be considered in light of the defendants' negligent maintenance of an unusually hazardous crossing." Since the jury found that the negligence of the defendants was one of the proximate causes of the collision, the plaintiffs could not have been prejudiced by any error committed by the court in its instructions as to the negligence of the defendants. *Conference v. Miles* and *Conference v. Creech* and *Teasley v. Creech,* 259 N.C. 1, 129 S.E. 2d 600 (1963). By the second part of this contention, the plaintiffs apparently are contending that the maintenance of an unusually hazardous crossing by the defendant railroad lessens the degree of care required by a motorist attempting to cross the tracks. The defendant railroad and Mrs. Wiggins were under a mutual and reciprocal duty to exercise due care to avoid the accident. *Johnson v. R. R.,* 255 N.C. 386, 121 S.E. 2d 580 (1961); *Moore v. R. R.,* 201 N.C. 26, 158 S.E. 556 (1931). While it is true that the maintenance of an unusually hazardous crossing by the defendant railroad places upon it a duty of care commensurate with the danger created, *May v. R. R.,* 259 N.C. 43, 129 S.E. 2d 624 (1963), it is equally true that the duty of care owed by the motorist increases commensurately. *Brown v. R. R.,* 171 N.C. 266, 88 S.E. 329 (1916). The assignments of error upon which these contentions are based are all without merit.

The plaintiffs have brought forward other assignments of error directed to the admission and exclusion of evidence, and to the court's instructions to the jury. A careful examination of each exception in the record fails to reveal any prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

S. DEWEY GRISSETT v. RUBY STEPHENS WARD AND CARL STEPHENS

No. 7113DC197

(Filed 31 March 1971)

1. **Contracts § 27; Uniform Commercial Code § 22— breach of contract to purchase potato crop — sufficiency of evidence for jury**

Plaintiff's evidence was sufficient for the jury in this action for breach of an alleged oral contract to purchase plaintiff's entire 1968 sweet potato crop at the market price on the date delivery was first made.

2. **Uniform Commercial Code § 13; Rules of Civil Procedure § 8— sale of potato crop — breach of contract — failure to plead statute of frauds**

In an action for breach of an alleged oral contract to purchase plaintiff's sweet potato crop, defendants cannot raise on appeal the defense of the statute of frauds under the Uniform Commercial Code, G.S. 25-2-201, where defendants failed to raise such defense in their pleadings or in the trial below.

APPEAL by defendants from *Walton, District Court Judge,* September 1970 Session of BRUNSWICK County, the General Court of Justice, District Court Division.

This was an action to recover the purchase price of sweet potatoes alleged to have been sold by the plaintiff to the defendants pursuant to an agreement entered into during the month of February 1968. The defendants filed an answer (verified 23 March 1970) denying any contract of purchase and sale and setting forth a counterclaim for amounts allegedly owed the defendants by the plaintiff in other transactions.

Plaintiff offered evidence tending to show that in February 1968 Carl Stephens, one of the defendants acting both for himself and his co-defendant, entered into an oral contract with him for the purchase of the entire crop of sweet potatoes to be produced by the plaintiff during the year 1968. Pursuant to this agreement, the plaintiff delivered his entire crop of sweet potatoes to the warehouse of the defendants and had received payment for only about one-half of the crop. The purchase price was to be the market price on the date first delivery was made. At that time the market price for No. 1 potatoes was $3.60 per bushel, and for No. 2 potatoes, $2.00 per bushel.

The evidence on behalf of the defendants tended to show that no contract had been entered into; that the defendants

were in the business of buying and selling sweet potatoes and also maintained a warehause where farmers could store potatoes; that the defendants purchased part of the plaintiff's crop from time to time during the Fall of 1968 as the plaintiff brought them to the warehouse. In November 1968 the market dropped and the weather conditions worsened, and the defendants discontinued buying potatoes. When the plaintiff brought the remainder of his crop to the warehouse, he was informed that the defendants had discontinued buying, but that they would be glad to store his potatoes for him at a warehouse charge if he desired, and he would then be in a position to wait for the market to improve; that the plaintiff had accepted this arrangement and placed the balance of his crop of potatoes on storage in the warehouse of the defendants.

From a jury verdict in favor of the plaintiff and a judgment in the amount of $3,925.60 less $1,314.24, the amount stipulated as the indebtedness of the plaintiff to the defendants growing out of other transactions, the defendants appealed to this Court.

Frink and Foy by Grover A. Gore for plaintiff appellee.

Sankey W. Robinson and E. J. Prevatte for defendant appellants.

CAMPBELL, Judge.

The defendants present two questions for decision. (1) Was there sufficient evidence to withstand a motion for a directed verdict in favor of the defendants? (2) Did the trial judge commit prejudicial error in the instructions to the jury?

[1] In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which, legitimately, may be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). Viewed in this light, we are of the opinion that the evidence was sufficient to go to the jury, and the motions for a directed verdict were properly denied. Plaintiff testified to the existence of an oral agreement between the parties, to the delivery of his crop of sweet potatoes to the defendants, and to the partial payment by the

defendants. He also testified as to the price which he was to receive for the potatoes, that he had been promised payment for that portion of the crop for which he had not been paid, but that such payment was never made. This evidence was sufficient to allow the jury to find that an agreement existed; that plaintiff had performed his part of the agreement; and that the defendants had failed to comply with their part of the agreement. The reasonableness or unreasonableness of the agreement itself is not before us. All of the parties to the alleged agreement were *sui juris;* such an agreement would not be illegal or against public policy.

> "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish. . . ." *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811 (1954); *Heating Co. v. Board of Education,* 268 N.C. 85, 150 S.E. 2d 65 (1966).

A question for the triers of facts was presented and the jury found for the plaintiff. There was no error in the trial court by this procedure.

[2] Defendants also contend, in their brief, that the plaintiff has not complied with G.S. 25-2-201, the statute of frauds provision relating to sales under the Uniform Commercial Code. The defendants, however, did not raise this defense in their pleadings or in the trial below. The defendant's answer was filed subsequent to the effective date of the North Carolina Rules of Civil Procedure. Rule 8(c) sets forth certain affirmative defenses which must be pleaded. The statute of frauds is one of these affirmative defenses. Defendants, not having raised this defense in their pleadings or in the trial below, cannot now present it before this Court. See 1 McIntosh, N. C. Practice 2d, Section 970.65 (Supp. 1970) and *Cohoon v. Swain,* 216 N.C. 317, 5 S.E. 2d 1 (1939).

The second question raised by the defendants pertains to the instructions to the jury given by the trial judge. We have reviewed these instructions in their entirety, and we think that when so considered, the trial judge presented to the jury the legal precepts involved and fairly and adequately instructed the jury.

The trial presented a factual determination by the triers of fact. We find no prejudicial error in the trial of this case.

Affirmed.

Judges BRITT and HEDRICK concur.

L. W. McLAMB AND WIFE, MARGIE McLAMB v. BROWN CONSTRUCTION COMPANY

No. 7118SC41

(Filed 31 March 1971)

1. Appeal and Error § 49— action for damages caused by blasting — exclusion of evidence — harmless error

In an action to recover damages to plaintiffs' residence allegedly caused by defendant's blasting operations, the trial court did not commit prejudicial error in the exclusion of testimony by defendant's expert witness tending to show that the blasting was 100 feet further away from plaintiffs' residence than plaintiffs' evidence tended to show, and that houses between plaintiffs' residence and the blasting site bore no visible signs of damage to their exterior when defendant's expert "just looked at them," the probative value of such testimony being so trivial that its exclusion could not have affected the result of the trial.

2. Damages § 13; Witnesses § 5— testimony competent for purpose of corroboration

In an action to recover damages to plaintiffs' residence allegedly caused by defendant's blasting operations, testimony by two witnesses describing the damage plaintiffs had pointed out to them as having been caused by the blasting, and testimony by another witness that he had not observed cracks in the ceiling in plaintiffs' house before the blasting, *held* competent to corroborate testimony by plaintiffs.

3. Damages § 13; Evidence § 15— damages observed 16 months after blasting — competency of testimony

Testimony by plaintiffs' witness as to damage he observed to plaintiff's house was not rendered incompetent by the fact that the witness' observations were made some 16 months after the blasting occurred.

4. Appeal and Error § 48— admission of evidence — harmless error

Admission of testimony by a neighbor of plaintiffs that he found a crack in his own windowsill about a week after the blasting, if error, was not prejudicial to defendant.

5. **Damages § 13; Evidence § 15— fair market value of home before and after blasting — testimony based on inspection 17 months after blasting**

In an action to recover damages to plaintiffs' home allegedly caused by defendant's blasting operations, opinion testimony by plaintiffs' witness as to the fair market value of the residence before and after the damages was not rendered incompetent by the fact that the inspection of the residence by the witness was made some seventeen months after the blasting.

6. **Rules of Civil Procedure § 51— recapitulation of the evidence**

The trial court is not required to recapitulate all the evidence, but only so much as is necessary to explain the application of the law. G.S. 1A-1, Rule 51(a).

APPEAL by defendant from *Crissman, Superior Court Judge,* 17 August 1970 Session, High Point Division, GUILFORD Superior Court.

Plaintiffs instituted this action to recover damages to their residence allegedly caused by blasting operations carried out by defendant. Plaintiffs allege, and defendant admits, that in October 1968 defendant used explosives for the purpose of dislodging rock deposits in the course of a ditch which defendant was excavating along Allen Jay Road near plaintiffs' property.

Plaintiffs offered evidence which tended to show that the blasting by defendant was one thousand feet from plaintiffs' house and that on 9, 10, or 11 October 1968 a blast, heavier than had been felt previously, "shook the house enough that you could feel the whole house vibrating and moving, and it run a plaster streak through our walls, completely through it, and plaster fell in the floor that day. . . ." Plaintiffs' evidence further tended to show cracks throughout the inside of the house in floors, walls, and ceilings; and cracks and damage to the exterior of the house. Plaintiffs' evidence tended to show damages as high as $15,000.00.

Defendant offered evidence through its expert engineer which tended to show that the blasts were not of sufficient intensity to cause earth wave vibration damage to plaintiffs' residence; that the damage to plaintiffs' residence was caused by poor construction, by use of green timbers, by thermal and humidity forces, and by uneven settling of the structure. Defendant's expert also testified that in his opinion all of plaintiffs' damages could be completely repaired for $1,800.00.

The jury returned a verdict in favor of plaintiffs assessing damages at $8,000.00. From judgment entered upon the verdict defendant appealed.

Haworth, Riggs, Kuhn & Haworth, by John Haworth for plaintiffs-appellees.

Morgan, Byerly, Post & Herring, by William L. Johnson, Jr., for defendant-appellant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge refused to allow the following testimony of defendant's expert witness:

"Q. Did you, at the time of this inspection, also inspect the vicinity of the blasting that took place?

"A. Yes, sir.

"Q. Approximately how far is this from the house?

"A. It was about 1100 feet.

"Q. Are there other residences located between the location of the blasting and the residence of Mr. and Mrs. McLamb?

"A. Yes, sir. There is a woods and several residences between Mr. and Mrs. McLamb's residence and the site of the blasting.

"Q. Did you inspect any of these other residences?

"A. Only from the outside; just looked at them.

"Q. Were there any visible signs of damage on the exterior of these houses?

"A. No, sir."

The testimony of the witness was by way of deposition and the trial judge had before him the later cross-examination of the witness wherein he testified that he was not present when the blasting was done. Therefore, the trial judge excluded the testimony quoted above upon the ground that it was hearsay. Conceding, without deciding, that it was error to exclude the testimony, we see no prejudice to defendant. The most that defendant could have hoped to establish by the excluded testimony was that the blasting was 100 feet further away from plaintiffs'

residence than plaintiffs' evidence tended to show, and that houses between plaintiffs' residence and the blasting site bore no visible signs of damage to their exterior when defendant's expert "just looked at them." The probative value of the excluded testimony was so trivial that we fail to see how its exclusion or admission would alter the results of the trial. A new trial will not be granted for mere technical error which could not have affected the result of the trial. 1 Strong, N.C. Index 2d, Appeal and Error, § 47, p. 192.

[2] Defendant assigns as error the admission of certain testimony of plaintiffs' witnesses. Two of plaintiffs' witnesses were allowed to describe the damage plaintiff had pointed out to them as having been caused by the blasting. Their testimony served to corroborate plaintiff's testimony, and was admissible for that purpose. Defendant also complains that one of plaintiffs' witnesses was allowed to testify that he had not observed the cracks in the ceiling in plaintiffs' house before the blasting. This testimony was competent as tending to corroborate plaintiffs' testimony that the cracks did not exist before the blasting.

[3] Defendant assigns as error that one of plaintiffs' witnesses was allowed to testify as to damage he observed to plaintiffs' house about sixteen months after the blasting; it is defendant's contention that the witness' observations are too remote in time from the date of the blasting. Defendant's objection at trial was as follows: "OBJECTION to his testimony. It is some year and a half or almost two years later, if your Honor please." This objection was overruled and the witness was allowed to describe the damage observed and give his opinion as to the cause. The mere fact that the inspection by the witness was over a year after the date of the blasting does not alone render the testimony incompetent. Defendant's objection was properly overruled.

[4] Defendant assigns as error that a neighbor of plaintiffs was allowed to testify that he found a crack in his own windowsill about a week after the blasting. Conceding, without deciding, that this testimony was incompetent, its probative value is so scanty that we fail to see how its inclusion or exclusion would alter the results of the trial. Mere technical error does not justify a new trial.

[5] Defendant assigns as error that plaintiffs' witness was allowed to give his opinion of the fair market value of plaintiffs' residence before and after the damages. It is defendant's conten-

tion that the inspection made by the witness was too remote in time from the date of the blasting. The inspection by this witness was about seventeen months after the blasting. It is defendant's contention that no showing was made that the witness observed only the damage that existed immediately after the blasting. This contention cannot be sustained. The testimony was that plaintiff pointed out to the witness the areas which plaintiff contended were damaged by the blasting; and plaintiff had already fully testified and described the areas he contended were damaged by the blasting. The weight and credibility to be given the testimony was for jury determination.

[6] Defendant assigns as error that the trial judge did not recapitulate all of the evidence, and that this amounted to an expression of opinion. We have carefully read the entire charge of the court to the jury, and we find no unfairness to defendant. The trial court is not required to recapitulate all of the evidence, but only so much as is necessary to explain the application of the law. G.S. 1A-1, Rule 51(a).

The remainder of defendant's assignments of error have been carefully considered and we have determined them to be without merit.

No error.

Judges MORRIS and VAUGHN concur.

ANNETTE ALLTOP v. J. C. PENNEY COMPANY, INC.

No. 7110SC222

(Filed 31 March 1971)

1. **Courts § 9; Rules of Civil Procedure § 56— entry of summary judgment — effect of prior order by another trial judge**

   Denial by first superior court judge of defendant's motion to dismiss for failure of the complaint to state a claim upon which relief could be granted did not preclude a second superior court judge from granting defendant's motion for summary judgment.

2. **Rules of Civil Procedure § 12— motion to dismiss**

   The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient.

3. **Rules of Civil Procedure § 56— purpose of summary judgment**

The purpose of the summary judgment rule is to provide an expeditious method for determining whether a material issue of fact actually exists. G.S. 1A-1, Rule 56.

4. **Damages § 3— injuries to person — improper collecting practices by department store — showing of compensable damage**

In plaintiff's action to recover damages for the alleged wrongful conduct of a department store in attempting to collect an unpaid account, the department store was entitled to entry of summary judgment where the plaintiff failed to show contemporaneous physical injury and an adverse effect on her employment resulting from the store's collection methods. G.S. 1A-1, Rule 56(c), (e).

APPEAL by plaintiff from *Clark, Superior Court Judge,* 12 January 1971 Session, WAKE Superior Court.

Plaintiff instituted this action seeking to recover compensatory and punitive damages for the alleged wrongful conduct of the defendant in attempting to collect an unpaid account of approximately $600.00.

Plaintiff alleged in her complaint that agents of the defendant repeatedly telephoned her at her home and at her place of employment demanding payment of approximately $600.00 owed to the defendant by the plaintiff's husband. Plaintiff alleged that she did not owe that sum or any sum to the defendant, and she so informed the defendant. Nevertheless, the agents of the defendant continued to call the plaintiff and demand payment. On at least two occasions, an agent of the defendant called plaintiff's employer, one Edna Wells, and informed her that the plaintiff was indebted to the defendant in the amount of approximately $600.00, and requested the plaintiff's employer to advance the money to the plaintiff so that the plaintiff could pay the defendant. Plaintiff's employer was threatened with legal action if she did not cooperate with the defendant.

Plaintiff alleged that the conduct of the defendant's agents was willful, wanton, malicious, and without justification; and that as a result of said conduct, the plaintiff's employment was jeopardized and advancement made more difficult, and that plaintiff has become nervous and upset and has experienced severe anxiety about her employment and personal life.

Before filing an answer, the defendant moved to dismiss plaintiff's action under G.S. 1A-1, Rule 12(b) (6) for failure to state a claim upon which relief could be granted. This motion

was denied by Superior Court Judge C. W. Hall on 13 November 1970.

The defendant then filed an answer denying the material allegations of plaintiff's complaint, and, on 4 December 1970, filed a motion for summary judgment supported by the deposition of the plaintiff taken on 30 November 1970. The plaintiff filed no response by affidavits or otherwise, but opposed the motion by relying solely on the allegations in her complaint. The court granted summary judgment for the defendant on 12 January 1971, and dismissed plaintiff's action.

From the granting of defendant's motion for summary judgment and the dismissal of the action, the plaintiff appealed to this Court.

Jacob W. Todd and Charles P. Green, Jr., by Jacob W. Todd for plaintiff appellant.

Smith, Anderson, Dorsett, Blount & Ragsdale, by George R. Ragsdale for defendant appellee.

HEDRICK, Judge.

[1, 2] Plaintiff first contends that Judge Hall's denial of the defendant's motion to dismiss for failure of the complaint to state a claim upon which relief could be granted precluded Judge Clark from considering and allowing defendant's motion for summary judgment in that it violates the principle of law that one superior court judge cannot overrule another superior court judge. This contention is without merit.

The federal courts, operating under rules practically identical to those in North Carolina, have held that the denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which merely challenges the sufficiency of the complaint, does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint. *Crowell v. Baker Oil Tools,* 49 F. Supp. 552 (D.C. Cal. 1943), *rev'd on other grounds,* 143 F. 2d 1003, *cert. denied,* 323 U.S. 760 (1944). See also Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.), Vol. 3, § 1240. The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. 2A Moore's Federal Practice, par. 56.02[3], p. 2035 (1965). See also *United Milk Products Co. v. Lawndale Nat. Bank of Chi-*

cago, 392 F. 2d 876 (7th Cir. 1968). But where a motion for summary judgment is made and is supported by matters outside the pleadings, the test is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact. Moore's Federal Practice, *supra; Richardson v. Rivers,* 335 F. 2d 996 (D.C. Cir. 1964).

[3] Plaintiff's other contention is that the trial judge erred in granting defendant's motion for summary judgment. The purpose of the summary judgment rule, Rule 56 of the Rules of Civil Procedure, is to provide an expeditious method for determining whether a material issue of fact actually exists. The rule states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c). See also, *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970); *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

The defendant's motion for summary judgment was supported by the deposition of the plaintiff. But plaintiff offered nothing to bolster the bare allegations of her complaint. G.S. 1A-1, Rule 56(e), provides in part:

> ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[4] In her complaint, plaintiff alleged that she did not owe the defendant any sum, but she admitted during the adverse examination that she had made credit purchases from the defendant using her husband's credit card, and her signature appears on 17 of the charge sales slips.

Plaintiff alleged that as a result of the defendant's conduct she became nervous and upset, yet she admits that she has not seen a doctor or taken any medication in this regard. Mere hurt or embarrassment are not compensable. *Flake v. Greensboro News Co.,* 212 N.C. 780, 195 S.E. 55 (1938). Nor are damages for mere fright recoverable unless there is contemporaneous

physical injury resulting from the defendant's conduct. *Crews v. Finance Co.*, 271 N.C. 684, 157 S.E. 2d 381 (1967).

Plaintiff also alleges that the conduct of the defendant has jeopardized her employment, yet the adverse examination reveals that up to the date of the examination the plaintiff was still employed at the same place of business, and that her income has at least remained the same.

The materials presented in support of defendant's motion for summary judgment show that plaintiff has suffered no compensable injury or damage, either to her personal health, or by reason of an adverse effect on her employment. Hence, we hold that the entry of summary judgment was proper since there appears to be no genuine issue as to any material fact. The judgment appealed from is

Affirmed.

Judges CAMPBELL and BRITT concur.

VERA JULIAN HAITHCOCK v. CHIMNEY ROCK COMPANY

No. 7119SC204

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 56— motion for summary judgment — burden of proof**

The burden is upon the party moving for summary judgment to establish the lack of a triable issue of fact. G.S. 1A-1, Rule 56.

2. **Rules of Civil Procedure § 56— test for determining motion for summary judgment**

In passing upon a motion for summary judgment, the test is whether the moving party, by affidavit or otherwise, has presented materials which would require a directed verdict in his favor if presented at trial.

3. **Rules of Civil Procedure § 56— motion for summary judgment — burden of opposing party**

If defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial.

4. Negligence §§ 5.1, 53— scenic attraction — duty of proprietor to invitee

Proprietor of a scenic attraction owed a business invitee on the premises the duty to exercise ordinary care to keep in reasonably safe condition the areas where the invitee was expected to go and to warn of unsafe conditions of which the proprietor was charged with knowledge.

5. Negligence § 57— injury to invitee at scenic attraction — summary judgment

The trial court properly granted defendant's motion for summary judgment in an action for injuries allegedly sustained when plaintiff slipped and fell on a rock while walking along a footpath at a scenic attraction operated by defendant, where the adverse examination of plaintiff, offered by defendant in support of its motion, showed that plaintiff did not actually know the nature of the object causing her fall or the duration of its presence on the footpath, and plaintiff relied solely on the unsupported allegations of her complaint.

ON writ of *certiorari* to review an order of *Gambill, Judge of the Superior Court,* 28 September 1970 Session, RANDOLPH Superior Court.

Plaintiff instituted this action to recover damages for injuries sustained while visiting a scenic attraction operated by defendant at Chimney Rock Park in Rutherford County. Plaintiff alleged that she was proceeding along a footpath some distance behind her husband when, her attention being diverted by the "spectacular views," she stepped upon a rock in the path and fell, injuring her right foot and left ankle.

The defendant caused the adverse examination of plaintiff to be taken, reproduced in pertinent part as follows:

"Q. Will you just tell us please what happened leading up to your fall and how the fall occurred?

"A. My husband and I were coming down this path and down these steps. My husband was in front of me and I was holding to a hand rail on my right and as I came to the bottom of these steps we were discussing Pulpit Rock I think over to the right, and I said—'Shall we go over see that.' There were steps over to that. We were discussing that and he and I were both looking over that way and I glanced down and saw we were coming to the bottom of the steps and I stepped on this rock I suppose; I didn't look at it. It was a hard, round object.

* * *

"Q. Other than your knowledge of that, could you definitely say whether or not you observed the rock with your eye before or after you fell?

"A. At some time or other yes, I looked over at this rock and I saw people going up.

"Q. I didn't mean that.

"A. No, I don't recall looking at that because I wasn't concerned then and I was hurting. My husband heard me fall and he turned around and came running back to help me up and wanted to know what happened. Of course I didn't stop to examine that because my knee was hurting, my ankle was hurting.

"Q. So as I understand, you are not able to definitely say you saw a rock before or after but you're certain it was one because you felt it through your shoe?

"A. I can't say it was a rock by the way it felt I am sure it was but there was some round, protruding object there that I stepped on and caused my foot to turn."

Defendant filed an answer in which it denied the material allegations of the complaint and asserted the contributory negligence of the plaintiff, and in addition, moved in the alternative for dismisal for failure to state a claim upon which relief could be granted or for judgment on the pleadings. Subsequently, the defendant filed a motion for summary judgment, relying upon the adverse examination of plaintiff in support of its motion. Plaintiff did not provide any material, by affidavit or otherwise, in opposition to the motion, although plaintiff's counsel did present oral arguments during the hearing upon the motion, the substance of which do not appear of record. From the granting of defendant's motion, and the judgment of dismissal entered thereupon, plaintiff appealed to this Court.

Ottway Burton for plaintiff-appellant.

Charles T. Myers for defendant-appellee.

BROCK, Judge.

[1-3] The purpose of the Summary Judgment procedure provided by Rule 56 of the Rules of Civil Procedure is to ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is entitled

to judgment as a matter of law. The burden is upon the moving party to establish the lack of a triable issue of fact. The test is whether the moving party, by affidavit or otherwise, presents materials which would require a directed verdict in his favor if presented at trial. *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425. If the defendant successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial. *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1. The question presented to us, therefore, is whether the pleadings and plaintiff's own testimony, as contained in her adverse examination, would have required a directed verdict for defendant.

[4, 5] Plaintiff's status in relation to defendant, we may assume, was that of a business invitee. The defendant was not an insurer of plaintiff's safety; rather, the duty owed to plaintiff was to exercise ordinary care to keep in reasonably safe condition the areas where she was expected to go and to warn of unsafe conditions of which the defendant was charged with knowledge. *Redding v. Woolworth Co.,* 9 N.C. App. 406, 176 S.E. 2d 383. Although plaintiff alleged that the cause of her fall was a rock in the path, her own testimony shows that it could as well have been some object unwittingly dropped or deliberately discarded by a fellow tourist, perhaps scant moments prior to her unfortunate mishap. Upon such weak evidence, a jury could not be permitted to speculate as to the nature of the object or the duration of its presence. cf. *Powell v. Deifells, Inc.,* 251 N.C. 596, 112 S.E. 2d 56; *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283. The materials produced by defendant in support of its motion amply demonstrate that plaintiff cannot bear her burden of proof to show a breach of duty. In the face of such materials, plaintiff chose to rest upon the unsupported allegations of her complaint. Summary Judgment was properly granted.

Affirmed.

Judges MORRIS and VAUGHN concur.

THURMAN L. PARRISH AND WIFE, MAGGIE M. PARRISH v. J. NORWOOD ADAMS AND WIFE, VALERINA C. ADAMS

No. 7111SC68

(Filed 31 March 1971)

1. **Descent and Distribution § 13— advancement — sufficiency of conveyance to son**

The conveyance to petitioner of a 3-acre parcel of land owned by his parents as tenants by the entirety, the conveyance stating that all the parties agreed that the 3-acre parcel represented the entire interest of the petitioner in the lands of his father, *held* sufficient to support a determination that the parents intended the conveyance as an advancement of the petitioner's complete inheritance. G.S. 29-2(1).

2. **Descent and Distribution § 13— advancement — intention of the parent**

Whether a gift is an advancement depends on the intention of the parent at the time the gift is made.

3. **Descent and Distribution § 13; Estoppel § 1— advancement — estoppel by deed**

Where a child accepts a deed with knowledge that the lands conveyed therein represent an advancement of his full share of the parents' realty, he is estopped to claim any other lands owned by the parents at the time of their deaths.

APPEAL by petitioners from *Bailey, Superior Court Judge,* 8 September 1970 Civil Session of HARNETT County Superior Court.

Petitioners seek partition of a certain described tract of land in Harnett County, claiming a one-fifth undivided interest therein.

The following facts are not in dispute: In 1933, the male petitioner's father and mother, P. L. Parrish and wife Bettie (Betty) Parrish (Mr. and Mrs. Parrish), acquired by deed a 20.65-acre tract of land in Harnett County. By deed, dated 21 April 1951, they conveyed to petitioners a parcel of approximately 3 acres, which was carved from the 20.65-acre tract. A life estate was reserved therein by Mr. and Mrs. Parrish. The deed recited consideration in the amount of $100 and other valuable consideration and contained the following language: "It is expressly understood and agreed between all parties herein, that the lands herein conveyed represents [*sic*] the entire interest of the said Thurman L. Parrish, in the lands of his father, P. L. Parrish, as of this date."

Mr. Parrish died intestate on 11 October 1956 and Mrs. Parrish died intestate 26 April 1967. Five children, including the male petitioner, survived. Respondents acquired the interest of all the children, except for any interest owned by male petitioner, in the land owned by Mrs. Parrish at her death.

Respondents filed answer denying that petitioners have any interest in the 20.65-acre tract of land, except for the 3-acre parcel conveyed to them by Mr. and Mrs. Parrish by deed of 21 April 1951.

At pretrial conference the parties entered into various stipulations including stipulation No. 7 which provides:

> "That if the Court finds as a fact and as a matter of law that Thurman L. Parrish received an advancement by virtue of the conveyance of certain premises by a deed dated April 21, 1951, from P. L. Parrish and wife, Betty M. Parrish, and recorded November 17, 1951, in Book 331, Page 309, Harnett County Registry, then and in that event it is stipulated as an agreed fact that the said Thurman L. Parrish received his full share from the estate of his mother, Betty M. Parrish."

The matter was heard by Judge Bailey who found the conveyance in question to have been an advancement and entered judgment dismissing the petition. Petitioners appealed.

James F. Penny, Jr., for plaintiff appellants.

Woodall, McCormick & Arnold by Gerald Arnold for defendant appellees.

GRAHAM, Judge.

G.S. 29-2(1) provides that: " 'Advancement' means an irrevocable *inter vivos* gift of property, made by an intestate donor to any person who would be his heir or one of his heirs upon his death, and intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift. . . ."

[1-3] Whether a gift is an advancement depends on the intention of the parent at the time the gift is made. *Harrelson v. Gooden,* 229 N.C. 654, 50 S.E. 2d 901; *Bradsher v. Cannaday,* 76 N.C. 445. We think the language in the deed clearly sufficient to permit a determination by the trial court that Mr. and Mrs. Parrish intended the conveyance of the 3-acre parcel of land,

by deed dated 21 April 1951, as an advancement of the male petitioner's complete inheritance. Petitioners contend that the language of the deed reflects, at most, only an intention that the conveyance constitute an advancement with respect to the lands of Mr. Parrish. However, the agreement expressed in the deed is that of all the parties, and the land being conveyed belonged to both parents as tenants by the entirety. Where a child accepts a deed with knowledge that the lands conveyed therein represent an advancement of his full share of the parents' realty, he is estopped to claim any other lands owned by the parents at the time of their deaths. *Coward v. Coward,* 216 N.C. 506, 5 S.E. 2d 537.

Furthermore, we hold that petitioners are estopped by their stipulation No. 7 from contending that the advancement has no application to Mrs. Parrish's estate. The stipulation clearly provides that if it is determined that the male petitioner received an advancement through the deed of 21 April 1951, he has received his full share from his mother's estate.

Petitioners assign as error the court's refusal to strike from the evidence the agreement, contained in the deed of 21 April 1951, that the lands conveyed represent the entire interest of the male petitioner in the lands of his father. They insist that the statement is immaterial. Far from being immaterial, the statement goes to the very heart of the issue involved in this case. Moreover, petitioners stipulated that this very deed "be admissible in evidence." We overrule this assignment of error.

Petitioners' final assignment of error challenges the court's finding that respondents own the land in question. We agree that title to the property has not been shown to be in respondents in the manner required by decisions in this jurisdiction. See *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; *King v. Lee,* 9 N.C. App. 369, 176 S.E. 2d 394. However, this finding may be disregarded as the court's finding that petitioners had no interest in the property required that the petition be dismissed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

DOXOL GAS OF ANGIER, INC. v. MARVIN BAREFOOT

No. 7111DC58

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 60— relief from default judgment — requisites**

In order to set aside a judgment by default, the court must find that defendant's neglect was excusable and that he had a meritorious defense to the action. G.S. 1A-1, Rule 60(b) (1).

2. **Rules of Civil Procedure § 60— relief from default judgment — excusable neglect**

The fact that defendant was in the midst of the tobacco curing season and did not have time to answer the complaint is insufficient as a matter of law to constitute excusable neglect. G.S. 1A-1, Rule 60(b) (1).

3. **Rules of Civil Procedure §§ 5, 7, 60— setting aside default judgment — notice to plaintiff**

Defendant's written motion to set aside a default judgment was not one which might be heard *ex parte*, and it was error for the court to hear and allow the motion without any notice to the plaintiff. G.S. 1A-1, Rules 5(a), 7(b) (1), and 60(b).

APPEAL by plaintiff from *Robert B. Morgan, Sr., Chief District Judge,* 14 September 1970 Session of HARNETT District Court.

On 9 July 1970 plaintiff filed verified complaint seeking recovery of $1,784.76 for goods sold and delivered under an express contract and recovery of $1,829.50 on a promissory note executed by defendant to plaintiff. On 21 July 1970 summons and copy of complaint were personally served on defendant. Defendant did not file answer or seek any extension of time to plead, and on 24 August 1970 judgment by default was entered in plaintiff's favor for the sums demanded. On 15 September 1970, without notice to plaintiff, defendant filed written motion to set the default judgment aside, alleging in the motion:

> "[T]hat at the time the complaint was served on him he was in the midst of barning tobacco, consisting of about 31 acres, that the defendant was busy with his labor problem and mislaid the complaint and did not have ample time to answer this complaint nor did he have ample time to subpoena witnesses and to even attend a trial due to the circumstances of his crop, and the defendant shows to the

Court that judgment was obtained by default and the defendant believes and so alleges that he has a meritorious defense. . . ."

On 15 September 1970, the same date the motion was filed, an order allowing the motion was also filed. This order was dated 14 September 1970, was signed by the Chief Judge of the District Court in Harnett County, and contains the following:

"[T]hat the defendant failed to file an Answer due to the fact that the defendant was involved in harvesting 31 acres of tobacco, and the defendant has shown to the Court that judgment by default was obtained against him and has also shown to the Court that he desires now to come into Court and file and *(sic)* answer and present his evidence, and the Court is of the opinion that the defendant is entitled to this relief;

"NOW, THEREFORE, the Judgment rendered in this cause and recorded in the Office of the Clerk of the Superior Court, Harnett County and the Office of the Clerk of the Superior Court of Wake County is hereby set aside and the defendant is granted thirty days from the date of execution of this Order to file an answer or otherwise plead in this cause, and this matter will be set for trial as by law provided."

From this order, plaintiff appealed.

James F. Penny for plaintiff appellant.

No counsel for defendant appellee.

PARKER, Judge.

[1] "Unless the judge finds that there was excusable neglect, and this finding is correct as a matter of law, he is not authorized to set aside the judgment. The facts found by him are conclusive if there is any evidence on which to base such finding of fact. Whether the facts found constitute excusable neglect or not is a matter of law and reviewable upon appeal." *Land Co. v. Wooten,* 177 N.C. 248, 98 S.E. 706. Even when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless there is a meritorious defense, *Land Co. v. Wooten, supra,* for "[i]t would be idle to vacate a judgment where there is no real or substantial defense on the merits." *Cayton v. Clark,* 212 N.C. 374, 193 S.E. 404. "Parties 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." 5 Strong, N. C. Index 2d, Judgments, § 25; *Jones v. Fuel Co.*, 259 N.C. 206, 130 S.E. 2d 324; *Meir v. Walton*, 2 N.C. App. 578, 163 S.E. 2d 403.

The cases cited above were decided under former G.S. 1-220, which has now been replaced by Rule 60(b)(1) of the Rules of Civil Procedure. The language of the Rule follows closely the language of the former statute, and the principles announced in the above cases still apply.

[2] In the present case it is our opinion and we so hold that the facts found in the order appealed from do not, as a matter of law, constitute excusable neglect. Furthermore, the defendant failed to show and there was no finding that he has any meritorious defense.

[3] We also note that the order appealed from was entered without any notice to plaintiff. G.S. 1A-1, Rule 60(b) provides that "[t]he procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action." Rule 7(b)(1) provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing. . . ." Rule 5(a) provides that "every written motion other than one which may be heard *ex parte* . . . shall be served upon each of the parties. . . ." Defendant's written motion to set aside the default judgment was not one which might be heard *ex parte*. *Harper v. Sugg*, 111 N.C. 324, 16 S.E. 173; 2 McIntosh, N. C. Practice and Procedure, § 1717.

The order appealed from is erroneous and is

Reversed.

Chief Judge MALLARD and Judge GRAHAM concur.

NORMAN EARL BRANTLEY v. FORREST V. DUNSTAN AND WALLACE R. GRAY

No. 7110SC133

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 56— claim barred by statute of limitations — summary judgment**

Where the record discloses that plaintiff's claim is barred by the statute of limitations, defendants are entitled to judgment as a matter of law, and summary judgment under G.S. 1A-1, Rule 56, is appropriate.

2. **Attorney and Client § 5; Limitation of Actions § 4— action against attorneys — negligence in filing defective summons — accrual of cause of action**

Cause of action to recover damages for alleged negligence of defendant attorneys in filing a fatally defective summons in plaintiff's action against a third party, whether sounding in contract or tort, accrued at the time the defective summons was filed, not when plaintiff thereafter dismissed defendants as his attorneys or when the Court of Appeals determined that plaintiff's claim against the third party was barred by the statute of limitations; consequently, plaintiff's action instituted against defendant attorneys more than three years after the defective summons was filed is barred by the statute of limitations. G.S. 1-52(1) and (5).

APPEAL by plaintiff from *Clark, Superior Court Judge,* 14 September 1970, Civil Term, WAKE County General Court of Justice, Superior Court Division.

Plaintiff instituted this action by filing a complaint 26 July 1970 seeking to recover from the defendants, attorneys-at-law, damages for alleged negligence on the part of the defendants in failing properly to file a cause of action on behalf of the plaintiff against one Lester Sawyer. Plaintiff alleged that he was involved in an automobile accident with Lester Sawyer on 26 November 1962 and suffered property damage and personal injury. Plaintiff then entered into a contract of employment with the defendants to institute a civil action for damages against Lester Sawyer. Defendants waited until 26 November 1965 to institute the action in the Superior Court of Dare County. The summons was dated 26 November 1965 and was served on Lester Sawyer 1 December 1965. It required him to appear before the Clerk of Court in Pasquotank County rather than Dare County within thirty days and answer the complaint. On 31 December 1965, Lester Sawyer filed with the Clerk of Superior Court of Dare

County a special appearance and motion to dismiss on the grounds that the court had never acquired jurisdiction over his person in that the summons directed him to appear in the wrong county. The hearing on the motion to dismiss was delayed and the case remained pending for several years until January 1969.

Sometime in September 1968, the plaintiff dismissed the defendants as his attorneys and employed other counsel. On 20 January 1969, the plaintiff filed a motion seeking to amend the summons served on Lester Sawyer. The motion was heard and an order entered allowing the summons to be amended, but this order was reversed on appeal to this Court. A subsequent order was entered in Dare County Superior Court dismissing plaintiff's action against Lester Sawyer.

Plaintiff alleges that his loss of the claim against Lester Sawyer was the result of defendants' failure properly to file the complaint and summons in Dare County Superior Court. Plaintiff seeks damages in the amount of $50,000.00, this being the alleged value of the claim against Lester Sawyer plus other damages suffered by the plaintiff occasioned by the improper filing of the complaint by the defendants.

Both defendants answered, denying the material allegations and affirmatively pleading the statute of limitations as a second defense. Both defendants then moved for summary judgment on the ground that the action was barred by the statute of limitations.

From an order granting defendants' motions for summary judgment and dismissing the action as to both defendants, the plaintiff appeals to this Court.

Broughton, Broughton, McConnell & Boxley by J. Mac Boxley and Charles P. Wilkins for plaintiff appellant.

Smith, Anderson, Dorsett, Blount & Ragsdale by James D. Blount, Jr., for defendant appellee Forrest V. Dunstan.

Maupin, Taylor & Ellis by Thomas F. Ellis for defendant appellee Wallace R. Gray.

CAMPBELL, Judge.

[1] The sole question presented upon this appeal is whether the record discloses that the plaintiff's claim is barred by the running of the statute of limitations. If so, defendants were en-

titled to judgment as a matter of law and summary judgment, under Rule 56, N. C. Rules of Civil Procedure, was appropriate. Whether regarded as arising out of contract or tort, the prescribed period for the commencement of the action is three years. G.S. 1-52(1) and (5).

[2] The record discloses that the injury complained of occurred when the defective summons was filed 26 November 1965. The present action was instituted when the complaint was filed on 26 June 1970, more than four years after the injury occurred.

Plaintiff contends that (1) the claim against the defendants sounds in contract rather than tort; (2) the filing of the defective summons on 26 November 1965 was a breach of the contract; (3) the breach was waived and performance continued under the contract; and that (4) the claim did not accrue until a subsequent breach of the contract occurred in September 1968 when plaintiff dismissed the defendants as his attorneys. However, under the facts presented, whether the claim sounds in contract or in tort makes no difference in regard to the outcome. Plaintiff's complaint discloses only that the plaintiff was dissatisfied with defendants' services and dismissed them in September 1968. The complaint, if it in fact sounds in contract, although we do not so hold, fails to allege any subsequent breach of the contract that would begin anew the running of the statute of limitations.

Plaintiff further contends that the claim against the defendants did not accrue until this Court determined that plaintiff's claim against Lester Sawyer was barred. *Brantley v. Sawyer*, 5 N.C. App. 557, 169 S.E. 2d 55 (1969). But the North Carolina Supreme Court has consistently held that the claim accrues at the time of the invasion of the right, and that nominal damages, at least, flow from such invasion. *Land v. Pontiac, Inc.*, 6 N.C. App. 197, 169 S.E. 2d 537 (1969), and cases cited therein.

> ". . . Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in G.S. 1-17. . . . It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. . . . It is likewise unimportant that the harmful consequences of the breach of duty or of contract were not

discovered or discoverable at the time the cause of action accrued. . . ." *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1 (1965).

[2] We hold that the claim accrued at the time of the filing of the defective summons and that the claim is now barred by the running of the statute of limitations.

The order granting defendants' motion for summary judgment and dismissing plaintiff's claim is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RAY THOMAS INGRAM

No. 7114SC170

(Filed 31 March 1971)

1. **Receiving Stolen Goods § 6— instructions — felonious intent**

Although the trial judge in his instructions did not use the words "felonious intent" in defining the offense of receiving stolen goods, the instructions nonetheless adequately required the jury to be satisfied beyond a reasonable doubt that the defendant acted with the requisite felonious intent.

2. **Criminal Law § 154— record on appeal — addition of unauthorized items**

Defense counsel's unauthorized adding of items to the record on appeal is condemned.

APPEAL by defendant from *Bickett, Judge of Superior Court,* 18 August 1970 Session, DURHAM Superior Court.

Defendant and one James Arthur Farrington were charged jointly in a bill of indictment containing three counts: (1) Felonious breaking or entering, (2) felonious larceny, and (3) receiving stolen property of a value of more than $200.00 knowing it to have been stolen.

The State's evidence tended to show the following. At about six o'clock p.m. on 16 April 1970 Mr. R. A. Brunson closed and locked the premises of "Brunson's," a retail appliance store, located on West Main Street in the city of Durham. At about

four o'clock a.m. the following morning (17 April 1970) an officer of the Durham Police observed a broken plate glass window at "Brunson's." It was determined that two television sets, one Zenith and one Magnavox, had been taken from "Brunson's" display window at the point where the plate glass was broken. At approximately nine-thirty o'clock a.m. of the same day (17 April 1970) another officer of the Durham Police observed the defendants at the rear of Scarborough Funeral Home in Durham. He observed defendants as they removed two television sets from the trunk of a 1970 Chrysler automobile, and carried them through the rear entrance into Scarborough Funeral Home. After defendants entered the Funeral Home they observed the officer inside and defendant Ingram remarked "Damn, Man, you got the police in here." Defendant Ingram was carrying the Zenith and defendant Farrington was carrying the Magnavox. The officer detained both defendants and notified the detective bureau.

Detective Moore went to the funeral home where he observed defendants and the two television sets. He escorted defendants, the television sets, and the 1970 Chrysler automobile to the police department. The television sets were identified as those missing from the display window of "Brunson's."

Detective Moore interrogated defendant Ingram at the police station where he was told the following by defendant Ingram:

> "That Ray Thomas Ingram told him that he had borrowed this Chrysler that belongs to Willie Tomlin and he stated that he and James Arthur Farrington and Willie Tomlin were out riding around and that Willie Tomlin went home to go to bed so he could go to work the next morning, and that he loaned his car to Ray Ingram. That Ray Thomas Ingram stated that he and Arthur Farrington went to two or three places drinking and that he got drunk after drinking heavily. That Ingram stated he had been drinking all night and that he went home sometime around one o'clock. That James Arthur Farrington came and woke him up about 6:30 o'clock and both of them went down around Papa Jack's on Pettigrew Street to get them a drink and that some man they didn't know came up and told them he had two television sets and wanted them to take them to Scarborough's Funeral Home. He stated that this man was driving a green Chevrolet with New Jersey license plates on it."

Defendants offered no evidence.

The jury returned verdicts of "not guilty" upon the breaking or entering and the larceny counts (counts 1 and 2), and a verdict of "guilty" upon the receiving count (count 3).

Defendant Ray Thomas Ingram appealed.

Attorney General Morgan, by Assistant Attorney General Hensey, for the State.

Winders, Williams & Darsie, by Charles Darsie, for defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge failed to instruct the jury that receiving must be with a felonious intent. In his instructions to the jury the trial judge did not use the words "felonious intent" in his definition of the offense of receiving stolen goods. However, there are other words which define the felonious intent as adequately as the word "felonious" itself. For approval of phrases or words other than "felonious" to describe felonious intent, see *State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569; *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572; *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426; *State v. Kirkland,* 178 N.C. 810, 101 S.E. 560 and *State v. Powell,* 103 N.C. 424, 9 S.E. 627.

We have carefully reviewed the instructions to the jury and in our opinion the instructions adequately require the jury to be satisfied beyond a reasonable doubt that defendant acted with the requisite (felonious) intent. This assignment of error is overruled.

[2] Defendant undertakes to assign as error that the trial judge settled the case on appeal by correcting the official trial transcript to reflect the verdict to be that which the trial judge found as a fact to be the verdict rendered by the jury. In this connection defense counsel added to the Record on Appeal two affidavits which were not served on the Solicitor and which were never considered by the trial judge. These two affidavits will be disregarded by this Court, and the unauthorized adding of items to the Record on Appeal is condemned. *State v. Houston,* 4 N.C. App. 484, 166 S.E. 2d 881. This purported assignment of error is overruled.

We have considered defendant's remaining assignments of error and find them to be without merit. In our opinion defendant has received a fair and impartial trial, free of prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES S. DAVIS

No. 7114SC72

(Filed 31 March 1971)

1. **Criminal Law § 162— striking of objectionable answer**

Where the court sustains defendant's objection to the answer of a witness and strikes the answer and cautions the jury not to consider it, it is presumed that the jury heeded the court's instruction and that any prejudicial effect of the answer was removed.

2. **Criminal Law § 162— motion to strike — waiver of objection**

Defendant's failure to move to strike an incompetent answer constitutes a waiver of objection.

APPEAL by defendant from *Canaday, J.*, 22 June 1970 Criminal Session, DURHAM Superior Court.

Defendant was tried on two bills of indictment charging (1) forgery of and uttering a check in amount of $321.24 on 1 December 1969, and (2) forgery of and uttering a check in amount of $602.44 on 3 December 1969. The cases were consolidated for trial and defendant pleaded not guilty on all counts.

The jury returned a verdict of guilty of uttering a forged check in each case and from judgment imposing two prison sentences of not less than three nor more than five years, to run consecutively, defendant appealed. Attorney Edwin J. Walker, Jr., who did not represent defendant at trial, was appointed to represent defendant in this court.

Attorney General Robert Morgan by Staff Attorney Walter E. Ricks III, for the State.

Edwin J. Walker, Jr., for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends that certain improper questions asked by the solicitor, and certain improper testimony illicited by him, resulted in prejudicial error to defendant. There are three exceptions included in this assignment and we will treat them separately.

With respect to Exception 5, the record discloses:

"Q. How many checks?

A. I guess 10 or 12, altogether.

DEFENDANT: Objection.

COURT: Sustained. Motion to strike allowed. Ladies and gentlemen, disregard the testimony of the witness about 10 or 12 checks. Don't consider that.

EXCEPTION No. 5."

[1] It is noted that the defendant did not object to the question when it was asked. Following the answer, the court sustained defendant's objection and of its own motion struck the answer and instructed the jury to disregard the testimony. It is presumed that the jury heeded the court's instruction and that any prejudicial effect of the testimony was removed. *Apel v. Coach Company,* 267 N.C. 25, 147 S.E. 2d 566 (1966).

With respect to Exception 6, the record discloses:

"I then communicated with the police department in Raleigh and was informed that he was picked up on another charge.

DEFENDANT: Objection.

COURT: Sustained.

EXCEPTION No. 6."

[2] Although the court sustained defendant's objection to the answer, defendant made no motion to strike. It is well settled in this jurisdiction that if testimony is incompetent, objection thereto should be interposed to the question at the time it is asked; if an answer is improper, objection to it and motion to strike should be interposed immediately; and objections not taken in apt time are waived. *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1966) and cases therein cited. As to Exception 6, the

trial court had no opportunity to rule on a motion to strike because no such motion was made.

Regarding Exception 8, the record discloses:

"REDIRECT EXAMINATION by Mr. Brannon:

Q. Just perhaps one other thing, Mr. Smith. Did you have occasion to find this individual, Charles Shepard Davis' fingerprints on any other items which were submitted to you?

Objection by defendant.

A. Yes sir.

DEFENDANT: Objection unless he is on trial for that.

COURT: Sustained.

EXCEPTION No. 8."

Here again the defendant failed to move that the witness' answer be stricken. Furthermore, we perceive no prejudice in the question and answer.

For the reasons stated, the assignment of error relating to Exceptions 5, 6 and 8 is overruled.

Defendant's remaining assignments of error relate to the court's charge to the jury. Suffice to say, we have carefully reviewed the charge, with particular reference to the portions covered by the assignments of error, but conclude that when it is considered contextually, the charge is free from prejudicial error. *State v. Heffner,* 1 N.C. App. 597, 162 S.E. 2d 100 (1968).

The assignments of error are overruled.

Defendant has filed in this court a motion in arrest of judgment, contending that the bills of indictment did not meet the test set forth in *State v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742, and *State v. Cross,* 5 N.C. App. 217, 167 S.E. 2d 868. The indictments in the cited cases involved forgery, and any defect in the forgery counts in the instant cases were cured by the jury verdicts. We hold that the uttering counts in the bills of indictment were sufficient and the motion in arrest of judgment is denied.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. TERRY INGLAND

No. 7112SC103

(Filed 31 March 1971)

1. **Conspiracy § 5—conspiracy prosecution — acts and declarations of other conspirators — admissibility**

In a prosecution of defendant for conspiracy to murder, testimony relating to the acts and declarations of other conspirators during the existence of the conspiracy was properly admissible in evidence.

2. **Conspiracy § 6— conspiracy to murder — sufficiency of evidence**

Issue of defendant's guilt of conspiracy to murder was properly submitted to the jury.

APPEAL from *McKinnon, Superior Court Judge,* 21 September 1970 Session, CUMBERLAND County Superior Court.

Defendant was charged in two bills of indictment with conspiracy to murder. At the close of the State's evidence, directed verdict for defendant was entered as to one charge. On the other the jury entered a verdict of guilty. Defendant appeals from the judgment entered on the verdict.

Richard Fortner, the alleged victim of the conspiracy, testified that Terry Ingland and James Ingland asked him to come to a house on Maiden Lane in the city of Fayetteville. Fortner injected himself with heroin and went to the house around midnight on 30 April 1970. Fortner named several people who were in the house on Maiden Lane. He then testified that one of them produced a shotgun and told him that he "was dead," that one held a knife and "turned it at him" and that another of the party also had a knife. The prosecuting witness then testified that he was questioned about being an informer on a group known as "the family." Following this, he was placed in a car and, with a knife at his ribs, taken to a wooded area outside Fayetteville and left with one of the alleged co-conspirators. He testified that he was tied up, with sharp stakes placed near his neck so that he could not move. He also said that one of the group told him that he would be killed before the others returned if he did not keep quiet. Defendant Terry Ingland was not present in the house on Maiden Lane, or in the automobile which took the prosecuting witness out to the wooded area where he was tied up.

Attorney General Morgan by Staff Attorney Covington for the State.

Twelfth District Assistant Public Defender William S. Geimer for defendant appellant.

MORRIS, Judge.

Defendant contends by his Exceptions Nos. 1, 2, 3 and 5, that the court erred in failing to sustain his objections to the testimony of the prosecuting witness about acts and declarations of other conspirators which acts and declarations were done and made out of his presence and without his knowledge. Defendant also contends that it was error on the part of the trial court not to grant his motion to strike the testimony in question.

Our Supreme Court has said in *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969), that "each appellant contends evidence of the acts and declarations of the other defendants were introduced in evidence over his objection. Actually the court cautioned the jury to consider acts and declarations of one as evidence against him only, unless the other was actually present and participating. *Due to the nature of the charge, the limitation was more favorable to the defendants than they had any right to expect.* The charge is conspiracy—a partnership in crime. Generally an unlawful agreement is made in secret and known only to the guilty parties. They conceal and cover up their unlawful activities. The more reprehensible the objective, the more carefully they plan to prevent detection and exposure 'Even though the offense of conspiracy is complete upon the formation of the illegal agreement, the offense continues until the conspiracy is consummated or is abandoned.' *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *United States v. Kissel,* 218 U.S. 601, 54 L. Ed. 1168." (Emphasis ours.)

In *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505 (1967), the Court said,

> "After a conspiracy is formed, and before it has terminated, that is, while it is a 'going concern', the acts and declarations of each conspirator made in furtherance of the object of the conspiracy are admissible in evidence against all parties to the agreement, regardless of whether they are present or whether they had actual knowledge of the acts or declarations. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d

508; *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *State v. Jackson,* 82 N.C. 565."

" 'A declaration or act of one conspirator, to be admitted against his co-conspirators, must have been made when the conspiracy was still in existence and in progress.' 16 Am. Jur. 2d, Conspiracy, § 40, p. 148, citing many decisions." *State v. Conrad, supra.*

[1] Here the evidence complained of was of acts or declarations committed or made by one or more of the conspirators while the conspiracy was a "going concern." The evidence was properly admitted for the consideration of the jury. These assignments of error are overruled.

[2] Defendant also assigns as error the court's failure to grant his motion for a directed verdict as to the charge on which he was convicted. This assignment of error is without merit. The evidence required submission to the jury. Defendant's remaining assignment of error is directed to the court's failure to set the verdict aside and grant a new trial. This assignment is also overruled. Defendant has been given a fair and impartial trial free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. BOBBY LOWRY

No. 7116SC54

(Filed 31 March 1971)

1. **Criminal Law § 150— right of defendant to appeal**

The right of appeal by a convicted defendant from a final judgment is unlimited and is a substantial right. G.S. 15-180.

2. **Criminal Law § 150— penalty for appeal by defendant**

The trial judge may not impose a penalty on the exercise of the right to appeal.

3. **Criminal Law § 150— increase in sentence — penalty for appeal**

A trial judge may increase the sentence given a defendant only where the record does not sustain the suggestion that defendant was being penalized for announcing his intention to appeal.

4. Criminal Law §§ 144, 150— increase of sentence to statutory minimum — penalty for appeal

It was error for the trial court, subsequent to notification of defendant's intention to appeal his conviction of felonious escape, to strike defendant's original sentence of forty-five days and impose a sentence of six months, the statutory minimum for the crime of felonious escape, where the record indicates that the greater sentence may have been imposed because defendant exercised his right to appeal.

APPEAL by defendant from *Braswell, Superior Court Judge,* 4 September 1970 Session of ROBESON County Superior Court.

Defendant was charged in a valid bill of indictment with felonious escape. He appeared in court and entered a plea of guilty and was sentenced on 31 August 1970 to forty-five days in the Robeson County Jail. Defendant was committed to the jail to begin serving his sentence. The defendant, while in jail and while the court was still in session, notified the court of his desire to appeal. He was brought into court and notified that the minimum sentence for felonious escape was set by statute at six months and that the forty-five day sentence would be stricken upon motion of the Solicitor and a new sentence of six months would be imposed. Defendant requested time to consider and counsel was appointed for him. After consideration, defendant informed the court that he wished to pursue his appeal. The court then, on motion of the Solicitor on 4 September 1970, ordered the former judgment stricken and imposed the minimum sentence of six months as provided by statute.

From the judgment of the court dated 4 September 1970 imposing the minimum statutory sentence of six months, the defendant appeals to this Court.

William S. McLean for defendant appellant.

Attorney General Robert Morgan by Staff Attorney Richard N. League for the State.

CAMPBELL, Judge.

Defendant contends that it was error for the trial judge, subsequent to notification of defendant's intention to exercise his right to appeal, to strike the original sentence of forty-five days and to impose a sentence of six months even though the statutory minimum for the crime committed is six months.

[1, 2] " 'In criminal cases the right of appeal by a convicted defendant from a final judgment is unlimited in the courts of North Carolina. This right of appeal is a substantial right. G.S. 15-180 . . . . ' " *State v. May,* 8 N.C. App. 423, 174 S.E. 2d 633 (1970). The Supreme Court of North Carolina has held that the trial judge may not impose a penalty on the exercise of the right to appeal. *State v. Patton,* 221 N.C. 117, 19 S.E. 2d 142 (1942); *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651 (1966).

[3] A trial judge may increase the sentence given a defendant only where the record does not sustain the suggestion that the defendant was being penalized for announcing his intention to appeal. *State v. Bostic,* 242 N.C. 639, 89 S.E. 2d 261 (1955).

[4] In the present case, the record contains the following:

> "After the pleas and original sentence on August 31, 1970 the Court received a written note from the defendant who was in jail, notifying the Court of his desire to appeal. He was thereafter brought into Court on two or more occasions at which time he was advised that the 45-day sentence would necessarily be stricken on motion by the Solicitor and that a new sentence of 6 months, the minimum sentence for the crime which he was charged, would be entered; that the defendant requested time to consider it and confer; that he was thereafter brought into Court and the Honorable William S. McLean was appointed to confer with him with reference to his appeal or the withdrawal of same. After said conference the defendant insisted on his appeal, whereupon on motion of the Solicitor that the former judgment be stricken for that it was not authorized by statute and that the minimum sentence as provided by statute be imposed was granted and that on September 4, 1970 the original sentence was stricken and judgment and commitment was entered and ordered . . . . "

Here, the record indicates that one of the reasons for the imposition of the greater sentence may have been as a penalty because of the appeal of the defendant. The defendant was brought into court on at least two occasions prior to the imposition of the six months' sentence and was warned that the statutory minimum was six months. It was only after the defendant announced his decision to appeal that the greater sentence was imposed. The State contends that the trial judge intended nothing more than to correct the sentence imposed and bring it within

the statutory limits. This may be so but it was incumbent upon the trial judge to correct the sentence in such a manner as to preclude any inference that the greater sentence was given as a penalty for exercising the right of appeal. By proceeding in the manner in which he did, the trial judge allowed the inference that the greater sentence was imposed as a penalty. Such an inference has a chilling effect on the exercise of the right to appeal and cannot be tolerated. *State v. Patton, supra; State v. Rhinehart, supra.*

The defendant is now entitled to the benefit of the lesser sentence of forty-five days, and it is so ordered.

Modified and affirmed.

Judges BRITT and HEDRICK concur.

HAROLD ADLER v. LUMBER MUTUAL FIRE INSURANCE COMPANY

No. 7110DC215

(Filed 31 March 1971)

1. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On appeal from the granting of a motion for directed verdict, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor.

2. **Insurance § 141— homeowner's policy — theft of rings — insufficiency of evidence**

Plaintiff's evidence was insufficient to be submitted to the jury in an action to recover under a homeowner's policy for the alleged theft of two diamond rings where it tended to show only that plaintiff's wife placed the rings in a dish on a dresser and that the rings were not there when she returned to pick them up two days later.

APPEAL by plaintiff from *Winborne, District Court Judge,* 16 November 1970 Session of WAKE County, the General Court of Justice, District Court Division.

Plaintiff brought this action against the defendant insurance company alleging a contract of insurance with the defendant, a loss thereunder, and a denial of liability by the defendant.

Plaintiff introduced into evidence a homeowner's policy issued by the defendant. The policy afforded coverage to the plaintiff against direct loss to unscheduled personal property by reason of theft. Testimony by the plaintiff and his wife tended to show that the plaintiff's wife had been wearing two diamond rings on or about 18 August 1969. She took the rings off and put them in a dish on her dresser. She only wore the rings when she was going out or to work, and she was home the next day so she did not wear them. About four o'clock that afternoon, she went to the shopping center and was gone from the home for two hours. The following morning as she was getting ready to go to work, she reached for the rings and discovered them missing. She reported the loss to the police and a detective came out and investigated but did not check for fingerprints or find any sign of forced entry. The house was locked while Mrs. Adler was at the shopping center, but there is a window that could be easily opened from the outside. There was no evidence of anything in the house being disarranged or missing. Only the rings were not there.

At the close of plaintiff's evidence, the defendant moved for a directed verdict. From an order of the court granting defendant's motion for a directed verdict, the plaintiff appeals to this Court.

William T. McCuiston for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey for defendant appellee.

CAMPBELL, Judge.

[1] Plaintiff assigns as error the granting of defendant's motion for a directed verdict. On appeal from the granting of a motion for directed verdict, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365 (1970). If the evidence thus considered

is insufficient to go to the jury, the granting of the motion for a directed verdict must be upheld.

The policy in question provides coverage for loss by theft and defines theft as follows:

> "THEFT, meaning any act of stealing or attempt thereat and, as to Coverage C (on premises), including theft of property covered from within any bank, trust or safe deposit company, public warehouse, or occupied by or rented to an Insured, in which the property covered has been placed for safekeeping.
>
> Upon knowledge of loss under this peril or of an occurrence which may give rise to a claim for such loss, the Insured shall give notice as soon as practicable to this Company or any of its authorized agents and also to the police."

[2] In order for plaintiff to recover under the terms of this policy, he must offer some evidence of loss by theft. Considered in the light most favorable to him, the plaintiff's evidence only shows that the rings were placed in a dish on his wife's dresser and were not there when she returned to pick them up two days later. No evidence, circumstantial or otherwise, was presented that would allow the jury to find that the loss was by theft. At most plaintiff's evidence established a mysterious disappearance.

The plaintiff relies on the case of *Davis v. Indemnity Co.*, 227 N.C. 80, 40 S.E. 2d 609 (1946). In that case, the policy had a provision to the effect that the mysterious disappearance of any insured property shall be presumed to be due to theft. No such provision is present in the policy held by plaintiff. The North Carolina Supreme Court, in *Davis v. Indemnity Co., supra,* speaking of the type policy that is now under consideration, stated:

> " . . . But all mysterious disappearances are not the result of theft. Hence, frequently, proof of the mysterious disappearance of property alone was held insufficient to support a verdict; and if there was no evidence of a breaking and entry or other circumstance pointing to theft as the more probable cause of the loss, a recovery under the policy was not permitted. . . . "

The directed verdict was properly granted on the grounds that plaintiff's evidence was insufficient to go to the jury on the issue of theft. This issue being determinative of the case on appeal, we do not consider plaintiff's other assignment of error.

The judgment of the District Court is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. MILES G. SAWYER III

No. 7115SC177

(Filed 31 March 1971)

1. **Criminal Law §§ 143, 145.1— revocation of probation — fair hearing**

Contention of defendant that the revocation of his probation should be set aside on grounds that (1) the probation officer was allowed to testify that when he went to defendant's residence he "was informed" that defendant no longer lived there and that he "received information" defendant was living with a juvenile, (2) the court expressed an opinion on defendant's credibility as a witness by stating, "It is difficult for me to believe that a Probation Officer would state or make such remarks to a probationer," and (3) his motion to suppress all the evidence on the ground that his arrest was illegal should have been allowed by the trial court, *held* without merit.

2. **Criminal Law §§ 143, 145.1— probation revocation**

Where the trial court found that defendant wilfully violated conditions of his probation, it was not necessary that the court also find that such violations were "without lawful excuse" in order to revoke defendant's probation.

APPEAL by defendant from *Canaday, Superior Court Judge,* 12 October 1970 Criminal Session, Superior Court of ALAMANCE County.

Defendant was arrested on 20 September 1970 on a warrant charging him with violation of probation.

From an order entered revoking probation and ordering his two-year sentence into immediate effect, defendant appeals.

Attorney General Morgan by Staff Attorney Eatman for the State.

Robert L. Harris for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns as error the court's allowing the probation officer to testify that when he went to defendant's residence he "was informed" that defendant no longer lived there, and that he "received information" that defendant was living with a juvenile. He also contends that the court expressed an opinion as to the credibility of probationer before the conclusion of the hearing. At the conclusion of defendant's testimony, the court stated "It is difficult for me to believe that a Probation Officer would state or make such remarks to a probationer."

During the course of the trial, defendant moved to suppress all evidence on the ground that the arrest was illegal. In support of his assignment of error to the court's continuing with the hearing he argues that the warrant did not specify what condition had been violated, that defendant was arrested and a copy of the order of arrest given to defendant on 20 September, report filed and a copy given to defendant on 14 October, and hearing had on 16 October. Defendant did not request any further bill of particulars nor ask for a continuance. Certainly he was familiar with the conditions of his probation.

In *State v. Hewett,* 270 N.C. 348, 353, 154 S.E. 2d 476 (1967), Chief Justice Parker clearly set out the requirements to be met in the conduct of a proceeding to revoke probation:

> "A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary. The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. *S. v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53, and cases cited. Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. *S. v. Robinson, supra; S. v. Morton,* 252 N.C. 482, 114 S.E. 2d 115; *S. v. Brown,* 253 N.C. 195, 116 S.E. 2d 349; Supplement to 1 Strong's N.C. Index, Criminal Law, § 136.

> All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. Judicial discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and 'is directed by the reason and conscience of the judge to a just result.' *S. v. Duncan, supra; Langnes v. Green,* 282 U.S. 531, 541, 75 L. Ed. 520, 526; *S. v. Robinson, supra; S. v. Morton, supra; S. v. Brown, supra.*"

A careful study of the record assures us that these requirements were met in this case. We note also that defendant testified on direct examination "I changed my place of residence without the permission of the probationer *(sic)* officer. . . . I am not currently up in my Court payments. I am behind because my wife and I are separated, and I have to pay her $45 for child support. I have three children, and I just don't have enough money for Court." These statements constitute admissions of violation of two of the conditions of probation.

[2] Defendant also assigns as error the court's denial of motion to arrest execution of sentence on the grounds that there was insufficient competent evidence to support a finding that defendant had violated conditions of probation and argues that even if there were, the court failed to find that the violations were without lawful excuse. Obviously defendant's own evidence is sufficient upon which to base a finding that defendant had violated the conditions of his probation. In the order revoking probation, the court found "that the defendant has wilfully violated the terms and conditions of Probation Judgment as hereinafter set out." This is sufficient to support the activation of the sentence. "All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant *has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.*" (Emphasis ours.) *State v. Hewett, supra,* at 353; *State v. Butcher,* 10 N.C. App. 93, 177 S.E. 2d 924 (1971).

We have carefully reviewed all of defendant's assignments of error and conclude that no prejudicial error has been made to appear.

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM TYRONE POWELL

No. 7110SC216

(Filed 31 March 1971)

Automobiles § 126; Criminal Law § 64— admission of breathalyzer test results — requisites of admissibility

The State is not required, prior to the admission of a breathalyzer test results, to introduce in evidence a certified copy of the methods approved by the State Board of Health for administering the test, although it is permissible to do so in order to show that the test complied with the applicable statutory standards. G.S. 20-139.1(b).

APPEAL by defendant from *Bowman, Special Superior Court Judge,* 11 November 1970 Special Criminal Session, WAKE Superior Court.

The defendant, in the District Court of Wake County, was convicted of operating a motor vehicle on the highways while under the influence of some intoxicating liquor. He appealed to the superior court. From a jury verdict of guilty and judgment thereon, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan by Assistant Attorney General William W. Melvin and Assistant Attorney General T. Buie Costen for the State.

William T. McCuiston for defendant appellant.

BROCK, Judge.

The sole question presented on this appeal, as stated by appellant, is "Did the court err when it ruled the breathalyzer reading in this case was admissible evidence?" Defendant does not argue that the witness who administered the test and testi-

fied as to the results was not shown to possess the qualifications required by G.S. 20-139.1(b). The thrust of defendant's argument is that in order to comply with G.S. 20-139.1(b) it is incumbent upon the State to introduce into evidence a certified copy of "the methods approved by the State Board of Health in administering the breathalyzer test" and that it was error to allow the witness to testify that he administered the test in accordance with the rules and regulations established by the North Carolina State Board of Health, without introducing a copy of such rules and regulations in evidence. This contention is without merit and the assignment of error based thereon is overruled.

According to the record on appeal in this case the State offered in evidence the "permit" to administer the breathalyzer test issued to the State's witness by the State Board of Health, and apparently this satisfied defendant with respect to the permittee's qualifications. It also appears from the record on appeal, and further developed in oral argument, that it was the feeling of the solicitor and the trial court that the introduction of such a "permit" was necessary before the individual administering the test would be allowed to testify as to its result. In the totality of the arguments before us we are referred to the holdings in *State v. Caviness,* 7 N.C. App. 541, 173 S.E. 2d 12, and *State v. King,* 6 N.C. App. 702, 171 S.E. 2d 33, as indicating that the "permit" must be introduced into evidence, and also as indicating that a certified copy of the "methods approved by the State Board of Health" for administering the breathalyzer test is required to be introduced into evidence.

The opinions in *State v. Caviness, supra,* and *State v. King, supra,* refer to *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334, and the opinion in *Mobley* refers to *State v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97, and *State v. Powell,* 264 N.C. 73, 140 S.E. 2d 705. There is not the slightest indication in *Mobley, Cummings* or *Powell* that the introduction of the "permit" or that the introduction of a certified copy of the "methods approved by the State Board of Health" is required before the individual may be allowed to testify as to the results of the breathalyzer test.

Similarly in *Caviness* the court was referring to the complete failure of the evidence in the record on appeal to show that the State's witness possessed a "permit" and a complete failure

of the evidence in the record on appeal to disclose that the breathalyzer test was administered according to the "methods approved by the State Board of Health." It is perfectly clear that the opinion in *Caviness* does not require the introduction into evidence of the "permit" or the introduction into evidence of a certified copy of the "methods approved by the State Board of Health." Chief Judge Mallard stated in *Caviness:*

> "This section of the statute requires two things before a chemical analysis of a person's breath can be considered valid. First, it requires that such analysis shall have been performed according to methods approved by the State Board of Health. Second, it requires that such analysis shall have been made by an individual possessing a valid permit issued by the State Board of Health for this purpose."

It is left open for the State to prove compliance with these two requirements in any proper and acceptable manner.

The record on appeal in *State v. King, supra,* shows that the State actually did introduce in evidence the "permit" of the breathalyzer operator. In *King* it was held that a person holding a valid "permit" issued by the State Board of Health is qualified to administer a breathalyzer test. And it was further held that when such a permit is introduced into evidence the permittee is competent to testify. However it is perfectly clear that the opinion in *King* does not limit the method of showing qualification of the permittee to an introduction of the "permit."

In our opinion, from a reading of the statute and the cases above cited, although permissible, it is not required that either the "permit" or a certified copy of the "methods approved by the State Board of Health" be introduced into evidence by the State before testimony of the results of the breathalyzer test can be given.

In the entire trial we find no error.

No error.

Judges MORRIS and VAUGHN concur.

L. A. YOUNG, EXECUTOR OF THE ESTATE OF THELMA Y. BENSON, DECEASED, AND MYRA LEE BENSON GILBERT v. R. M. MARSHBURN AND SEABOARD COAST LINE RAILROAD COMPANY

No. 7111SC114

(Filed 31 March 1971)

1. **Parties § 3— parties defendant — wrongful death action — executor of estate**

An executor cannot be joined as a party defendant in a wrongful death action, since the executor alone is authorized to commence the action. G.S. 28-173.

2. **Death § 3; Executors and Administrators § 8— wrongful death action — executor entitled to maintain action**

The trial court properly dismissed a wrongful death action that was instituted by a person other than the executor of the deceased's estate. G.S. 28-173.

3. **Rules of Civil Procedure § 12— dismissal of action**

An action may be dismissed for failure to state a claim upon which relief can be granted. G.S. 1A-1, Rule 12(b)(6).

APPEAL by plaintiff, Myra Lee Benson Gilbert, from *Bailey, J.*, September 1970 Session of JOHNSTON Superior Court.

This is a civil action instituted by the plaintiff, Myra Lee Benson Gilbert, to recover for the wrongful death of Thelma Y. Benson, plaintiff's adoptive mother, which resulted from an automobile-train collision on 17 March 1968.

After answering the complaint, the defendants, on 23 July 1970, filed a "Motion to Dismiss and For Judgment on the Pleadings" under the provisions of Rules 12(b)(6) and 12(c) of the North Carolina Rules of Civil Procedure.

After a hearing on the defendants' motion, the trial judge made the following pertinent findings of fact:

"1. This is a purported action to recover damages for the alleged wrongful death of Thelma Y. Benson, who died as the result of a collision between her automobile and a train of defendant Seaboard Coast Line Railroad Company, operated by defendant, R. M. Marshburn, as engineer, on March 17, 1968.

"2. Plaintiff Myra Lee Benson Gilbert is an adopted daughter of the deceased and she seeks in this action to recover

in her own name and in her own behalf damages for the death of said Thelma Y. Benson.

"3. L. A. Young, named as plaintiff in the caption of the cause, is executor of the estate of Thelma Y. Benson.

"4. L. A. Young, as such executor, refused to institute an action against the defendants for the alleged wrongful death of Thelma Y. Benson, and refused to become, and never became, a party to the present action. As such executor he was represented in the administration of said estate by counsel other than those who signed the complaint in this action.

"5. Counsel who signed the complaint signed only as counsel for Myra Lee Benson Gilbert. They stated in open court that they were not employed by L. A. Young, said executor, but that they used his name as a plaintiff in an attempt to comply with the provisions of G.S. 28-173.

"6. The complaint in said action is not signed by said executor or by counsel purporting to act for him, as provided by G.S. 1-144, which was in effect when said complaint was filed, or as required by Rule 11, North Carolina Rules of Civil Procedure, now in effect."

Based on its findings of fact, the court concluded as a matter of law that Myra Lee Benson Gilbert, the adopted daughter of Thelma Y. Benson, had failed to state a claim against either defendant upon which relief could be granted.

From an order dismissing the action, the plaintiff appealed to the North Carolina Court of Appeals.

Bryan, Jones, Johnson, Hunter & Greene by K. Edward Greene; and Joe Levinson for plaintiff appellant.

Maupin, Taylor & Ellis by William W. Taylor, Jr., for defendant appellees.

HEDRICK, Judge.

[1] Before this case was argued, the appellant filed in this Court a motion that L. A. Young, executor of the estate of Thelma Y. Benson, "be joined as a defendant in this action." This motion is denied for that L. A. Young, executor, is not a

proper party to be joined as a defendant in an action which he alone by statute is authorized to commence. G.S. 28-173.

[2] The appellant's single assignment of error presents the question of whether anyone other than the executor, administrator, or collector of an estate can maintain an action for wrongful death. The answer is no.

"The right of action for wrongful death is purely statutory. It may be brought only 'by the executor, administrator, or collector of the decedent.' G.S. 28-173. . . . If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed in this State, it should be dismissed. . . . " *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761 (1963).

[3] An action may be dismissed for failure to state a claim upon which relief can be granted on motion filed pursuant to Rule 12(b) (6). We hold that the plaintiff, Myra Lee Benson Gilbert, the adopted daughter of Thelma Y. Benson, may not maintain an action for wrongful death in her own name; therefore, she has failed to state a claim upon which relief can be granted. The order dismissing the action is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

JAMES KOUTSIS v. RUBY JOHNSON WADDEL

No. 7111SC127

(Filed 31 March 1971)

Damages § 16— instructions — permanent damages — application of law to evidence

In an action to recover for personal injuries received in an automobile accident, the trial court properly declared and explained the law arising on the evidence as to the issue of damages by correctly stating the rule for the assessment of damages and reviewing in detail the evidence of plaintiff's injuries, and the court did not err in failing to give special instructions favorable to defendant with respect to an award of permanent damages for a back injury allegedly sustained by plaintiff in the accident.

APPEAL by defendant from *Bailey, J.*, October 1970 Civil Session, HARNETT Superior Court.

This is a civil action to recover damages for personal injuries allegedly sustained by plaintiff in an automobile accident occurring on 19 March 1969. Issues of negligence and damages were submitted to and answered by the jury in favor of the plaintiff and against the defendant, and from a judgment entered on the verdict that the plaintiff recover $10,000.00, the defendant appealed to this Court.

Wilson, Bowen & Lytch by Wiley F. Bowen for plaintiff appellee.

Bryan, Jones, Johnson, Hunter & Greene by Robert C. Bryan for defendant appellant.

HEDRICK, Judge.

By his single assignment of error the defendant contends that the court failed to declare and explain the law arising on the evidence with respect to the issue of damages as required by G.S. 1A-1, Rule 51(a), and the defendant asserts that the court should have instructed the jury:

> "(a) . . . that if they believe that plaintiff's back injury, . . . was sustained when he lifted the pot on February 10, and was not an aggravation of a pre-existing injury sustained in the accident, then they should not consider any back injury found by Dr. Israel in arriving at the amount of the damages.
>
> "(b) . . . that if the jury should find that the plaintiff's injuries were not lasting or permanent, they should award nothing for future pain and suffering.
>
> "(c) . . . that if they believed the plaintiff's back had completely healed when he was released by Dr. Poole on June 1st that any award for back injury should terminate on June 1st."

The evidence with respect to the plaintiff's injuries tended to show: On 19 March 1969, plaintiff was injured in an automobile accident and was hospitalized for ten days. The plaintiff had a severe contusion of the spleen and left kidney and marked sprain of the muscles of the lumbar spine area. Dr. M. B. Poole testified that he filled out forms which indicated that the

plaintiff would be partially disabled until 1 June 1969 and that he "would no longer be disabled either wholly or partially after June 1st, 1969. . . . " Dr. Poole also testified that the plaintiff "could or would have" some permanent residual disability as a result of the injury sustained in the automobile accident. Dr. Ray Israel testified that he examined the plaintiff in November 1969, February 1970, and through April 1970, and "made a diagnosis that the plaintiff had a lumbosacral strain secondary to trauma and hematuria secondary to trauma . . . that the prognosis is poor for complete recovery . . . and estimates that the extent of the permanency is about 10% of the back." On 10 February 1970, plaintiff picked up a pot that weighed about fifteen pounds and began to have severe pain in his lower back. The plaintiff went to see Dr. Israel on the same day. With respect to this incident, Dr. Israel testified, " . . . that lifting or bending on February 10th could aggravate an injury to the extent that Mr. Koutsis had when he examined him, but he did not think it could cause the initial injury."

The assignment of error is without merit. All of the evidence tends to show that the injury described by Dr. Israel resulted from the automobile accident on 19 March 1969, and the incident on 10 February 1970 was at most an aggravation of the original injury. There is no evidence whatsoever tending to show that the plaintiff sustained a new or independent injury on 10 February 1970. There is an abundance of evidence tending to show that the plaintiff had some residual or permanent disability which resulted from the automobile accident.

The evidence clearly shows that the defendant's back had not healed when he was released by Dr. Poole in June 1969, and he was suffering from hematuria (blood in the urine) when Dr. Israel examined him in November 1969.

The defendant made no request for special instructions.

"Where the court adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence, the charge is sufficient and will not be held error for failure of the court to give instructions on subordinate features of the case, since it is the duty of a party desiring instructions on a subordinate feature, or

greater elaboration, to aptly tender a request therefor." 7 Strong, N.C. Index 2d, Trial, § 33, p. 329.

We have carefully considered the court's instructions to the jury with respect to the issue of damages and find that the court declared and explained the law arising on the evidence by correctly stating the rule for the assessment of damages and reviewing in detail the evidence of plaintiff's injuries. *Hunter v. Fisher,* 247 N.C. 226, 100 S.E. 2d 321 (1957); *Dinkins v. Booe,* 252 N.C. 731, 114 S.E. 2d 672 (1960).

On this appeal we find

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. GRADY McMILLAN

No. 7112SC87

(Filed 31 March 1971)

1. **Parent and Child § 9— nonsupport prosecution — sufficiency of evidence**

The defendant in a nonsupport prosecution was entitled to judgment as of nonsuit where the State did not offer any evidence that the defendant wilfully or intentionally failed to support his children. G.S. 14-323.

2. **Parent and Child § 9— nonsupport prosecution — excessive sentence**

Sentence of eighteen months' imprisonment that was imposed upon defendant's first conviction of failure to support his children, *held* excessive. G.S. 14-322.

3. **Parent and Child § 9— nonsupport of children — continuing offense — statute of limitations**

A parent's wilful failure to provide adequate support for his children is a continuing offense, which is not barred by any statute of limitations until the youngest child reaches the age of eighteen.

APPEAL by defendant, Grady McMillan, from *Blount, Superior Court Judge,* 28 September 1970 Session of CUMBERLAND Superior Court.

This is a criminal prosecution on a warrant charging the defendant, an indigent, with wilful failure to provide adequate

support for his five children, in violation of G.S. 14-322, a misdemeanor.

On the defendant's plea of not guilty in the superior court, the State offered evidence tending to show the following facts: The five children named in the warrant, ranging in age from four to fourteen years when the warrant was issued on 28 January 1970, were born of the marriage union between the defendant and Caroline Dudley McMillan. The children went to live with their maternal aunt, Mrs. Maggie McLeod, at 711 Commerce Street, Fayetteville, North Carolina, when their mother became ill and was hospitalized in January 1967. The mother died and all of the children were still with their aunt at the time of the trial in the superior court, except there was some evidence that the youngest child was staying with the wife of an older brother. Although the defendant had been requested to aid in the support of the children, he had given only $28.00 to Mrs. McLeod during all the time that the children had lived in her home. The Cumberland County Department of Social Services was contributing to the support of all five children on 28 January 1970.

The jury found the defendant guilty as charged, and from a judgment of imprisonment of eighteen months, suspended on condition that the defendant contribute $25.00 each week for the support of his children named in the warrant, the defendant appealed to the North Carolina Court of Appeals.

Attorney General Robert Morgan and Staff Attorney L. Philip Covington for the State.

Marion C. George, Jr., for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends that when the evidence is considered in the light most favorable to the State it fails to disclose that his failure to adequately support his five children was wilful, and that his motion for judgment as of nonsuit ought to have been allowed.

In *State v. Hall,* 251 N.C. 211, 110 S.E. 2d 868 (1959), Parker, J., later C.J., stated:

> "In a prosecution under G.S. 14-322 the failure by a defendant to provide adequate support for his child must be wilful, that is, he intentionally and without just cause or excuse

does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved."

In the instant case there is not one scintilla of evidence in the record that the defendant is employed, or that he owns any property, or has any income or any ability whatsoever to contribute to the support of his children; nor is there any evidence that the defendant has failed to apply himself to some honest calling for the support of himself and family, or that he is a frequenter of drinking houses, or is a known common drunkard, so as to bring the case within the presumption raised by G.S. 14-323. The record is devoid of evidence from which the jury might infer that the defendant wilfully or intentionally failed to discharge his obligation to support his children. The defendant's motion for judgment as of nonsuit should have been allowed.

[2] Another serious error appears on the face of the record. The judgment appealed from imposed a jail sentence of eighteen months. G.S. 14-322 provides for the first violation of the statute a fine not exceeding five hundred dollars or imprisonment not exceeding six months, or both, in the discretion of the court.

[3] Since a parent's wilful failure or refusal to provide adequate support for his children is a continuing offense, and is not barred by any statute of limitations until the youngest child shall have reached the age of eighteen years, the State may, if it is so advised, institute another prosecution of the defendant. The judgment appealed from is reversed.

Reversed.

Judges CAMPBELL and BRITT concur.

BECK DISTRIBUTING CORPORATION v. IMPORTED PARTS, INC., PRINCIPAL, (AND MARYLAND CASUALTY COMPANY, SURETY)

No. 7110SC36

(Filed 31 March 1971)

1. **Appeal and Error § 39— record on appeal — extension of time for docketing**

After the time for docketing the record on appeal in the Court of Appeals has expired, the trial judge is without authority to enter a valid order extending the time of docketing.

2. **Attachment § 11— recovery on attachment bond**

A plaintiff that recovered judgment against defendant for $12,425.64 is entitled to enforce the provisions of a $16,000 attachment bond executed by defendant and his surety, the condition of which was "that if the plaintiff recovers judgment, the defendant shall pay all sums that may be awarded to the plaintiff." G.S. 1-440.46(d).

APPEAL by Maryland Casualty Company from *Bailey, Superior Court Judge,* 7 July 1970 Session of Superior Court held in WAKE County.

This cause, under the title of *"Beck Distributing Corporation v. Imported Parts, Incorporated,"* has been heard by this court before on an appeal by Imported Parts, Inc. (Imported). This court found no error in the trial. The opinion was filed 1 April 1970 and is reported in 7 N.C. App. 483. *Certiorari* was denied on 28 May 1970 by the Supreme Court in 276 N.C. 575. Maryland Casualty Company (Surety) is not listed in the title of that case as a party and was not represented by counsel on that appeal. The judgment in that case is the same judgment involved on this appeal and reads as follows:

"This cause coming on to be heard before the undersigned Judge Presiding and a jury duly impaneled at the November 17, 1969 Term of Superior Court of Wake County, and the jury having answered the issue as follows:

'1. What amount, if any, is plaintiff entitled to recover of defendant?

ANSWER: $12,425.64.'

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff have and recover of the defendant Imported Parts, Inc. as principal, and its surety, Maryland Casualty Com-

pany the sum of TWELVE THOUSAND FOUR HUNDRED TWENTY-FIVE AND 64/100 DOLLARS ($12,425.64), with interest from May 31, 1967; and that the costs of this action be taxed by the Clerk against the defendant."

On 22 June 1970 Surety filed a motion to vacate and set aside the judgment in this action insofar as it applies to it and asked that the plaintiff, Beck Distributing Corporation (Beck) be enjoined from enforcing it, for that:

"(1) The judgment is void as to Maryland Casualty Company; or

(2) The judgment does not properly and correctly set forth the liability, if any, of Maryland Casualty Company."

Judge Bailey entered an order dated 7 July 1970 denying the motion, and Surety appealed to the Court of Appeals.

Boyce, Mitchell, Burns & Smith by Robert E. Smith for plaintiff appellee.

Harris, Poe, Cheshire & Leager by W. C. Harris, Jr., for Maryland Casualty Company, appellant.

MALLARD, Chief Judge.

[1] The order of Judge Bailey appealed from is dated 7 July 1970. The record on appeal was docketed in the Court of Appeals on 16 October 1970. Absent a valid order extending the time to docket the record on appeal, the time for docketing the record on appeal in this case expired on 5 October 1970, or 90 days after 7 July 1970. On 16 October 1970 Judge Bailey, upon motion of Surety, entered an order attempting to extend the time for docketing the record on appeal to 16 October 1970. This order is ineffective. After the time for docketing the record on appeal in this court had expired, the trial judge could not then enter a valid order extending the time. In *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), *cert. denied,* 275 N.C. 137, it is said:

" * * * The record on appeal must be docketed in the Court of Appeals within ninety days after the date of the judgment, order, decree or determination appealed from. Within this period of ninety days, but not after the expiration thereof, the trial tribunal may for good cause extend the

time not exceeding sixty days for docketing the record on appeal. * * * "

However, in this case we treat the appeal as an application for a writ of *certiorari,* allow it, and consider the case on its merits.

[2] Beck had attached the property of Imported. Beck and Imported agreed to a return of the attached property to Imported upon the execution by Imported of a bond, with adequate surety, in the amount of $16,000. Surety and Imported executed a bond for $16,000, the condition of which was "that if the plaintiff recovers judgment, the defendant shall pay all sums that may be awarded to the plaintiff in this action." The plaintiff recovered judgment for $12,425.64 in a trial found to be free from prejudicial error. The statute, G.S. 1-440.46(d) (which relates to attachment proceedings), reads:

"Upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein."

By its express terms, the bond signed by Surety in this action was for the benefit of the plaintiff. The judgment did not exceed the amount of the bond, and the trial judge correctly gave judgment against the defendant and Surety.

The order of Judge Bailey denying the motion of Surety is affirmed.

Affirmed.

Judges PARKER and GRAHAM concur.

LORRAINE G. COBB v. MARSHALL L. COBB

No. 7110DC29

(Filed 31 March 1971)

1. **Appeal and Error § 42— evidence not included in record on appeal — findings of fact — presumption**

Where the evidence presented in a child custody hearing was not brought forward in the record on appeal, it is presumed that the court's findings are supported by the evidence.

2. Divorce and Alimony § 24; Infants § 9— award of custody to father

Findings of fact by the trial court are sufficient to support judgment awarding custody of children to the father.

APPEAL by plaintiff from *Preston, District Court Judge,* 2 July 1970 Session, WAKE District Court.

Plaintiff instituted this action seeking alimony *pendente lite,* alimony without divorce and custody of minor children. The cause came on for hearing before District Court Judge Ransdell who, on 3 June 1969, entered an order finding, among other things: (1) that plaintiff was not entitled to alimony *pendente lite;* (2) that both parents were fit and proper persons to have custody of the children of the marriage; and (3) that it will be to the best interests of said children "at this time" that their custody and care be granted to plaintiff. There was no appeal from this order. On 13 February 1970 defendant filed a motion in the cause seeking, among other things, an order placing two of the children in the custody of defendant. Plaintiff's reply to the motion included a motion that the matter be set for hearing before some judge other than Judge Ransdell. By consent of both parties District Court Judge Preston entered an order dated 6 April 1970 (amended on 11 May 1970) allowing defendant to withdraw his motion and plaintiff to withdraw her reply thereto. The consent order also included the following:

> "6. That the Family Counseling Service conduct a complete investigation, including both parties, regarding the custody and welfare of the minor children of the parties, and report the results of said investigation to the undersigned for guidance in the disposition of this cause."

On 28 May 1970 the Chief District Court Judge Bason, apparently on his own motion, entered the following order, from which there was no appeal.

> To: Law Enforcement Officer
>
> It appearing to the court from the petition or motion for review in this case that the above named child is in danger, or subject to such serious neglect as may endanger his health or morals, and that the best interest of the child requires that the court assume immediate custody;
>
> YOU ARE ORDERED, therefore, to assume immediate physical custody of said child and to place the child with

the Department of Social Services of Wake County pending the hearing on the merits.

Again pursuant to motion of the court, a custody hearing was set for 4 June 1970. It was conducted before Judge Preston on June 4, 5 and 8. All parties were present and represented by counsel. On 2 July 1970 Judge Preston entered an order finding in substance that plaintiff was not providing proper guidance and supervision for the children, that at times they were left alone and unattended overnight, were living in a state of turmoil and that plaintiff was not a proper and suitable person to have custody of the two children. The court found defendant to be a fit and proper person to have custody of the children and that the best interests of the children required that they be placed in the custody of the defendant. The court ordered that custody be granted to the defendant and that costs be apportioned between the parties.

Vaughan S. Winborne for plaintiff appellant.

Harris, Poe, Cheshire and Leager by W. Brian Howell for defendant appellee.

VAUGHN, Judge.

[1, 2] Plaintiff has elected not to bring forward any of the evidence admitted in the custody hearing before Judge Preston. It is presumed therefore that the court's findings are supported by competent evidence, and the same are conclusive on this appeal. The findings are sufficient to support the judgment. All of the plaintiff's assignments of error that were properly brought forward on appeal have been carefully considered and are found to be without merit.

Affirmed.

Judges BROCK and MORRIS concur.

LORENA CLARK PINER, ADMINISTRATRIX OF THE ESTATE OF PATRICK DEAN PINER, DECEASED PLAINTIFF v. RYDER TRUCK RENTALS, INC., AND SAV-A-STOP, INCORPORATED, THIRD-PARTY PLAINTIFFS v. ROBERT E. PRINCE, AND AUSBY E. PRINCE, THIRD-PARTY DEFENDANTS

No. 7112SC112

(Filed 31 March 1971)

Venue § 8— motion to remove for convenience of witnesses — discretion of court

A motion for change of venue for the convenience of the witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown.

APPEAL by original defendants, Ryder Truck Rentals, Inc., and Sav-A-Stop, Inc., from *Cooper, J.*, 26 October 1970 Civil Session of CUMBERLAND Superior Court.

Clark, Clark & Shaw by Jerome B. Clark for plaintiff appellee.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellants.

HEDRICK, Judge.

This is a civil action instituted by the plaintiff administratrix, Lorena Clark Piner, to recover compensation for the alleged wrongful death of Patrick Dean Piner which occurred as a result of an automobile accident in New Hanover County on 1 May 1969. The plaintiff, a resident of Cumberland County, and in which county the estate is being administered, filed a complaint in the Superior Court of Cumberland County, alleging that the negligence of the defendants, Ryder Truck Rentals, Inc., and Sav-A-Stop, Inc., proximately caused the death of her intestate. The defendants filed answer denying the material allegations of the complaint, and simultaneously filed a third-party complaint for contribution against Ausby E. Prince and Robert E. Prince, owner and operator, respectively, of an automobile in which the deceased was a passenger, alleging that their negligence was a concurring proximate cause of Patrick Dean Piner's death. At the same time, the original defendants filed a motion to remove the cause to New Hanover County " . . . on the grounds of convenience of witnesses and in the interest of

justice." On 26 October 1970, the trial judge held a hearing on the motion, at which time the original defendants presented affidavits in support of their motion. On 3 November 1970, the trial judge, by an order which states in pertinent part " . . . the court, in its discretion, having concluded that the ends of justice will not be promoted by a removal of the cause from the venue in which it was commenced. . . ", denied the motion. The original defendants appealed.

A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown. *Cooperative Exchange v. Trull,* 255 N.C. 202, 120 S.E. 2d 438 (1961); *Brendle v. Stafford,* 246 N.C. 218, 97 S.E. 2d 843 (1957); *Howard v. Coach Co.,* 212 N.C. 201, 193 S.E. 2d 138 (1937).

The appellants have failed to show any abuse of discretion in the judge's denial of their motion. The order of the trial judge is affirmed.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JUDY ANN McDANIEL

No. 7112SC120

(Filed 31 March 1971)

Criminal Law § 155.5— docketing of appeal

Criminal appeal is subject to dismissal for failure of defendant to docket the case on appeal within ninety days. Court of Appeals Rule No. 5.

APPEAL by defendant from *Cooper, Superior Court Judge,* 6 August 1970 Term, CUMBERLAND County Superior Court.

Defendant was charged in a valid bill of indictment with possession of the narcotic drug heroin. Defendant, an indigent, was represented by court-appointed counsel and entered a plea of not guilty.

Evidence for the State tended to show that Officer White of the Fayetteville Police Department observed the defendant sniffing something from a piece of paper. He approached the defendant and asked to see what she had in her hand. She refused and Officer White placed her under arrest. A few minutes later, she voluntarily opened her hand revealing something like waxed paper with a white substance contained therein. The substance was subsequently examined by the S.B.I. and determined to be heroin.

The jury returned a verdict of guilty as charged. From a sentence of 2 to 3 years, the defendant appeals to this Court.

Attorney General Robert Morgan by Staff Attorney Howard P. Satisky for the State.

Mitchel E. Gadsden for defendant appellant.

CAMPBELL, Judge.

The judgment in this case was entered on 6 August 1970. The case on appeal was not docketed in this Court until 16 December 1970 and no order extending the time for docketing appears in the record. Rule 5 of the Rules of Practice in the Court of Appeals allows ninety days to docket the case on appeal. As this case was not docketed within the prescribed period of time, the appeal is subject to dismissal for failure to comply with the Rules.

We have, nevertheless, examined each of defendant's assignments of error and find no prejudicial error. *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970) covers all points raised by the defendant. Defendant has had a fair trial in all respects.

Appeal dismissed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RUSSELL L. McKAY

No. 7114SC211

(Filed 31 March 1971)

Larceny § 8— instructions

The trial court did not commit prejudicial error in its instructions on a charge of larceny pursuant to a breaking and entering.

APPEAL by defendant from *Bickett, Superior Court Judge,* 2 November 1970 Criminal Session, DURHAM Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the felonies of breaking and entering and larceny. From a verdict of guilty on both counts and judgment thereon, the defendant appealed.

Attorney General Robert Morgan by Trial Attorney H. A. Cole, Jr., for the State.

Hofler, Mount, White and Long by Edwin J. Walker, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant, represented by court-appointed counsel, brings forward only one assignment of error and that is directed to a portion of the court's charge on the second count of the bill of indictment which charged larceny pursuant to a breaking and entering. An examination of the challenged instruction discloses no prejudicial error. Judge Bickett correctly declared and explained the law arising on the evidence in the case.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. CLAIBORNE LEE SHERRON

No. 7114SC107

(Filed 31 March 1971)

APPEAL from *Bickett, Superior Court Judge,* 18 August 1970 Session of DURHAM County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the offense of breaking and entering a store building with the intent to commit a felony therein. Upon call of the case for trial he tendered a plea of guilty to non-felonious breaking and entering. The plea was accepted after a determination by the court that it was freely, understandingly and voluntarily made. Judgment was entered imposing an active prison sentence of two years and defendant appealed.

Attorney General Morgan by Deputy Attorney General Moody for the State.

W. Paul Pulley, Jr., for defendant appellant.

GRAHAM, Judge.

Defendant's court appointed counsel has filed a brief in which he candidly states that he is unable to find error in any of the proceedings. We have reviewed the record proper and find that no error appears on the face thereof.

No error.

Chief Judge MALLARD and Judge PARKER concur.

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ANALYTICAL INDEX

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ACTIONS

§ 10. Method of Commencement and Time from Which Action is Pending

Prior to 1 January 1970 the usual procedure to commence a civil action was by issuance of summons, and the date of the summons was *prima facie* evidence of the date of issuance. *Hendrix v. Alsop,* 338.

Where plaintiff instituted an action against the individual defendant in May 1967 and thereafter filed a complaint in August 1969 against the individual defendant and two corporate defendants, the action was still pending against the original defendant in August 1969. *Ibid.*

AGRICULTURE

§ 9.5. Actions for Defective Seed

Doctrine of strict liability in tort does not apply to sale of mislabeled tomato seeds. *Gore v. George J. Ball, Inc.,* 310.

Doctrine of *res ipsa loquitur* was inapplicable in action to recover lost profits sustained by reason of defendant's delivery to plaintiff of inferior grade of tomato seeds. *Ibid.*

Plaintiff's evidence was sufficient for jury on issue of defendant's breach of contract in supplying plaintiff with grade of tomato seeds inferior to grade ordered by plaintiff. *Ibid.*

§ 10. Violations of Seed Regulations

It was unnecessary for appellate court to decide whether alleged violation of N. C. Seed Law constituted negligence *per se. Gore v. George J. Ball, Inc.,* 310.

ANIMALS

§ 2. Liability of Owner for Injuries Inflicted by Domestic Animal

Trial court should have allowed defendants' motion for summary judgment in this action for personal injuries received by plaintiff when she was thrown from an allegedly vicious horse kept in defendant's pasture. *Patterson v. Reid,* 22.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Appeal from interlocutory injunction restraining defendant from violating provisions of a covenant not to compete is not premature. *Industries v. Blair,* 323.

APPEAL AND ERROR—Continued

§ 7. Parties Who May Appeal

Attorney had no standing to appeal from a clerk's order in an estate proceeding, where it appeared the attorney was acting in his own pecuniary interest. *In re Alston,* 46.

§ 10.5. Motions in Court of Appeals

The Court of Appeals granted the motion of grandparents to be made a party to a child custody action. *Brandon v. Brandon,* 457.

§ 22. Certiorari to Preserve Right to Review

The Court of Appeals treats as a petition for *certiorari* an appeal which failed to comply with the rules of the Court. *Insurance Co. v. Webb,* 672.

§ 24. Form of and Necessity for Objections

It is not the function of the appellate court to search out possible errors which may be prejudicial to an appellant; it is the appellant's duty, acting within the rules of practice, to point out to the appellate court the precise error of which he complains. *Nye v. Development Co.,* 676.

All exceptions which present the same question of law must be grouped together under one assignment of error. *Ibid.*

An assignment of error which attempts to present several propositions of law is broadside. *Wells v. Insurance Co.,* 584.

§ 26. Exception to Judgment

An exception to the judgment does not challenge the sufficiency of the evidence to support the findings of fact. *Wells v. Insurance Co.,* 584.

§ 31. Assignments of Error to the Charge

An assignment of error based on failure to charge should set out appellant's contention as to what the court should have charged. *Daly v. Weeks,* 116.

§ 39. Time of Docketing

Court of Appeals dismisses an appeal for failure of appellant to docket the record on appeal within the time allowed by the Rules. *Williford v. Williford,* 541.

After the time for docketing the record on appeal has expired, the trial judge is without authority to enter a valid order extending the time for docketing. *Distributing Corp. v. Parts,* 737.

§ 42. Presumptions Regarding Matters Omitted from Record

Where the evidence was not included in the record on appeal, it is presumed the court's findings are supported by the evidence. *Cobb v. Cobb,* 739.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

Exclusion of testimony cannot be held prejudicial error where excluded testimony was not entered on the record. *Dotson v. Chemical Corp.,* 123.

APPEAL AND ERROR — Continued

Where it had already been stipulated that defendant was driving the car that hit and killed deceased, plaintiff could not be prejudiced by exclusion of his witness' testimony that defendant's car hit the deceased. *Dudley v. Batten,* 173.

The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been. *Peterson v. Taylor,* 297.

Trial court did not commit prejudicial error in exclusion of evidence offered by defendant in action to recover damages to plaintiffs' residence allegedly caused by defendant's blasting operations where such exclusion could not have affected the result of the trial. *McLamb v. Construction Co.,* 688.

§ 50. Harmless and Prejudicial Error in Instructions

Trial court's instructions which assumed, in the absence of supporting evidence in the record, that a railroad crossing was obstructed by an embankment, trees and shrubbery were reversible error. *Penny v. R. R.,* 659.

Plaintiffs could not have been prejudiced by any error in the court's instructions as to defendant's negligence where the jury found that defendant was negligent. *Leggett v. R. R. Co.,* 681.

§ 53. Error Cured by Verdict

When the issue of defendant's negligence was answered in favor of plaintiffs, plaintiffs were not prejudiced by the admission of challenged testimony relating to the negligence of defendant. *Johnson v. Simmons,* 113.

§ 57. Review of Findings of Fact

Findings of fact in a nonjury trial are conclusive if supported by competent evidence. *Bryant v. Kelly,* 208; *Music House v. Theatres,* 242; *Blackwell v. Butts,* 347.

A failure to make a proper finding of fact in a matter at issue will result in prejudicial error. *Peoples v. Peoples,* 402.

Trial judge is not required to find all the facts shown by the evidence. *In re Custody of Stancil,* 545.

ARREST AND BAIL

§ 6. Resisting Arrest

Evidence that defendant, by continued use of loud and abusive language over a period of several minutes, prevented a deputy sheriff from talking with a suspect at the scene of a reported assault, held sufficient for submission to the jury in a prosecution for delaying or obstructing an officer. *S. v. Leigh,* 202.

Warrant charging that defendant unlawfully and wilfully delayed and obstructed a deputy sheriff in discharging his duty to investigate a reported assault "by abusive language directed at the officer" and by "trying

ARREST AND BAIL—Continued

to convince the person being investigated from cooperating with the officer," *held* sufficient to charge an offense under G.S. 14-223. *Ibid.*

In a warrant for resisting arrest, use of the words "the affiant" in lieu of identifying by name the officer allegedly resisted is disapproved. *S. v. Powell,* 443.

Uniform traffic ticket was insufficient to charge crimes of resisting arrest and assaulting an officer. *Ibid.*

Warrant for resisting arrest is fatally defective where the officer allegedly resisted is not identified by name in the affidavit and the order of arrest erroneously refers to defendant as "Dempsey Roy Smith" rather than by his correct name of "Dempsey Roy Powell." *Ibid.*

§ 9. Right to Bail

Appearance bond of $5,000 for defendant charged with felonious breaking and entering and felonious larceny was not excessive. *S. v. Pitts,* 355.

§ 10. Who May Take Bail

Defendant's contention that the bond requirement set by the issuing magistrate was increased by the arresting officer is unsupported by the record. *S. v. Pitts,* 355.

ASSAULT AND BATTERY

§ 11. Indictment and Warrant

Uniform traffic ticket was insufficient to charge crimes of resisting arrest and assaulting an officer. *S. v. Powell,* 443.

ATTACHMENT

§ 9. Vacation of Attachment

Trial court properly vacated the attachment of an airplane where the attachment was levied more than 10 days after the issuance of the order. *Robinson v. Robinson,* 463.

§ 11. Liabilities on Defendant's Bond

Plaintiff was entitled to enforce the provisions of an attachment bond executed by defendant and his surety. *Distributing Corp. v. Parts,* 737.

ATTORNEY AND CLIENT

§ 3. Scope of Attorney's Authority

Attorney had no standing to appeal from a clerk's order in an estate proceeding, where it appeared the attorney was acting in his own pecuniary interest. *In re Alston,* 46.

§ 5. Representation of and Liabilities to Client

Cause of action to recover damages for alleged negligence of defendant attorneys in filing a fatally defective summons in plaintiff's action against a third party, thereby causing the claim to be barred by the statute of

ATTORNEY AND CLIENT — Continued

limitations, accrued at the time the defective summons was filed and is governed by the three-year statute of limitations. *Brantley v. Dunstan*, 706.

§ 9. Persons Liable for Compensation of Attorney

Provisions in notes executed prior to 1965 repeal of G.S. 25-8 that required the debtors to pay reasonable attorneys' fees for collection of the notes were rendered unenforceable by that statute. *Register v. Griffin*, 191.

AUTOMOBILES

§ 3. Driving after Suspension or Revocation of License

It was proper for the solicitor to cross-examine defendant with respect to her driving record where defendant did not request that her driving record as certified by the Motor Vehicles Department be limited or restricted in any way. *S. v. Rhodes*, 154.

Properly certified copy of defendant's driving record was admissible as evidence that defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged, and where defendant failed to request that contents of the record be limited, he may not now complain that the record indicated he has been involved in nine accidents. *S. v. Herald*, 263.

Certification by Department of Motor Vehicles' employee was sufficient to render admissible copy of order of security requirement or suspension of driving privilege. *Ibid.*

Trial court erred in failing to require jury to find that defendant operated motor vehicle "upon a public highway" while his operator's license was permanently revoked. *S. v. Harris*, 553.

§ 6. Negligence in Sale of Defective Vehicles

The manufacturer of a truck owes a duty to the public to use reasonable care in its manufacture and to make reasonable inspection of the construction. *Cassels v. Motor Co.*, 51.

Plaintiff's complaint in an action against a truck manufacturer for negligence in manufacturing a truck and against a truck dealer for failure to inspect and for sale of a defective truck, held sufficient to withstand defendant's motion to dismiss. *Ibid.*

§ 11. Following Vehicles

Plaintiff's evidence in rear-end collision case warranted an instruction on issue of defendant's negligence in following plaintiff's vehicle too closely, although plaintiff and defendant were traveling in different lanes prior to the collision. *Huggins v. Kye*, 221.

§ 18. Entering Highway from Driveway

Motorist who emerged from a private driveway had the duty to look again to the right prior to entering the far traffic lane, where the motorist's vision to the right was obstructed by a curve in the highway. *Blackwell v. Butts*, 347.

AUTOMOBILES—Continued

§ 19. Right of Way at Intersections

Rules governing uncontrolled intersection applied to give defendant driver approaching T-intersection on a servient street the right of way where stop sign governing the servient street was not in place. *Dawson v. Jennette,* 252.

Where two drivers approaching an intersection at right angles knew that the traffic light controlling the intersection was malfunctioning in relation to their respective streets, the liability of the drivers for the resultant collision must be determined on the supposition that the light was properly working at the time of the collision. *Bledsoe v. Gaddy,* 470.

§ 21. Sudden Emergencies

The doctrine of sudden emergency is not available to one who by his own negligence has brought about the emergency. *Johnson v. Simmons,* 113.

§ 45. Relevancy and Competency of Evidence

Where it had already been stipulated that defendant was driving the car that hit and killed deceased, plaintiff could not be prejudiced by exclusion of his witness' testimony that defendant's car hit deceased. *Dudley v. Batten,* 173.

In action for personal injuries sustained in automobile collision, reference to insurance by trial court and by plaintiff did not constitute grounds for awarding plaintiff a new trial. *Peterson v. Taylor,* 297.

§ 46. Opinion Testimony as to Speed

Trial court properly excluded opinion testimony by witness as to what reasonable speed in shopping center parking lot would have been. *Peterson v. Taylor,* 297.

§ 47. Physical Facts at Scene

Defendant's testimony that the approximate distance from an intersection to the scene of an automobile collision was 75 to 100 feet was not an "indisputable physical fact" that negated defendant's other testimony that he did not begin passing decedent's car until after he had passed the intersection. *Coppley v. Carter,* 512.

§ 57. Sufficiency of Evidence of Failing to Yield Right of Way at Intersection

Rules governing uncontrolled intersection applied to give defendant driver approaching T-intersection on a servient street the right of way where stop sign governing the servient street was not in place. *Dawson v. Jennette,* 252.

Plaintiff's evidence was sufficient to support a jury finding that defendant's agent entered a dominant highway from a servient road without first determining that the move could be made in safety. *Baker v. Bottling Co.,* 126.

§ 66. Sufficiency of Evidence of Driver's Identity

Evidence was sufficient to support a jury finding that plaintiff's intestate was the operator of the automobile at the time of the accident. *Davis v. Peacock,* 256.

AUTOMOBILES—Continued

§ 72. Sufficiency of Evidence of Sudden Emergency

Plaintiff's evidence did not warrant an instruction on the doctrine of sudden emergency. *Johnson v. Simmons*, 113.

Doctrine of sudden emergency applied to automobile collision in shopping center parking lot. *Peterson v. Taylor*, 297.

§ 79. Contributory Negligence in Intersectional Accident

Plaintiff's evidence established his contributory negligence as a matter of law in failing to yield right-of-way to defendant's car that had approached the intersection from plaintiff's right. *Moore v. Butler*, 120.

Plaintiff's evidence disclosed her contributory negligence as a matter of law in action for damages resulting from intersection collision. *Whitley v. Harding*, 282.

Plaintiff's testimony that he entered an intersection controlled by a malfunctioning traffic light which he knew from prior experience would change from red to blank, *held* insufficient to establish plaintiff's contributory negligence as a matter of law in relying upon the blank light. *Bledsoe v. Gaddy*, 470.

§ 90. Instructions in Automobile Accident Case

Trial court's instructions did not confuse or mislead jury as to alleged negligence of defendant in stopping on highway without first seeing that such movement could be made in safety. *Strickland v. Powell*, 225.

Plaintiff's evidence in rear-end collision case warranted an instruction on issue of defendant's negligence in following plaintiff's vehicle too closely, although plaintiff and defendant were traveling in different lanes prior to the collision. *Huggins v. Kye*, 221.

§ 91. Issues and Verdict

Trial court erred in instructing jury that if it answered negatively issue as to whether minor plaintiff was injured as result of negligence of defendant, it was required to answer negatively issue as to whether plaintiff driver was damaged by the negligence of defendant. *Strickland v. Powell*, 225.

Trial court erred in refusing to submit plaintiff's tendered issue as to wilful and wanton conduct of the driver of an automobile which failed to negotiate a curve while going more than 100 mph. *Brewer v. Harris*, 515.

§ 93. Right of Passenger to Sue Jointly or Severally Tortfeasors Causing Injury

Trial court erred in failing to charge jury that possible negligence on part of driver of automobile in which minor plaintiff was a passenger would not shield defendant from liability if his negligence was one of the proximate causes of plaintiff's injuries. *Strickland v. Powell*, 225.

§ 94. Contributory Negligence of Passenger

An instruction that a passenger would be guilty of negligence *per se* if he realized there was danger in the manner the car was being operated and failed to take the action necessary for his safety held reversible error. *Black v. Weaver*, 380.

Trial court erred in refusing to submit plaintiff's tendered issue as to wilful and wanton conduct of the driver of an automobile which failed to negotiate a curve while going more than 100 mph. *Brewer v. Harris*, 515.

AUTOMOBILES—Continued

§ 112. Competency and Relevancy of Evidence in Manslaughter Case

Blood alcohol test administered to defendant two hours and twelve minutes after automobile accident had probative value and was properly admitted in evidence. *S. v. Oldham*, 172.

§ 113. Sufficiency of Evidence in Manslaughter Case

In a prosecution for involuntary manslaughter arising from a collision between an 81-year-old pedestrian and an automobile operated by defendant on a narrow, winding mountain road, the State's evidence was insufficient to withstand motion for nonsuit. *S. v. Ledford*, 315.

§ 125. Warrant for Operating Vehicle While Under the Influence of Intoxicants

For a defendant to be subjected to the infliction of the heavier punishment for a second offense of drunken driving, it is necessary that a prior conviction, and the time and place thereof, be alleged in the warrant and proved by the State. *S. v. Owenby*, 170.

§ 126. Competency of Evidence in Prosecution for Driving While Intoxicated

Evidence that the defendant had been previously convicted of drunken driving was admissible in a prosecution charging defendant with a second offense of drunken driving. *S. v. Owenby*, 170.

The State is not required, prior to the admission of breathlyzer test results, to introduce in evidence a certified copy of the methods approved by the State Board of Health for administering the test. *S. v. Powell*, 726.

§ 127. Sufficiency of Evidence of Drunken Driving

Issue of defendant's guilt of drunken driving was properly submitted to the jury. *S. v. Beasley*, 663.

§ 129. Instructions in Drunken Driving Prosecution

Defendant charged with driving under the influence is entitled to a new trial for failure of the court to declare and explain the law arising on the evidence. *S. v. Korn*, 187.

An instruction that defendant is under the influence of intoxicants if he is abnormal in any degree from the consumption of intoxicants held reversible error. *S. v. Harris*, 553; *S. v. Beasley*, 663.

Trial court's instruction in drunken driving prosecution was reversible error where the jury might have understood that the breathlyzer test results raised a presumption which defendant had the burden to rebut. *S. v. Beasley*, 663.

§ 130. Punishment for Drunken Driving

Sentence of six months imprisonment which was imposed upon conviction of drunken driving is within the statutory maximum. *S. v. Thigpen*, 88.

§ 132. Passing Standing School Bus

The statute pertaining to the mechanical stop signal on a school bus is designed for the protection of life, limb and property. *Slade v. Board of Education*, 287.

AVIATION

§ 1. Creation of Airport Authorities

Operation of aircraft in this country is governed by Federal law. *Baker v. Insurance Co.*, 605.

§ 2. Liabilities in Operation of Airport

A plaintiff who taxied his airplane off the concrete runway of an airport in order to avoid an automobile blocking the way to the airport parking area failed to show that the operator of the airport was negligent when plaintiff struck a concrete slab and overturned. *McElduff v. McCord*, 80.

§ 3.5. Damage to or Loss of Plane

A pilot who at the time of his airplane crash did not have in force a current medical certificate as required by the Federal Aviation Agency was not a "properly certificated" pilot within the meaning of an insurance policy providing coverage for the plane while it was commanded by a properly certificated pilot. *Baker v. Insurance Co.*, 605.

§ 5. Status of Pilot

A plaintiff who landed his airplane at a municipal airport with the intention of parking the plane and paying a fee to the airport operator was an invitee. *McElduff v. McCord*, 80.

BAILMENT

§ 3. Liabilities of Bailee to Bailor

Enactment of a statute which makes fraudulent conversion or concealment by a bailee a misdemeanor does not remove bailees from the provisions of the felonious embezzlement statute. *S. v. Hutson*, 653.

BILLS AND NOTES

§ 20. Presumptions and Burden of Proof in Actions on Notes

In a bank's action against guarantors who promised payment of such portion of a loan as the debtor "is unable to pay at maturity," the guarantors are entitled to dismissal of the action upon the bank's failure to prove what portion of the loan the debtor was unable to pay at maturity. *Bank v. Black*, 270.

A new note not given in payment but merely in renewal does not change the original debt. *Cable v. Oil Co.*, 569.

Trial court properly determined that a $1500 deed of trust given by testatrix to secure endorsements of a bank note signed by testatrix and her son as makers was a lien upon surplus proceeds from foreclosure sale of the land which it covered, notwithstanding the son had executed renewal notes for larger amounts which had not been signed by testatrix. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Breaking and Entering Other Than Burglariously

A felonious breaking or entering may consist of a mere pushing or pulling open of an unlocked door, or the raising or lowering of an unlocked window, or the opening of a locked door with a key. *S. v. Bronson*, 638.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 3. Indictment

Indictment charging defendant with feloniously breaking and entering a "building occupied by one Duke Power Company, Inc.," is not fatally defective in failing to identify the subject premises with more particularity. *S. v. Carroll,* 143.

§ 4. Competency of Evidence

In prosecution charging defendant with breaking into a coin-operated vending machine, testimony that the damage to the machine amounted to $75.00 was admissible. *S. v. Bauguess,* 524.

§ 5. Sufficiency of Evidence

State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of felonious breaking and entering and automobile larceny under the doctrine of possession of recently stolen property. *S. v. Fields,* 105.

Evidence was sufficient to establish defendants' guilt of breaking and entering. *S. v. Stroud,* 30.

State's evidence was sufficient for jury on issue of defendant's guilt of felonious breaking and entering of a furniture store. *S. v. Pitts,* 355.

Variance between indictment and proof as to description of premises broken into was fatal in this prosecution for felonious breaking and entering. *S. v. Benton,* 280.

Evidence that defendant's fingerprints were on a pane of glass from the store broken into constituted sufficient evidence to be submitted to the jury in a felonious breaking and entering prosecution. *S. v. Pittman,* 508.

In a prosecution charging defendant with the breaking or entering of a tire company with intent to steal therefrom, the jury could reasonably infer that defendant entered the building through a skylight with intent to commit larceny. *S. v. Bronson,* 638.

In a prosecution for larceny and felonious breaking or entering, defendant failed to show that his intoxication at the time of the crimes made him unable to form the requisite intent. *Ibid.*

§ 6. Instructions

Statement of material fact not shown in evidence was prejudicial error on breaking and entering charge but not on conspiracy charge. *S. v. Blackshear,* 237.

§ 8. Sentence and Punishment

Sentence of six to ten years imprisonment which was imposed upon defendant's conviction of felonious breaking and entering was within the statutory limits and did not constitute cruel and unusual punishment. *S. v. Strickland,* 540.

§ 10. Prosecution for Possessing Housebreaking Implements

Evidence was sufficient to establish defendants' guilt of possession of burglary tools. *S. v. Stroud,* 30.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

State's evidence was sufficient to permit the jury to find that a bolt-cutter was possessed by defendants as an "implement of housebreaking," and "without lawful excuse." *S. v. Shore,* 75.

CARRIERS

§ 2. State License and Franchise

The Utilities Commission properly granted a contract carrier permit to an applicant who sought to carry liquified petroleum gas in eastern North Carolina. *Utilities Comm. v. Transport Co.,* 626.

CONSPIRACY

§ 5. Relevancy and Competency of Evidence

Testimony relating to the acts and declarations of other conspirators during the existence of the conspiracy is admissible in evidence. *S. v. Ingland,* 715.

§ 6. Sufficiency of Evidence

Issue of defendant's guilt of conspiracy to murder was properly submitted to the jury. *S. v. Ingland,* 715.

§ 7. Instructions

Statement of material fact not shown in evidence was prejudicial error on breaking and entering charge but not on conspiracy charge. *S. v. Blackshear,* 237.

CONSTITUTIONAL LAW

§ 5. Separation of Powers

The statute which grants the Board of Paroles discretionary power to determine whether the remainder of a parolee's original sentence shall be served concurrently or consecutively with a second sentence imposed for a crime committed during the parole, held constitutional. *Jernigan v. State,* 562.

§ 30. Due Process in Trial

A defendant who was arrested in March 1969 and tried in January 1970 was not denied his right to a speedy trial. *S. v. Murphy,* 11.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Defendant's request that he be allowed to subpoena as witnesses certain police officers who lived in another county was properly denied by the trial court. *S. v. Wood,* 149.

Defendant was not denied ample opportunity to confer with counsel and prepare his defense by trial court's denial of his motion for continuance. *S. v. Blackshear,* 237.

CONSTITUTIONAL LAW—Continued

Defendant's contention that he was denied timely notice of the charges against him in the bill of indictment is not supported by the record. *S. v. Pitts*, 355.

§ 32. Right to Counsel

Where the record on appeal was completely silent as to any evidence upon which the court based its order denying counsel to defendant, the Court of Appeals assumes the order was correct and was based upon sufficient evidence to support the finding that defendant was not an indigent. *S. v. Cheek*, 273.

§ 36. Cruel and Unusual Punishment

Consecutive sentences of two years' imprisonment, each of which was imposed upon a youthful offender's pleas of guilty to nonfelonious breaking and entering and to felonious larceny, were not cruel and excessive punishment. *S. v. Jones*, 184.

Sentence imposed upon felonious breaking conviction was within statutory limits and did not constitute cruel and unusual punishment. *S. v. Strickland*, 540.

CONTEMPT OF COURT

§ 6. Hearing on Order to Show Cause; Findings

An order in a contempt hearing which confined a father to jail until he complied with a child support order must find that the father presently possesses the means to comply with the order. *Cox v. Cox*, 476.

CONTRACTS

§ 7. Contracts in Restraint of Trade

Covenants by employee not to compete with employer were supported by valuable consideration where they were part of the original contract of employment. *Industries, Inc. v. Blair*, 323.

Covenant by manager of a division of a petroleum refining and reprocessing company not to compete with his employer for a period of five years in 13 specified states was reasonably necessary to protect the employer's interest and was reasonable as to time and territory. *Ibid.*

§ 12. Construction of Contracts Generally

Law of Georgia applied in construing and determining validity of covenant not to compete contained in employment contract executed in Georgia. *Industries, Inc. v. Blair*, 323.

§ 16. Time of Performance of Contract

Silence of a contract as to the time of its performance will not by itself render the contract unenforceable. *Atkinson v. Wilkerson*, 643.

§ 17. Term and Duration of Agreement

Where the duration of a contract is not specified, it will continue for a reasonable time. *Atkinson v. Wilkerson*, 643.

CONTRACTS—Continued

§ 26. Competency and Relevancy of Evidence in Action on Contract

Trial court erred in allowing a witness to give his opinion as to the income which could have been received from plaintiffs' crops with proper care without basing the opinion on the facts in evidence. *Daly v. Weeks*, 116.

§ 27. Sufficiency of Evidence

Plaintiffs' evidence was sufficient for the jury in action for breach of contract to farm plaintiffs' land. *Daly v. Weeks*, 116.

Plaintiff's evidence was sufficient for jury on issue of defendant's breach of contract in supplying plaintiff with grade of tomato seeds inferior to grade ordered by plaintiff. *Gore v. George J. Ball, Inc.*, 310.

Trial court properly set aside a contract conveying to defendant the right to remove dirt, gravel and minerals from land described therein, where defendant had given no consideration for the contract. *Atkinson v. Wilkerson*, 643.

Plaintiff's evidence was sufficient for jury in action for breach of contract to purchase plaintiff's sweet potato crop. *Grissett v. Ward*, 685.

CORPORATIONS

§ 12. Transactions Between Corporation and Officers or Agents

In an action by the creditor of defendant corporation to set aside as fraudulent a deed of trust executed by the corporation to secure a loan from another defendant who was a director of the corporation, the trial court erred in granting summary judgment in favor of the defendants. *Lee v. Shor*, 231.

COSTS

§ 4. Items of Costs

Provisions in notes executed prior to 1965 repeal of G.S. 25-8 that required the debtors to pay reasonable attorneys' fees for collection of the notes were rendered unenforceable by that statute. *Register v. Griffin*, 191.

COURTS

§ 2. Jurisdiction of Courts in General

The rules for determining when a cause of action arises for purposes of the statute of limitations also apply in determining when a cause of action arises for the purpose of determining jurisdiction. *Rendering Corp. v. Engineering Corp.*, 39.

§ 9. Jurisdiction of Superior Court after Orders of Another Superior Court Judge

Denial by superior court judge of defendant's motion to dismiss did not preclude a second superior court judge from granting motion for summary judgment. *Alltop v. Penney Co.*, 692.

COURTS—Continued

§ 10. Terms of Superior Court

Superior Court had authority under Rule 60(b)(6) to set aside void order granting summary judgment entered in another county. *Capital Corp. v. Enterprises,* 519.

§ 11.1. Practice and Procedure in District Court

Defendants were entitled to a jury trial in the district court where their demand for jury trial was contained in their answer at the time the case was transferred to the district court from the superior court. *Credit Co. v. Hayes,* 527.

§ 21. What Law Governs as Between This and Other States

Law of Georgia applied in construing and determining validity of covenant not to compete contained in employment contract executed in Georgia. *Industries, Inc. v. Blair,* 323.

CRIMINAL LAW

§ 2. Intent

Juries must frequently ascertain intent from evidence as to a person's actions. *S. v. Wingard,* 101.

Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred. *S. v. Bronson,* 638.

§ 6. Mental Capacity as Affected by Intoxicants

Mere evidence that defendant had been drinking at the time he uttered a forged check does not warrant an instruction on the defense of intoxication. *S. v. McLain,* 146.

§ 9. Aiders and Abettors

An aider and abettor is equally guilty with the actual perpetrator of the crime. *S. v. Berryman,* 649.

§ 21. Preliminary Proceedings

A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment. *S. v. Pitts,* 355.

Fact that defendant was given a preliminary hearing 13 days after his arrest is not ground for dismissal of indictment. *Ibid.*

The record does not support defendant's contention that he was denied the right to present evidence in his own behalf at his preliminary hearing. *Ibid.*

§ 23. Plea of Guilty

Defendant is entitled to have his pleas of guilty vacated where the record fails to show affirmatively that defendant was aware of the consequences of his pleas of guilty and that his pleas were voluntarily and understandingly made. *S. v. Harris,* 553.

CRIMINAL LAW—Continued

§ 25. Plea of Nolo Contendere

The rules which apply to the voluntariness of guilty pleas also apply to the voluntariness of *nolo contendere* pleas. *S. v. Lloyd,* 157.

Defendant's contention that he entered a plea of *nolo contendere* with expectation of receiving a suspended sentence and that the trial court erred in accepting the plea and imposing a five-year prison sentence on him is without merit. *Ibid.*

§ 26. Plea of Former Jeopardy

Court properly denied defendant's plea of former jeopardy in probation revocation proceeding where it was based on prior hearing which was a nullity. *S. v. Triplett,* 165.

§ 32. Burden of Proof and Presumptions

Defendant's plea of not guilty controverts and puts in issue the existence of every fact essential to constitute the offense charged. *S. v. Brinkley,* 160.

§ 34. Evidence of Guilt of Other Offenses

Evidence that the defendant had been previously convicted of drunken driving was admissible in a prosecution charging defendant with a second offense of drunken driving, even though the defendant neither testified as a witness nor offered evidence of good character. *S. v. Owenby,* 170.

In a felonious breaking and entering prosecution it was prejudicial error to admit testimony that defendant's fingerprints were found at the scene of a break-in one and one-half months prior to the instant offense. *S. v. Pittman,* 508.

§ 42. Articles and Clothing Connected With the Crime

Briers taken from the coat worn by defendant at the time of his arrest were properly admitted in evidence. *S. v. Murphy,* 11.

The trial court in a malicious throwing of acid case properly admitted the cup in which the acid was contained. *S. v. Wingard,* 101.

§ 51. Qualification of Experts

Although the State's witness had not been formally tendered and accepted as an expert in handwriting analysis, his opinion testimony that the defendant had forged the signature on a check was not prejudicial to the defendant, where there was sufficient evidence establishing the witness' qualification as an expert in handwriting analysis. *S. v. Wyatt,* 538.

§ 55. Blood Tests

Blood alcohol test administered to defendant two hours and twelve minutes after automobile accident had probative value and was properly admitted in evidence. *S. v. Oldham,* 172.

§ 60. Fingerprint Evidence

Evidence that defendant's fingerprints were on a pane of glass from the store broken into constituted sufficient evidence to be submitted to the jury in a felonious breaking and entering prosecution. *S. v. Pittman,* 508.

CRIMINAL LAW—Continued

§ 64. Evidence as to Intoxication

The State is not required, prior to the admission of breathalyzer test results, to introduce in evidence a certified copy of the methods approved by the State Board of Health for administering the test. *S. v. Powell*, 726.

§ 66. Evidence of Identity by Sight

Trial court properly found that the in-court identifications of defendant were of independent origin and were untainted by a confrontation at the police station. *S. v. Murphy*, 11.

§ 75. Voluntariness and Admissibility of Confession

The requirement that a defendant be advised of his *Miranda* rights would seem to be inapplicable in a case where an officer was investigating a motorist who had driven his car into a ditch and who appeared to be under the influence of intoxicating liquor. *S. v. Beasley*, 663.

§ 76. Determination and Effect of Admissibility of Confession

Trial court's instructions that defendant's confession, if made, was voluntary held prejudicial error. *S. v. Williams*, 183.

Where the evidence relating to voluntariness of defendant's confession was conflicting, the admission of the confession without factual findings from which the appellate court could determine whether the trial court committed legal error is erroneous. *S. v. Griffin*, 134; *S. v. Wyatt*, 284.

Where there is no conflict in the evidence presented at a *voir dire* hearing on the admissibility of a confession, it is not essential that the trial court make specific findings of fact, although it is desirable that it do so. *S. v. Beasley*, 663.

§ 84. Evidence Obtained by Unlawful Means

If defendant, who was out of prison under the work release program on the night of the crime, was an occupant of the residence where his wife lived, he waived his right to complain of a warrantless search by police when he consented to the search; if defendant was not an occupant of the residence, his wife consented to the search and defendant has no standing to complain of the search. *S. v. Shedd*, 139.

On motion to suppress the evidence, trial judge is required to remove the jury from the courtroom and conduct an extensive *voir dire*. *S. v. Bush*, 247.

No search warrant was required for seizure from defendant's car of white plastic jugs containing non-taxpaid whiskey. *S. v. Simmons*, 259.

§ 85. Character Evidence Relating to Defendant

Evidence that the defendant had been previously convicted of drunken driving was admissible in a prosecution charging defendant with a second offense of drunken driving. *S. v. Owenby*, 170.

§ 89. Corroboration Testimony

Defendant was not prejudiced by the admission for corroborative purposes of testimony by a State's witness as to what a police officer and

another person told him occurred at the time of defendant's arrest, notwithstanding the officer was never called as a witness before the jury. *S. v. Fields*, 105.

§ 91. Continuance

Trial court did not abuse its discretion in denying defendant's motion for a continuance of his probation revocation hearing. *S. v. Bush*, 185.

Defendant was not denied ample opportunity to confer with counsel and prepare his defense by trial court's denial of his motion for continuance. *S. v. Blackshear*, 237.

§ 92. Consolidation of Counts

Trial court properly consolidated for trial charges against one defendant for breaking and entering and larceny and a charge against a second defendant for receiving goods allegedly stolen by the first defendant. *S. v. Davis*, 175.

Trial court did not err in consolidating for trial two indictments before State had passed jury in trial of defendant on one of the indictments. *S. v. Blackshear*, 237.

§ 99. Expression of Opinion by Court During Trial

The statute prohibiting a court from giving an opinion on the evidence in the presence of the jury is not applicable in a probation revocation proceeding. *S. v. Butcher*, 93.

Questions asked a witness by the trial court did not constitute an expression of opinion. *S. v. Fields*, 105.

Trial court improperly expressed an opinion on the credibility of defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." *S. v. Byrd*, 56.

Trial court's instruction which assumed that the testimony of the investigating officer substantially corroborated that of the prosecuting witness was erroneous. *Ibid.*

§ 101. Misconduct Affecting Jury

Trial court properly cured an impropriety arising out of the jury's reading of a dictionary definition of the offense charged. *S. v. McLain*, 146.

§ 102. Argument and Conduct of Counsel

Trial court's refusal to allow defense counsel to cite and argue a U. S. District Court case was not error. *S. v. Bush*, 247.

Trial court did not err in failing to require jury to retire while counsel addressed court with reference to court's striking of testimony. *S. v. Hutson*, 653.

§ 104. Consideration of Evidence on Motion to Nonsuit

Contradictions in the State's evidence are for the jury to resolve and do not warrant nonsuit. *S. v. Watson*, 168.

CRIMINAL LAW—Continued

In passing upon a motion for nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State. *S. v. Bronson*, 638.

A defendant who offers no evidence in his behalf is entitled to have his motion for nonsuit passed upon on the basis of the facts in evidence when the State rested its case. *S. v. Berryman*, 649.

§ 112. Instructions on Burden of Proof

Trial court's instructions on the law of circumstantial evidence were proper. *S. v. Bauguess*, 524.

§ 113. Application of Law to Evidence

In a joint prosecution of two defendants for armed robbery, an instruction that the jury must find either both defendants guilty or both defendants not guilty was reversible error. *S. v. Douglas*, 136.

Trial court's failure to instruct jury on defense of alibi was prejudicial error. *S. v. Miller*, 532.

§ 114. Expression of Opinion by Court on the Evidence in the Charge

Trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men," held an unauthorized expression of opinion in violation of G.S. 1-180. *S. v. Brinkley*, 160.

Trial court did not express an opinion on the evidence when it instructed the jury that defendant was accused of embezzlement, which occurs when a bailee, "as in this case," rightfully receives property as a bailee, etc. *S. v. Hutson*, 653.

§ 117. Charge on Credibility of Witness

Trial court's failure to instruct the jury to scrutinize the testimony of defendant's brother, a co-defendant, who testified for the State is not reversible error when defendant made no request for such instruction. *S. v. Wood*, 149.

§ 118. Charge on Contentions of the Parties

Trial court's remarks in stating the contentions of the parties constituted an expression of opinion and warranted a new trial, notwithstanding the stated contentions might have been properly argued to the jury by the solicitor. *S. v. Stroud*, 30.

§ 127. Arrest of Judgment

A fatal defect in the warrant or bill of indictment should be the subject of a motion to quash before pleading, or the subject of a motion in arrest of judgment after a verdict. *S. v. Stokes*, 176.

§ 138. Severity of Sentence and Determination Thereof

Fact that defendant did not receive same sentence as that of his co-conspirator is not ground for legal objection. *S. v. Farris*, 188.

§ 143. Revocation of Suspension of Judgment

The statute prohibiting a court from giving an opinion on the evidence in the presence of the jury is not applicable in a probation revocation proceeding. *S. v. Butcher*, 93.

CRIMINAL LAW—Continued

It was not necessary for the court to find that defendant's breach of a condition of his probation was "willful" in order to activate the sentence, where the court found that such breach was "without lawful excuse." *Ibid*; *S. v. Sawyer*, 723.

It was within the discretion of the trial court in this probation revocation proceeding to decide whether, under the circumstances, defendant was justified in paying his own hospital bill and expenses in connection with an illegitimate child born eleven months after the probation judgment was entered while ignoring payments ordered by the court, which included a hospital bill incurred by the victim of defendant's assault. *S. v. Butcher*, 93.

Contention by defendant that revocation of his probation should be set aside on grounds that probation officer was allowed to give hearsay testimony at the hearing, the court expressed an opinion on defendant's credibility as a witness, and the court erred in denying his motion to suppress all the evidence on ground his arrest was illegal, held without merit. *S. v. Sawyer*, 723.

§ 144. Modification of Judgment in Trial Court

It was error for the trial court, subsequent to notification of defendant's intention to appeal a conviction of felonious escape, to strike defendant's original sentence of 45 days and impose the statutory minimum sentence for the crime of six months, where the record indicated that the greater sentence was imposed because defendant appealed. *S. v. Lowry*, 717.

§ 145.1. Probation

Trial court did not abuse its discretion in denying defendant's motion for a continuance of his probation revocation hearing. *S. v. Bush*, 185.

Where order entered in Wilkes County extending period of time of defendant's probation was void, probation revocation proceeding was properly transferred to and heard in Surry County while defendant's appeal from the void Wilkes County order was pending in the Court of Appeals. *S. v. Triplett*, 165.

Court properly denied defendant's plea of former jeopardy in probation revocation proceeding where it was based on prior hearing which was a nullity. *Ibid.*

Superior court judge has authority to order defendant's probation revoked and his prison sentence put into effect, notwithstanding no probation violation warrant was served on defendant during the period of probation. *S. v. Best*, 62.

A probation violation warrant may be issued at any time during the period of a defendant's probation, but it is not required that the defendant be apprehended and brought into court for hearing within that time. *Ibid.*

Order revoking defendant's probation is set aside where it was based solely on pleas of guilty which have been vacated on appeal. *S. v. Harris*, 553.

§ 145.5. Paroles

The statute which grants the Board of Paroles discretionary power to determine whether the remainder of a parolee's original sentence shall be served concurrently or consecutively with a second sentence imposed for

CRIMINAL LAW—Continued

a crime committed during the parole, held constitutional. *Jernigan v. State,* 562.

§ 147.5. Jurisdiction of Court of Appeals

The Rules of Practice in the Court of Appeals are mandatory and not directory. *S. v. Thigpen,* 88.

§ 150. Right of Defendant to Appeal

It was error for the trial court, subsequent to notification of defendant's intention to appeal a conviction of felonious escape, to strike defendant's original sentence of 45 days and impose the statutory minimum sentence for the crime of six months, where the record indicated that the greater sentence was imposed because defendant appealed. *S. v. Lowry,* 717.

§ 154. Case on Appeal

Defense counsel's unauthorized adding of items to the record on appeal is condemned. *S. v. Ingram,* 709.

§ 155.5. Docketing of Transcript in Court of Appeals

Criminal appeal is subject to dismissal for failure of defendant to docket the case on appeal within ninety days. *S. v. McDaniel,* 743.

§ 157. Necessary Parts of Record Proper

Record on appeal must show disposition of cases in district court and an appeal therefrom to superior court where the district court had exclusive original jurisdiction of each of the misdemeanors with which defendant was charged. *S. v. Harris,* 553.

§ 158. Presumptions as to Matters Omitted from Record

Where the record on appeal was completely silent as to any evidence upon which the court based its order denying counsel to defendant, the Court of Appeals assumes the order was correct and was based upon sufficient evidence to support the finding that defendant was not an indigent. *S. v. Cheek,* 273.

§ 159. Form and Requisites of Transcript

An appeal that sets forth the evidence in question and answer form is subject to dismissal by the Court of Appeals. *S. v. Thigpen,* 88.

Proceedings in a criminal case must be set forth in the record on appeal in the order of time in which they occurred. *S. v. Harris,* 553.

§ 160. Correction of Record

The Court of Appeals denies a motion by the Attorney General to remand the case to superior court for clarification or correction of the record. *S. v. Thigpen,* 88.

§ 161. Form and Requisites of Exceptions and Assignments of Error in General

All exceptions must be grouped and numbered. *S. v. Thigpen,* 88.

An assignment of error which is not supported by an exception previously noted in the case on appeal presents no question of law for the appellate court to decide. *S. v. Thigpen,* 88.

CRIMINAL LAW—Continued

An assignment of error to the entry of judgment presents the case for review for error appearing on the face of the record. *S. v. Martin,* 181.

Assignments of error based on pages in the record instead of numbered exceptions are inadequate. *S. v. Blackshear,* 237.

The mental process by which a trial judge arrives at his ruling on a question of law is not the subject of exceptions and assignments of error. *S. v. Bush,* 247.

§ 162. Objections to Evidence and Motion to Strike

Failure to object to evidence in apt time ordinarily constitutes a waiver of objection. *S. v. Wingard,* 101; *S. v. Davis,* 712.

It is presumed that the jury heeded the court's instruction not to consider incompetent evidence. *S. v. Davis,* 712.

§ 163. Assignments of Error to the Charge

Assignment of error to "those portions of the charge of the Court as they appear of record herein" is insufficient. *S. v. Oldham,* 172.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

Sufficiency of State's evidence will be reviewed on appeal even though defendant failed to renew motion for nonsuit at conclusion of all evidence. *S. v. Pitts,* 355.

§ 165. Exceptions to Remarks of Court and Argument of Counsel

It is the final ruling of the judge upon the question of law that should be the subject of exception by defendant, not what argument of counsel the judge allowed or did not allow. *S. v. Bush,* 247.

§ 166. The Brief

An assignment of error not discussed in the brief is deemed abandoned. *S. v. Berryman,* 649.

§ 168. Harmless and Prejudicial Error in Instructions

Trial court's recapitulation of the State's evidence prejudiced defendant by its fullness, warmth and vigor, thereby entitling defendant to a new trial. *S. v. Stokes,* 176.

Statement of material fact not shown in evidence was prejudicial error on breaking and entering charge but not on conspiracy charge. *S. v. Blackshear,* 237.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Defendant was not prejudiced by the admission for corroborative purposes of testimony by a State's witness as to what a police officer and another person told him occurred at the time of defendant's arrest, notwithstanding the officer was never called as a witness before the jury. *S. v. Fields,* 105.

An officer's testimony that defendant was an escaped felon at the time of his apprehension for larceny did not warrant mistrial. *S. v. Bronson,* 638.

CRIMINAL LAW—Continued

Exclusion of testimony was not prejudicial when record fails to show answer of the witness. *S. v. Hutson,* 653.

§ 170. Harmless and Prejudicial Error in Incidents During Trial

Trial court properly cured an impropriety arising out of the jury's reading of a dictionary definition of the offense charged. *S. v. McLain,* 146.

§ 171. Error Relating to One Count of Crime Charged

Where single judgment was pronounced on verdicts of guilty as to two crimes and a new trial was granted on one of the charges, cause must be remanded for proper judgment on verdict in the valid conviction. *S. v. Blackshear,* 237.

§ 180. Writs of Error Coram Nobis

The Court of Appeals is without authority to entertain an application for writ of *coram nobis. Dantzic v. State,* 369.

§ 181. Post Conviction Hearing

The Post Conviction Act is not available to a petitioner whose sentence was suspended and who is not a person imprisoned; petitioner's remedy is to apply for the writ of *coram nobis. Dantzic v. State.* 369.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

In action for personal injuries sustained in automobile collision, reference to insurance by trial court and by plaintiff did not constitute ground for awarding plaintiff a new trial. *Peterson v. Taylor,* 297.

Trial court did not abuse its discretion in refusing to set aside as excessive verdict of $5000 for injuries to plaintiff's left hand. *Williams v. Hayes,* 275.

In plaintiff's action to recover damages for the alleged wrongful conduct of a department store in attempting to collect an unpaid account, the department store was entitled to entry of summary judgment where the plaintiff failed to show contemporaneous physical injury and an adverse effect on her employment resulting from the store's collection methods. *Alltop v. Penney Co.,* 692.

§ 10. Credit on Damages for Sums Paid by Other Persons

In action for personal injuries sustained in automobile collision, reference to insurance by trial court and by plaintiff did not constitute ground for awarding plaintiff a new trial. *Peterson v. Taylor,* 297.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Testimony by plaintiffs' witnesses as to damage observed to plaintiffs' house and as to fair market value of the house before and after the damages allegedly caused by defendant's blasting operations was not rendered incompetent by the fact that the witnesses' observations were made some 16 months after the blasting. *McLamb v. Construction Co.,* 688.

DAMAGES—Continued

§ 16. Instructions on Measure of Damages

Trial court did not err in charging jury on permanent injury as an element of damages. *Williams v. Hayes*, 275.

Trial court properly declared and explained the law arising on the evidence with respect to permanent damages in an action to recover for personal injuries received in an automobile accident. *Koutsis v. Waddel*, 731.

DEATH

§ 3. Grounds of Action for Wrongful Death

Trial court properly dismissed a wrongful death action that was instituted by a person other than the executor of deceased's estate. *Young v. Marshburn*, 729.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

The courts of this State do not issue anticipatory judgments resolving controversies that have not arisen. *Bland v. Wilmington*, 163.

§ 2. Proceedings

Action by municipal firemen seeking a declaratory judgment on their right to reside outside the municipality while continuing their employment with the municipality is properly dismissed by the trial court when no firemen were residing outside the municipality at the time of the action. *Bland v. Wilmington*, 163.

DEEDS

§ 14. Reservations in Deed

Reservation by the grantor in a deed conveying 331 acres of "the right to lay out and stake off 35 acres of the above described land wherever it so desires and to take therefrom all sand and gravel it so desires," held not void for vagueness. *Builders Supplies Co. v. Gainey*, 364.

§ 19. Restrictive Covenant

Restrictive covenant in a deed was not void for vagueness. *Latham v. Taylor*, 268.

DESCENT AND DISTRIBUTION

§ 13. Advancement of Estate

Whether a gift is an advancement depends on the intention of the parent at the time the gift is made. *Parrish v. Adams*, 700.

Conveyance to a son of a 3-acre tract of land owned by his parents was sufficient to constitute an advancement of the petitioner's complete inheritance. *Ibid.*

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

Trial court erred in allowance of plaintiff husband's motion for a directed verdict dismissing defendant wife's counterclaim for alimony. *Garner v. Garner,* 286.

§ 18. Alimony and Subsistence Pendente Lite

Failure of the trial court to make factual findings as to whether the wife had sufficient means whereon to subsist during the prosecution of her alimony suit was prejudicial error. *Peoples v. Peoples,* 402.

In the wife's action for alimony *pendente lite,* a purported finding that plaintiff is a dependant spouse and that defendant is a supporting spouse was a conclusion that was not supported by findings of fact. *Ibid.*

An order that awards both child support and alimony or alimony *pendente lite* must separately state and identify each allowance. *Robinson v. Robinson,* 463.

§ 19. Modification of Decree

An order for alimony or alimony *pendente lite* may be modified or vacated upon motion and a showing of changed circumstances. *Robinson v. Robinson,* 463.

Trial court which reduced a husband's support payments *pendente lite* from $900 monthly to $100 weekly was required to resolve the issue of whether the husband's substantial decrease in income resulted from his disregard of the obligation to support his wife and children. *Ibid.*

§ 21. Enforcing Payment

Provisions of separation agreement relating to support payments for the wife which were incorporated in divorce judgment were not enforceable by contempt proceedings. *Williford v. Williford,* 529.

§ 23. Support of Children of the Marriage

An order in a contempt hearing which confines a father to jail until he complies with a child support order must find that the father presently possesses the means to comply with the order. *Cox v. Cox,* 476.

§ 24. Custody of Children

A court should not take a child from the custody of its parent and place it in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody or for some other extraordinary fact or circumstance. *Thorne v. Thorne,* 151.

Award of custody of a child to its maternal grandmother was unsupported by the evidence and findings of fact. *Ibid.*

EASEMENTS

§ 7. Location of Easement

Reservation by the grantor in a deed conveying 331 acres of "the right to lay out and stake off 35 acres of the above described land wherever it so desires and to take therefrom all sand and gravel it so desires," *held* not void for vagueness. *Builders Supplies Co. v. Gainey,* 364.

EJECTMENT

§ 1. Nature and Scope of Remedy of Summary Ejectment

A landlord who accepts rents accruing after the entry of a summary eviction judgment against his tenant is not estopped from regaining possession of the premises pursuant to the summary eviction judgment. *Mason v. Apt., Inc.*, 131.

§ 5. Damages in Summary Ejectment

A landlord is clearly entitled to the amount of rent specified in the summary eviction judgment. *Mason v. Apt., Inc.*, 131.

EMBEZZLEMENT

§ 1. Nature and Elements of the Offense

Enactment of statute which makes fraudulent conversion or concealment by a bailee a misdemeanor does not remove bailees from the provisions of the felonious embezzlement statute. *S. v. Hutson*, 653.

§ 6. Instructions

Trial court did not express an opinion on the evidence when it instructed the jury that defendant was accused of embezzlement, which occurs when a bailee, "as in this case," rightfully receives property as a bailee, etc. *S. v. Hutson*, 653.

ESCAPE

§ 1. Elements of and Prosecution for Escape

Defendant freely, understandingly and voluntarily entered a plea of *nolo contendere* to a valid indictment charging him with felonious escape. *S. v. Ware*, 179.

ESTOPPEL

§ 1. Creation and Operation of Estoppel by Deed

Where a child accepts a deed with knowledge that the lands conveyed therein represent an advancement of his full share of the parents' realty, he is estopped to claim any other lands owned by the parents at the time of their deaths. *Parrish v. Adams*, 700.

EVIDENCE

§ 3. Facts Within Common Knowledge

The court cannot take judicial notice of the width of a railroad right-of-way. *Penny v. R. R. Co.*, 659.

§ 8. Prima Facie Proof

When the facts in evidence make out a *prima facie* case, it is one for submission to the jury. *Wells v. Insurance Co.*, 584.

EVIDENCE—Continued

§ 29. Accounts, Ledgers and Private Writings

A publication entitled A Handbook for School Bus Drivers of North Carolina was properly admitted in evidence in a tort claims action against a county board of education. *Slade v. Board of Education*, 287.

§ 40. Nonexpert Opinion Evidence in General

Trial court erred in allowing a witness to give his opinion as to the income which could have been received from plaintiff's crops with proper care without basing the opinion on facts in evidence. *Daly v. Weeks*, 116.

§ 41. Nonexpert Opinion Evidence as Invasion of Province of Jury

Trial court properly excluded opinion testimony by witness as to what reasonable speed in shopping center parking lot would have been. *Peterson v. Taylor*, 297.

§ 46. Nonexpert Opinion Evidence as to Handwriting

Trial court erred in admitting testimony by defendant's witness as to speed of plaintiff's train at time of collision where witness did not testify that he actually saw the train prior to the collision. *R. R. Co. v. Hutton & Bourbonnais Co.*, 1.

§ 50. Expert Medical Testimony

Trial court erred in refusing to permit plaintiff's expert medical witness to define his specialty (orthopedic surgery) for the jury and to state the length of his practice, notwithstanding defendants has stipulated the witness was an expert in orthopedic surgery. *Dotson v. Chemical Corp.*, 123.

§ 51. Expert Testimony as to Blood Tests

Trial court properly admitted evidence of blood alcohol tests performed on automobile passenger and driver in an action for wrongful death of the passenger. *Brewer v. Harris*, 515.

EXECUTORS AND ADMINISTRATORS

§ 6. Title and Control of Assets

Personal property vests in the executor upon the decedent's death. *S. v. Jessup*, 503.

§ 8. Collection of Assets

Trial court properly dismissed a wrongful death action that was instituted by a person other than the executor of deceased's estate. *Young v. Marshburn*, 729.

§ 9. Control and Management of Estate

Until a personal representative is appointed for the estate, there is no right to retain an attorney to represent the estate. *In re Alston*, 46.

FRAUD

§ 12. Sufficiency of Evidence

Plaintiff's evidence was insufficient for the jury in this action to recover money withdrawn by defendant from the savings account of her

FRAUD—Continued

mother, now deceased, on the ground that defendant fraudulently induced her mother to place money in a joint savings account. *Edwards v. Gurkin*, 97.

FRAUDS, STATUTE OF

§ 6. Contracts Affecting Realty

An oral promise to release property from the lien of a deed of trust is enforceable. *Nye v. Development Co.*, 676.

GAS

§ 3. Delivery of Gas to Consumer

The Utilities Commission properly granted a contract carrier permit to an applicant who sought to carry liquified petroleum gas in eastern North Carolina. *Utilities Comm. v. Transport Co.*, 626.

GUARANTY

In a bank's action against guarantors who promised payment of such portion of a loan as the debtor "is unable to pay at maturity," the guarantors are entitled to dismissal of the action upon the bank's failure to prove what portion of the loan the debtor was unable to pay at maturity. *Bank v. Black*, 270.

HABEAS CORPUS

§ 2. Determination of Legality of Restraint

An indictment is sufficient ground to detain a defendant for trial. *S. v. Murphy*, 11.

§ 4. Review

Defendant was not prejudiced when trial court refused to supply him with a transcript of the *habeas corpus* proceeding. *S. v. Murphy*, 11.

An appeal is not allowed as a matter of right from a *habeas corpus* proceeding. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 11. Neighborhood Public Road

A judgment in a prior action establishing the correct boundary line between plaintiffs' and defendants' property did not bar plaintiffs' subsequent action to enjoin defendants from obstructing an alleged neighborhood public road that traversed land lying within the defendants' established boundary line. *Walton v. Meir*, 598.

Landowner whose property was traversed by a neighborhood public road could not interfere with adjacent landowners' legitimate use of the road. *Ibid.*

HUSBAND AND WIFE

§ 11. Construction and Operation of Separation Agreement

The cardinal rule for construing a separation agreement is to ascertain the intention of the parties as expressed in the language of their agreement. *Goodwin v. Snepp.*, 304.

In wife's action to recover payments under separation agreement providing (1) husband's payments were to be modified upon substantial reduction in his income and after consideration of the circumstances of both parties and (2) if modification could not be reached by negotiation matter was to be submitted to a superior court judge, trial judge committed error in failing to consider and make a ruling on husband's unilateral action in reducing the monthly payments from $500 to $250. *Ibid.*

In the wife's action to recover support payments under the terms of a separation agreement, the wife's breach of her covenant not to interfere with the husband's visitation rights does not constitute a valid defense to the husband's failure to make payments in conformity with the separation agreement. *Williford v. Williford*, 451.

The question whether the wife's breach of a provision in the separation agreement will constitute a defense to her action upon the agreement to enforce an alimony or support provision is generally made to turn upon the question whether the two provisions are dependent or independent. *Ibid.*

INDICTMENT AND WARRANT

§ 1. Preliminary Proceedings

A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment. *S. v. Pitts*, 355.

Fact that defendant was given a preliminary hearing 13 days after his arrest is not grounds for dismissal of indictment. *Ibid.*

§ 7. Form and Requisites of Warrant

Order of arrest and its supporting affidavit constitute the warrant and must be construed together. *S. v. Powell*, 443.

§ 9. Charge of Crime

Indictment charging defendant with larceny of "automobile parts . . . of one Furches Motor Company" sufficiently identifies the property alleged to have been stolen. *S. v. Foster*, 141.

§ 10. Identification of Accused

Warrant for resisting arrest is fatally defective where the officer allegedly resisted is not identified by name in the affidavit and the order of arrest erroneously refers to defendant as "Dempsey Roy Smith" rather than by his correct name of "Dempsey Roy Powell." *S. v. Powell*, 443.

§ 11. Identification of Victim

Indictment charging defendant with feloniously breaking and entering a "building occupied by one Duke Power Company, Inc.," is not fatally

INDICTMENT AND WARRANT—Continued

defective in failing to identify the subject premises with more particularity. *S. v. Carroll,* 143.

§ 12. Amendment

The allowance of a motion to amend a warrant is not self-executing, and when the amendments are not actually made pursuant to the court's ruling, the defects are not cured. *S. v. Powell,* 443.

§ 14. Grounds and Procedure on Motion to Quash

A fatal defect in the warrant should be the subject of a motion to quash before pleading. *S. v. Stokes,* 176.

An indictment may be quashed for want of jurisdiction, irregularity in the selection of the jury, or defect in the bill of indictment; however, an asserted variance between the allegations of the indictment and the proof is properly raised by motion for nonsuit. *S. v. Griffin,* 134.

Defendant's contention that bill of indictment against him should be dismissed because he had been held under excessive bond is without merit. *S. v. Pitts,* 355.

§ 15. Time for Making Motion to Quash

Motion to quash a warrant made for the first time in superior court on appeal from conviction in recorder's court may be entertained by the superior court judge in his discretion. *S. v. Powell,* 443.

§ 17. Variance

Question of fatal variance between indictment and proof was properly presented by defendant's motion for nonsuit. *S. v. Benton,* 280.

Variance between indictment and proof as to description of premises broken into was fatal in this prosecution for felonious breaking and entering. *Ibid.*

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minor

A court should not take a child from the custody of its parent and place it in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody or for some other extraordinary fact or circumstance. *Thorne v. Thorne,* 151.

Award of custody of a child to its maternal grandmother was unsupported by the evidence and findings of fact. *Ibid.*

Trial court had authority to issue an *ex parte* order awarding the father custody of his 18-month-old son pending a hearing on the merits. *Brandon v. Brandon,* 457.

Trial court did not abuse its discretion in awarding custody of an 18-month-old child to its paternal grandparents. *Ibid.*

INFANTS—Continued

In disallowing the award of counsel fees to the wife's attorney in a child custody hearing, trial court erred in ruling that it had to find "as a matter of law" that the wife was substantially dependent upon her husband. *Ibid.*

The wife waived her right to receive five days notice in child custody hearing where she appeared and presented testimony. *Ibid.*

Findings of fact by trial court are sufficient to support award of custody of children to the father. *Cobb v. Cobb,* 739.

The custody of a ten-year-old boy whose father had died is properly awarded to the boy's paternal grandmother rather than to the mother. *In re Custody of Stancil,* 545.

The awarding of visitation rights with a child is a judicial function, the exercise of which should not be assigned to the custodian of the child. *Ibid.*

INJUNCTIONS

§ 12. Issuance and Continuance of Temporary Order

The burden is on the party seeking a temporary injunction to establish that he will ultimately prevail in a final determination of the case and that there will be irreparable harm if the relief is not granted. *Mason v. Apt., Inc.,* 131.

§ 16. Liability on Bonds

Municipality did not waive its governmental immunity by execution of a bond to obtain an injunction under [former] G.S. 1-496 preventing an alleged violation of its zoning ordinance, and is thus not liable on the bond; however, the surety is not protected by governmental immunity and is liable on the bond. *Hillsborough v. Smith,* 70.

INSANE PERSONS

§ 2. Appointment of Guardian

Rules relating to the determination of the competency of a party litigant who is not represented by a guardian. *Rutledge v. Rutledge,* 427.

A party for whom a guardian or guardian *ad litem* is proposed is entitled to five days notice unless the court, for good cause, should prescribe a shorter period. *Ibid.*

INSURANCE

§ 3. Contract and Policy Generally

An insurance policy is a contract. *Baker v. Insurance Co.,* 605.

§ 6. Construction of Policy

If the word "premises" in a homeowner's policy is subject to two different constructions, the court must adopt the construction most favorable to the policyholder. *Blackwelder v. Insurance Co.,* 576.

INSURANCE—Continued

§ 15. Payment of Premiums and Avoidance of Policy for Nonpayment

In an action to recover on a life policy the beneficiary's evidence was sufficient to raise a *prima facie* case that the insured had paid the initial premium in compliance with the policy terms and that the policy was in force on the date of insured's death. *Wells v. Insurance Co.*, 584.

§ 37. Actions on Life Policy

In an action on a life policy, it was proper for the judge to examine the witnesses on the premium-collecting practices of the insurer and its agents. *Wells v. Insurance Co.*, 484.

§ 46. Intentional Acts

Complaint of insured who was injured when another person secretly threw lye in her face held sufficient to state a claim for relief under an accident policy providing coverage for injuries suffered through "accidental means." *Bone v. Insurance Co.*, 393.

§ 80. Compulsory Insurance

The public policy embodied by the Financial Responsibility Act controls over an exclusionary provision in a policy issued pursuant to the Act. *Insurance Co. v. Webb*, 672.

§ 86. Assigned Risk Insurance

In an action by an assigned risk insurer seeking reimbursement from the insured for the settlement of a claim the insurer would not have had to pay except for the requirements of the Financial Responsibility Act, the insurer was entitled to recover attorneys' and adjusters' fees. *Insurance Co. v. Webb*, 672.

§ 112. Subrogation of Insurer

In an action by an assigned risk insurer seeking reimbursement from the insured for the settlement of a claim the insurer would not have had to pay except for the requirements of the Financial Responsibility Act, the insurer was entitled to recover attorneys' and adjusters' fees. *Insurance Co. v. Webb*, 672.

§ 139. Construction of Windstorm Policy

The term "appurtenant private structure" as used in the homeowner's policy requires the structure in question to be incident to the main insured building. *Blackwelder v. Insurance Co.*, 576.

§ 140. Actions on Windstorm Policy

Homeowner offered sufficient evidence that his wind-damaged shed was an "appurtenant private structure" within the meaning of a homeowner's policy. *Blackwelder v. Insurance Co.*, 576.

§ 142. Actions on Burglary and Theft Policies

Plaintiff's evidence was insufficient to be submitted to the jury in an action to recover under a homeowner's policy for the alleged theft of two diamond rings where it showed only a mysterious disappearance. *Adler v. Insurance Co.*, 720.

INSURANCE—Continued

§ 147. Aviation Insurance

The insurer of an airplane was not required to show any causal connection between the crash of the plane and the insured's breach of an exclusionary clause, where the language of the policy explicitly rendered such proof unnecessary. *Baker v. Insurance Co.*, 605.

A pilot who at the time of his airplane crash did not have in force a current medical certificate as required by the Federal Aviation Agency was not a "properly certificated" pilot within the meaning of an insurance policy providing coverage for the plane while it was commanded by a properly licensed certificated pilot. *Ibid.*

INTOXICATING LIQUOR

§ 9. Indictment and Warrant

Warrant adequately charged defendant with possession of property designed for the manufacture of liquor. *S. v. Stokes*, 176.

§ 12. Competency and Relevancy of Evidence

No search warrant was required for seizure from defendant's car of white plastic jugs containing non-taxpaid whiskey. *S. v. Simmons*, 259.

JUDGMENTS

§ 37. Matters Concluded in General

The principle that a judgment is final both as to matters actually determined and as to matters that could have been litigated and decided does not require a defendant to counterclaim for affirmative relief that would have no effect on the relief sought by the plaintiff. *Walton v. Meir*, 598.

A judgment in a prior action establishing the correct boundary line between plaintiffs' and defendants' property did not bar plaintiffs' subsequent action to enjoin defendants from obstructing an alleged neighborhood public road that traversed land lying within defendants' established boundary line. *Ibid.*

JURY

§ 1. Right to Trial by Jury

Defendants were entitled to a jury trial in the district court where their demand for jury trial was contained in their answer at the time the case was transferred to the district court from the superior court. *Credit Co. v. Hayes*, 527.

LANDLORD AND TENANT

§ 2. Form and Validity of Leases

A lien on personal property granted to a lessor by contract is not excluded from the Uniform Commercial Code. *Music House v. Theatres*, 242.

LANDLORD AND TENANT—Continued

§ 6. General Construction and Operation of Lease

Lease agreement between lessor and lessee *is held* to create a security interest in favor of lessor, upon the lessee's default under the lease, in a piano and organ that was acquired by the lessee for use on the premises. *Music House v. Theatres,* 242.

LARCENY

§ 1. Elements of Crime

Elements of felonious larceny. *S. v. Bronson,* 638.

§ 4. Warrant and Indictment

Indictment charging defendant with larceny of "automobile parts . . . of one Furches Motor Company" sufficiently identified the property alleged to have been stolen. *S. v. Foster,* 141.

The ownership of money that was stolen after the death of the owner but before the appointment of his personal representative was properly laid in the estate of the deceased owner. *S. v. Jessup,* 503.

§ 5. Presumptions and Burden of Proof

Evidence that defendant had 201 one hundred dollar bills in his possession eleven months after the larceny of $20,100 from his father's locked packhouse was admissible, notwithstanding the State failed to identify the money in defendant's possession as being identical to the money stolen. *S. v. Jessup,* 503.

§ 7. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to support a finding of defendant's guilt of the larceny of coins from a supermarket. *S. v. Watson,* 168.

State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of felonious breaking and entering and automobile larceny under the doctrine of possession of recently stolen property. *S. v. Fields,* 105.

Evidence was sufficient to establish the larceny of a safe. *S. v. Stroud,* 30.

State's evidence was sufficient for jury on issue of defendant's guilt of larceny of property from a furniture store. *S. v. Pitts,* 355.

Issue of defendant's guilt of larceny of $20,100 from his father's locked packhouse on the morning of his father's death was properly submitted to the jury. *S. v. Jessup,* 503.

In a prosecution for larceny and felonious breaking or entering, defendant failed to show that his intoxication at the time of the crimes made him unable to form the requisite intent of the crimes. *S. v. Bronson,* 638.

§ 8. Instructions

In a prosecution for larceny of an automobile wherein the defendant contended that he was so intoxicated as to be incapable of forming a criminal intent, the trial court's instructions on intent were prejudicial to defendant. *S. v. Evans,* 265.

LIBEL AND SLANDER

§ 2. Words Actionable Per Se

In order to be actionable *per se*, a false statement must impute that a person is guilty of a punishable offense. *Williams v. Freight Lines*, 384.

§ 4. Words Actionable Per Quod

Where false statements are actionable only *per quod*, some special damage must be pleaded and proved. *Williams v. Freight Lines*, 384.

§ 5. General Rules as Applied to Particular Statements

A statement that the business agent and the shop steward of a Teamsters Union local were nothing but a bunch of "s.o.b. gangsters" was actionable *per quod*, not actionable *per se*. *Williams v. Freight Lines*, 384.

§ 6. Publication

Supplemental pleadings which were filed by plaintiffs in 1970 for the purpose of alleging special damage did not relate back to plaintiffs' original complaints for slander *per quod* that were filed in 1963. *Williams v. Freight Lines*, 384.

§ 14. Pleadings

Plaintiff's purported "amended complaints" in a slander action were in effect supplementary pleadings. *Williams v. Freight Lines*, 384.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from Which Statute Runs

The rules for determining when a cause of action arises for purposes of the statute of limitations also apply in determining when a cause of action arises for the purpose of determining jurisdiction. *Rendering Corp. v. Engineering Corp.*, 39.

Cause of action to recover damages for alleged negligence of defendant attorneys in filing a fatally defective summons in plaintiff's action against a third party, thereby causing the claim to be barred by the statute of limitations, accrued at the time the defective summons was filed and is governed by the three-year statute of limitations. *Brantley v. Dunstan*, 706.

§ 12. Institution of Action

Where plaintiff failed to comply with the statute relating to extension of time to file complaint, the date the complaint was filed must be used in determining whether the statute of limitations is applicable. *Hendrix v. Alsop*, 338.

MASTER AND SERVANT

§ 11. Agreement Not to Engage in Like Employment after Termination of Employment

Covenants by employee not to compete with employer were supported by valuable consideration where they were part of the original contract of employment. *Industries, Inc. v. Blair*, 323.

MASTER AND SERVANT—Continued

Covenant by manager of a division of a petroleum refining and reprocessing company not to compete with his employer for a period of five years in 13 specified states was reasonably necessary to protect the employer's interest and was reasonable as to time and territory. *Ibid.*

§ 16. Construction and Operation of Labor Contract

A statement that the business agent and the shop steward of a Teamsters Union local were nothing but a bunch of "s.o.b. gangsters" was actionable *per quod,* not actionable *per se. Williams v. Freight Lines,* 384.

§ 18. Liability of Contractee to Independent Contractor

In an action for personal injuries sustained by employee of sub-contractor when he fell through duct opening in second floor of a building being constructed by defendant contractor, evidence was sufficient for jury on issue of defendant's negligence and did not disclose contributory negligence as a matter of law on part of plaintiff in undertaking to move a loose sheet of plywood with aluminum bucks piled on top which covered the opening. *Maness v. Construction Co.,* 592.

§ 55. Injuries Compensable Under Workmen's Compensation Act

As used in G.S. 97-2(18), "accident" involves an interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences. *Gray v. Storage, Inc.,* 668.

§ 56. Causal Relation Between Employment and Injury

Words "out of" refer to the origin or cause of the accident, and the words "in the course of" refer to the time, place and circumstances under which it occurred. *Robbins v. Nicholson,* 421.

Employment does not have to be the sole cause of an injury, it being sufficient if there is some causal connection between the employment and the injury. *Ibid.*

§ 59. Wilful Act of Third Person

Evidence and findings were sufficient to support Industrial Commission's conclusion that deaths of two employees who were shot by femme decedent's husband while they were working in a grocery store arose out of their employment at the store. *Robbins v. Nicholson,* 421.

§ 60. Unauthorized Acts of Employee

Death of insurance agent by drowning while on a fishing trip awarded as a prize by district manager did not arise out of and in the course of his employment. *Burton v. Insurance Co.,* 499.

§ 65. Hernia

Hernia suffered by claimant while lifting a sofa bed in performance of his usual and customary duties as a mover of household furniture did not arise by accident. *Gray v. Storage,* 668.

§ 67. Strokes

Finding by Industrial Commission that stroke suffered by plaintiff while at work was not caused by injury arising out of and in course of

MASTER AND SERVANT—Continued

employment held supported by competent medical evidence. *Harris v. Construction Co.*, 413.

§ 77. Review of Award for Change of Condition

Claim for permanent partial disability filed more than a year after final payment of weekly benefits involves a "change of condition" and is barred by G.S. 97-47, even though the employer and its carrier knew at the time closing receipt was signed that the employee was still undergoing treatment for his injury. *Watkins v. Motor Lines*, 486.

Statement by employer's agent that closing receipt signed by claimant had nothing to do with permanent disability, if a misrepresentation, constituted a misrepresentation as to a matter of law which would not estop the employer from relying on one year limitation as a bar to the claim. *Ibid.*

Workmen's Compensation Act contains no basis for altering a final award of compensation other than for change of condition. *Ibid.*

§ 85. Extent of Jurisdiction of Industrial Commission Generally

Full Industrial Commission has power to grant rehearing on ground of newly discovered evidence and to receive further evidence regardless of whether such evidence is newly discovered. *Harris v. Construction Co.*, 413.

§ 93. Prosecution of Claim and Proceedings Before Commission

The principle that a motion for further hearing on the ground of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission is not applicable when the Commission declines to consider such a motion under a misapprehension of applicable principles of law. *Owens v. Mineral Co.*, 84.

An employee's application for a rehearing on the ground that he has additional evidence to establish his claim of disability by silicosis was improperly denied by the Industrial Commission. *Ibid.*

Industrial Commission did not err in denying plaintiff's motion to remand cause to hearing commissioner for purpose of taking further medical testimony. *Harris v. Construction Co.*, 413.

§ 94. Findings and Award of Commission

An agreement to pay compensation approved by the Industrial Commission is equivalent to an award. *Watkins v. Motor Lines*, 486.

§ 96. Review in Court of Appeals

Motion by appellant in workmen's compensation proceeding for a new hearing on ground of newly discovered evidence is denied by Court of Appeals. *Harris v. Construction Co.*, 413.

MAYHEM

§ 1. Nature and Elements of the Crime

In a prosecution for maliciously throwing acid or alkali, the jury need not find that the intent to murder, maim, or disfigure was the sole or

MAYHEM—Continued

even the dominant motivation for defendant's actions. *S. v. Wingard,* 101.

§ 2. Prosecution and Punishment

In a prosecution for maliciously throwing acid, State's evidence was sufficient to support a finding of defendant's guilt on every essential element of the crime, including intent. *S. v. Wingard,* 101.

In a prosecution for the malicious throwing of corrosive acid or alkali, any error by the trial court in charging on the lesser included offense of assault could not have been prejudicial to the defendant. *Ibid.*

MINES AND MINING

§ 1. Minerals Contract

Trial court properly set aside a contract conveying to defendant the right to remove dirt, gravel and minerals from land described therein, where defendant had given no consideration for the contract. *Atkinson v. Wilkerson,* 643.

MORTGAGES AND DEEDS OF TRUST

§ 7. Construction as to Debts Secured

Deed of trust executed in 1963 secured not only note executed contemporaneously therewith but also secured four additional notes executed in 1964 and 1965. *Register v. Griffin,* 191.

§ 9. Release of Part of Land from Mortgage Lien

An agreement to release property from the lien of a deed of trust does not have to be recorded. *Nye v. Development Co.,* 676.

§ 17. Payment and Satisfaction

Trial court properly determined that $1500 deed of trust given by testatrix to secure endorsements of a bank note signed by testatrix and her son as makers was a lien upon surplus proceeds from foreclosure sale of the land which it covered, notwithstanding the son had executed renewal notes for larger amounts which had not been signed by testatrix. *Cable v. Oil Co.,* 569.

§ 37. Election Between Suit to Set Aside Foreclosure and Action for Damages for Wrongful Foreclosure

To recover damages for the wrongful foreclosure of a deed of trust, plaintiff may elect to sue the *cestui* for the true worth of the property. *Nye v. Development Co.,* 676.

MUNICIPAL CORPORATIONS

§ 4. Powers of Municipality in General

Municipality had authority to compensate landowners for water and sewer line easement across tract of land located outside the municipal

MUNICIPAL CORPORATIONS—Continued

limits by agreement to furnish fire protection for buildings located on such tract. *Valevais v. New Bern,* 215.

§ 5. Distinction Between Governmental and Private Powers

Fact that easement obtained by municipality in exchange for promise to furnish fire protection permitted municipality to sell water at a profit did not make the furnishing of such fire protection a proprietary function. *Valevais v. New Bern,* 215.

§ 9. Officers and Employees of Municipality

Service of summons on the city manager was sufficient to give the court jurisdiction over the city. *Farr v. Rocky Mount,* 128.

Action by municipal firemen seeking a declaratory judgment on their right to reside outside the municipality while continuing their employment with the municipality is properly dismissed by the trial court when no firemen were residing outside the municipality at the time of the action. *Bland v. Wilmington,* 163.

§ 12. Liability for Torts of Municipality

While G.S. 160-179 authorizes a municipality to institute an action to restrain a violation of its zoning ordinances, the statute does not authorize or require the municipality to waive its governmental immunity by so doing. *Town of Hillsborough v. Smith,* 70.

Agreement by municipality to furnish fire protection for property lying outside municipality did not waive municipality's governmental immunity with respect to torts committed in operation of its fire department. *Valevais v. New Bern,* 215.

Although municipality contracted to furnish protection for property of plaintiff lying outside city limits, alleged failure of fire department to answer fire call for such property would constitute a negligent omission, not a breach of contract. *Ibid.*

§ 30. Zoning Ordinances

While G.S. 160-179 authorizes a municipality to institute an action to restrain a violation of its zoning ordinances, the statute does not authorize or require the municipality to waive its governmental immunity by so doing. *Town of Hillsborough v. Smith,* 70.

§ 41. Actions by Muncipality

A municipality does not waive its governmental immunity by the mere act of instituting a civil action. *Town of Hillsborough v. Smith,* 70.

§ 42. Claims and Actions Against Municipality for Personal Injury

Service of summons on the city manager was sufficient to give the court jurisdiction over the city. *Farr v. Rocky Mount,* 128.

NEGLIGENCE

§ 5. Dangerous Substances

Doctrine of strict liability in tort does not apply to sale of mislabeled tomato seeds. *Gore v. George J. Ball, Inc.,* 310.

NEGLIGENCE—Continued

§ 5.1. Duties of Business Places to Invitees

Operator of a nursing home owed an invitee the duty of ordinary care to keep the premises in a reasonably safe condition so as not to expose her unnecessarily to danger and to give her warning of hidden dangers or unsafe conditions of which the operator had knowledge, express or implied. *Long v. Methodist Home,* 534.

§ 6. Res Ipsa Loquitur

Doctrine of *res ipsa loquitur* was inapplicable in action to recover lost profits sustained by reason of defendant's delivery to plaintiff of inferior grade of tomato seeds. *Gore v. George J. Ball, Inc.,* 310.

§ 7. Wilful and Wanton Negligence

Trial court erred in refusing to submit plaintiff's tendered issue as to wilful and wanton conduct of the driver of an automobile which failed to negotiate a curve while going more than 100 mph. *Brewer v. Harris,* 515.

§ 10. Concurring and Intervening Negligence

The defense of insulating negligence is not available where the negligence of the first party continues to be a proximate cause up to the moment of injury. *Slade v. Board of Education,* 287.

§ 35. Nonsuit for Contributory Negligence

A directed verdict on the ground of contributory negligence will be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. *Bledsoe v. Gaddy,* 470.

§ 36. Nonsuit for Intervening Negligence

The defense of insulating negligence was not available in a tort claims action for injuries received by a student who had gotten off a school bus. *Slade v. Board of Education,* 287.

§ 41. Instruction on Intervening Cause

When the law on proximate cause is properly defined and applied, it is not error for the court to fail to elaborate on the subordinate phase of insulating negligence. *R. R. Co. v. Hutton & Bourbonnais,* 1.

§ 42. Instruction on Burden of Proof

Trial court's instruction on the burden of proof to show contributory negligence was sufficient. *Johnson v. Simmons,* 113.

§ 52. Definition of Invitee

A plaintiff who landed his airplane at a municipal airport with the intention of parking the plane and paying a fee to the airport operator was an invitee. *McElduff v. McCord,* 80.

§ 53. Duties and Liabilities to Invitees

Operator of a nursing home owed an invitee the duty of ordinary care to keep the premises in a reasonably safe condition so as not to expose her

NEGLIGENCE—Continued

unnecessarily to danger and to give her warning of hidden dangers or unsafe conditions of which the operator had knowledge, express or implied. *Long v. Methodist Home,* 534.

Duties of proprietor of scenic attraction to business invitees on the premises. *Haithcock v. Chimney Rock Co.,* 696.

Subcontractor's employee working on construction of a building was an invitee on the premises. *Maness v. Construction Co.,* 592.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees

Plaintiff's evidence was insufficient for jury in action to recover for injuries sustained in a fall on a wet floor in defendant's nursing home, where plaintiff had as much or more knowledge as did defendant concerning the condition of the floor. *Long v. Methodist Home,* 534.

Trial court properly granted defendant's motion for summary judgment in action for injuries allegedly sustained when plaintiff slipped and fell on a rock while walking along a footpath at a scenic attraction operated by defendant. *Haithcock v. Chimney Rock Co.,* 696.

NOTICE

§ 3. Waiver of Notice

The party entitled to notice of a motion may waive such notice. *Brandon v. Brandon,* 457.

PARENT AND CHILD

§ 6. Right to Custody of Child

Trial court did not abuse its discretion in awarding custody of an 18-month-old child to its paternal grandparents. *Brandon v. Brandon,* 457.

The custody of a ten-year-old boy whose father had died is properly awarded to the boy's paternal grandmother rather than to his mother. *In re Custody of Stancil,* 545.

The awarding of visitation rights with a child is a judicial function, the exercise of which should not be assigned to the custodian of the child. *Ibid.*

§ 9. Prosecutions for Nonsupport

A parent's wilful failure to provide adequate support for his children is a continuing offense, which is not barred by any statute of limitations until the youngest child reaches the age of eighteen. *S. v. McMillan,* 734.

Sentence of eighteen months' imprisonment that was imposed upon defendant's first conviction of failure to support his children, *held* excessive. *S. v. McMillan,* 734.

Defendant in a nonsupport prosecution was entitled to judgment as of nonsuit where there was no evidence that defendant wilfully failed to support his children. *S. v. McMillan,* 734.

PARTIES

§ 1. Necessary Parties

Superior court properly dismissed complaint filed against additional defendants where plaintiff had obtained no order authorizing him to make defendants additional parties. *Hendrix v. Alsop,* 338.

§ 3. Parties Defendant

Trust beneficiary was permissive and necessary party in action by trustee to construe trust. *Trust Co. v. Carr,* 610.

An executor cannot be joined as a party defendant in a wrongful death action. *Young v. Marshburn,* 729.

PAYMENT

§ 1. Transactions Constituting Payment

A new note not given in payment but merely in renewal does not change the original debt. *Cable v. Oil Co.,* 569.

PHYSICIANS AND SURGEONS

§ 16. Sufficiency of Evidence of Malpractice

The femme plaintiff in a malpractice action failed to establish that her family physician was negligent in not diagnosing a lump in her breast as cancerous. *Weatherman v. White,* 480.

PRINCIPAL AND SURETY

§ 11. Miscellaneous Sureties

Municipality did not waive its governmental immunity by execution of a bond to obtain an injunction under [former] G.S. 1-496 preventing an alleged violation of its zoning ordinance, and is thus not liable on the bond; however, the surety is not protected by governmental immunity and is liable on the bond. *Hillsborough v. Smith,* 70.

PROCESS

§ 3. Time of Service

Prior to 1 January 1970 the usual procedure to commence a civil action was by issuance of summons, and the date of the summons was *prima facie* evidence of the date of issuance. *Hendrix v. Alsop,* 338.

§ 14. Service on Foreign Corporation by Service on Secretary of State

Where an alleged cause of action against a nonresident manufacturer for either breach of implied warranty or negligence arose in another state, and the manufacturer was neither domesticated nor represented by a designated process agent in this State, the manufacturer could not be brought into court in plaintiff's action in this State by substituted service of process on the Secretary of State. *Rendering Corp. v. Engineering Corp.,* 39.

QUASI-CONTRACTS

§ 2. Action to Recover on Implied Contract

In a cabinetmaker's action to recover balance of purchase price for kitchen cabinets sold and delivered, there is a fatal variance between his pleading and proof, where he alleges an express contract with a real estate firm but introduced evidence showing a contract with a third party; the cabinetmaker is not entitled to recover from the real estate firm on the theory of an implied contract. *Nichols v. Real Estate, Inc.*, 66.

RAILROADS

§ 5. Crossing Accidents

Trial court erred in admitting testimony by defendant's witness as to speed of plaintiff's train at time of collision where witness did not testify that he actually saw the train prior to the collision. *R. R. Co. v. Hutton & Bourbonnais Co.*, 1.

Trial court properly directed a verdict against defendant on its counterclaim for damages sustained by its tractor-trailer in a collision with plaintiff's train. *Ibid.*

While the maintenance of an unusually hazardous grade crossing places upon the railroad a duty of care commensurate with the danger created, the duty of care owed by a motorist at such crossing also increases. *Leggett v. R. R. Co.*, 681.

Trial court in its instructions gave plaintiffs the benefit of every inference fairly deducible from the evidence that plaintiff's testate stopped before driving onto defendant's railroad tracks. *Ibid.*

Trial court's instructions which assumed, in the absence of supporting evidence in the record, that a railroad crossing was obstructed by an embankment, trees and shrubbery held reversible error. *Penny v. R. R.*, 659.

Testimony by a truck passenger that as the truck approached a railroad crossing he looked to the left and right but did not see or hear the train until the truck was on the tracks, held sufficient to support a jury finding that the railroad was negligent in not giving timely warning of the train's approach. *Ibid.*

RECEIVING STOLEN GOODS

§ 6. Instructions

Although the trial judge did not use the words "felonious intent" in his instructions on receiving stolen goods, the instructions nonetheless adequately required the jury to find the felonious intent. *S. v. Ingram*, 709.

REGISTRATION

§ 1. Instruments Within Purview of Registration Statute

An agreement to release property from a lien of a deed of trust does not have to be recorded. *Nye v. Development Co.*, 676.

ROBBERY

§ 4. Sufficiency of Evidence

Evidence of defendants' guilt of armed robbery was sufficient to go to the jury. *S. v. Douglas,* 136.

§ 5. Instructions and Submission of Lesser Degrees of Crime

Where all of the State's evidence tended to show a completed common law robbery from the person, trial court was not required to instruct the jury as to a lesser included offense. *S. v. Frazier,* 178.

Evidence was sufficient to show defendant's guilt of aiding and abetting a cellmate who robbed a jailor during a jail break. *S. v. Berryman,* 649.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

The Rules are inapplicable where all proceedings in issue transpired before 1 January 1970. *Hendrix v. Alsop,* 338.

§ 6. Time of Action

A party for whom a guardian *ad litem* is proposed is entitled to five days notice. *Rutledge v. Rutledge,* 427.

The right of a parent to have at least five days notice of a child custody hearing is not an absolute right but may be waived by the parent. *Brandon v. Brandon,* 457.

§ 7. Pleadings Allowed; Form of Motions

A written motion to set aside a default judgment cannot be heard *ex parte,* and it was error for the court to allow the motion without notice to plaintiff. *Doxol Gas v. Barefoot,* 703.

§ 8. General Rules of Pleadings

A complaint is sufficient to withstand motion to dismiss where no insurmountable bar to recovery appears on the face of the complaint and where allegations contained therein are sufficient to give defendant sufficient notice of the nature and basis of plaintiff's claim. *Cassels v. Motor Co.,* 51.

Defendants cannot raise for first time on appeal the defense of the statute of frauds under the Uniform Commercial Code. *Grissett v. Ward,* 685.

§ 9. Pleading Special Matters

When items of special damage are claimed each shall be averred. *Williams v. Freight Lines,* 384.

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. *Alltop v. Penney Co.,* 692.

An action may be dismissed for failure to state a claim upon which relief can be granted. *Young v. Marshburn,* 729.

§ 15. Amended and Supplemental Pleadings

Plaintiffs' purported "amended complaints" in a slander action were in effect supplementary pleadings. *Williams v. Freight Lines,* 384.

RULES OF CIVIL PROCEDURE—Continued

§ 17. Parties Plaintiff and Defendant

Rules relating to the determination of the competency of a party litigant who is not represented by a guardian. *Rutledge v. Rutledge*, 427.

In the wife's action for alimony and child custody and support, the trial court committed reversible error in hearing the action on its merits without first determining whether a guardian should be appointed for the husband. *Ibid.*

§ 20. Permissive Joinder of Parties

Trust beneficiary was permissive and necessary party in action by trustee to construe trust. *Trust Co. v. Carr*, 610.

§ 41. Dismissal of Actions

If the case is tried by the judge without a jury, motion for involuntary dismissal is proper; the function of the judge in such case is to evaluate the evidence without any limitations as to inferences which the court must indulge in upon motion for a directed verdict in a jury case. *Bryant v. Kelly*, 208.

Although defendant's motion for dismissal in a nonjury trial was incorrectly designated as a motion for a directed verdict, the trial court properly treated the motion as a motion for involuntary dismissal. *Ibid.*

Defendant's motion for an involuntary dismissal of the case challenges the sufficiency of plaintiff's evidence. *Wells v. Insurance Co.*, 584.

§ 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

Upon deciding that the trial court should have granted appellant's motion for a directed verdict made at the close of all the evidence, the Court of Appeals may direct entry of judgment in accordance with the motion, but only when appellant also in apt time moved for judgment notwithstanding the verdict. *Nichols v. Real Estate, Inc.*, 66.

Defendants' motion for "dismissal" on grounds of insufficient evidence to go to the jury, rather than for a "directed verdict," *held* not fatal where the defendants stated grounds entitling them to a directed verdict. *Creasman v. Savings & Loan Assoc.*, 182.

Motion for a directed verdict under Rule 50(a) is proper when trial is being held before a jury. *Bryant v. Kelly*, 208.

If motion for directed verdict is granted, adverse party who did not object to failure of motion to state specific grounds therefor cannot raise the objection on appeal. *Builders Supplies Co. v. Gainey*, 364.

Sufficiency of evidence upon which jury based its verdict is drawn into question upon motion for judgment *non obstante veredicto*. *Coppley v. Carter*, 512.

Motion in the alternative for a new trial lies within the discretion of the trial judge. *Ibid.*

Consideration of evidence on motion for directed verdict and motion for judgment notwithstanding verdict. *Maness v. Construction Co.*, 592; *Adler v. Insurance Co.*, 720.

RULES OF CIVIL PROCEDURE—Continued

When directed verdict may be allowed in favor of party having burden of proof. *Hodge v. First Atlantic Corp.*, 632.

§ 51. Instructions to Jury

In charging the jury in a civil action the judge must declare and explain the law arising on the evidence. *Huggins v. Kye*, 221; *Credit Co. v. Brown*, 382.

Plaintiff is entitled to a new trial for failure of the trial judge to declare and explain the law arising on the evidence given in the case. *Credit Co. v. Brown*, 382.

Trial court is not required to recapitulate all the evidence, but only so much as is necessary to explain the application of the law. *McLamb v. Construction Co.*, 688.

§ 52. Findings by the Court

Trial court in a nonjury trial must find the facts specially and state its conclusions of law thereon. *Bryant v. Kelly*, 208.

Rule 52 of the Rules of Civil Procedure entitled "Findings by the Court" does not apply in awarding alimony *pendente lite*. *Peoples v. Peoples*, 402.

§ 55. Default Judgment

An entry of default is only an interlocutory act. *Whaley v. Rhodes*, 109.

Entry of default in an automobile accident case was properly vacated by the trial court upon a showing by defendant that he had good cause for his failure to file an answer. *Ibid.*

There is no necessity for a finding of excusable neglect in granting a motion to set aside and vacate the entry of default. *Ibid.*

In order to set aside a judgment by default, the court must find that defendant's neglect was excusable and that he had a meritorious defense to the action. *Doxal Gas v. Barefoot*, 708.

§ 56. Summary Judgment

If defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact. *Patterson v. Reid*, 22; *Haithcock v. Chimney Rock Co.*, 696.

Affidavit statements based on hearsay should not be considered in passing on a motion for summary judgment. *Patterson v. Reid*, 22.

Prerequisites of summary judgment. *Lee v. Shor*, 231.

The court should not resolve an issue of credibility at a hearing on a motion for summary judgment. *Ibid.*

It was improper to grant a summary judgment in favor of defendants prior to their filing of objections or answer to plaintiff's interrogatories. *Ibid.*

Superior court had no authority to rule upon plaintiff's motion for summary judgment while defendant's motion for change of venue to proper county was pending. *Capital Corp. v. Enterprises*, 519.

RULES OF CIVIL PROCEDURE—Continued

Entry of partial summary judgment was appropriate where it appeared from the items in support of the motion that plaintiff was entitled to judgment as a matter of law. *Atkinson v. Wilkerson*, 643.

Denial by superior court judge of defendant's motion to dismiss did not preclude a second superior court judge from granting motion for summary judgment. *Alltop v. Penney Co.*, 692.

Summary judgment is appropriate where the record discloses that plaintiff's claim is barred by statute of limitations. *Brantley v. Dunstan*, 706.

§ 60. Relief from Judgment or Order

Superior Court had authority under Rule 60(b)(6) to set aside void order granting summary judgment entered in another county. *Capital Corp. v. Enterprises*, 519.

A written motion to set aside a default judgment cannot be heard *ex parte*, and it was error for the court to allow the motion without notice to plaintiff. *Doxol Gas v. Barefoot*, 703.

The fact that defendant was in the midst of the tobacco curing season and did not have time to answer the complaint was insufficient to constitute excusable neglect. *Ibid.*

SALES

§ 2. Delivery of Goods

Plaintiff's alleged cause of action against a nonresident manufacturer of a boiler feed unit for either breach of implied warranty or negligence arose in Pennsylvania when sale of the feed unit to an independent North Carolina dealer was completed in that state by its delivery to a common carrier for shipment to the dealer f.o.b. Lancaster, Pennsylvania. *Rendering Corp. v. Engineering Corp.*, 39.

§ 10. Recovery of Purchase Price

In a cabinetmaker's action to recover balance of purchase price for kitchen cabinets sold and delivered, there is a fatal variance between his pleading and proof, where he alleges an express contract with real estate firm but introduced evidence showing a contract with a third party; the cabinetmaker is not entitled to recover from the real estate firm on the theory of an implied contract. *Nichols v. Real Estate, Inc.*, 66.

§ 22. Defective Goods or Materials

The doctrine of strict liability in tort does not apply to the sale of mislabeled tomato seeds. *Gore v. George J. Ball, Inc.*, 310.

Plaintiff's complaint in an action against a truck manufacturer for negligence in manufacturing a truck and against a truck dealer for failure to inspect and for sale of a defective truck, held sufficient to withstand defendants' motions to dismiss. *Cassels v. Motor Co.*, 51.

The seller of an article is subject to the same liability to the purchaser as the manufacturer if the article is potentially dangerous by reason of a defect in construction or the absence of safety devices. *Ibid.*

SCHOOLS

§ 11. Liability for Torts

A publication entitled A Handbook for School Bus Drivers of North Carolina was properly admitted in evidence in a tort claims action against a county board of education. *Slade v. Board of Education,* 287.

In a tort claims action to recover for injuries received by a six-year-old student who was hit by a truck on a busy highway shortly after getting off the school bus, the Industrial Commission correctly held that the responsibility of the school bus driver to the student was not limited to the mere discharge of the student in a place of immediate safety. *Ibid.*

SEALS

The presence of a seal on the instrument in question does not prevent a court of equity from looking behind the seal for the consideration. *Atkinson v. Wilkerson,* 643.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

No search warrant was required for seizure from defendant's car of white plastic jugs containing non-taxpaid whiskey. *S. v. Simmons,* 259.

§ 2. Consent to Search Without Necessary Warrant

If defendant, who was out of prison under the work release program on the night of the crime, was an occupant of the residence where his wife lived, he waived his right to complain of a warrantless search by police when he consented to the search; if defendant was not an occupant of the residence, his wife consented to the search and defendant has no standing to complain of the search. *S. v. Shedd,* 139.

§ 3. Requisites and Validity of Search Warrant

An affidavit by an SBI agent that defendant had possession of LSD on his premises was sufficient to support a finding of probable cause. *S. v. Bush,* 247.

SOLICITORS

Where the district court has exclusive original jurisdiction of the offense with which defendant was charged, the solicitor has a duty to make certain that the record on appeal shows the disposition of the case in the district court and an appeal to the superior court. *S. v. Harris,* 553.

STATE

§ 8. Negligence of State Employee

In a tort claims action to recover for injuries received by a six-year-old student who was hit by a truck on a busy highway shortly after getting off the school bus, the Industrial Commission correctly held that the responsibility of the school bus driver to the student was not limited to the

STATE—Continued

mere discharge of the student in a place of immediate safety. *Slade v. Board of Education*, 287.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence

Plaintiff's evidence held insufficient to establish his ownership of the land. *Taylor v. Electric Membership Corp.*, 277.

TRIAL

§ 33. Statement of Evidence and Application of Law Thereto in Instructions

The court is required to declare the law and apply the evidence thereto in regard to each substantial and essential feature of the case without any request for special instructions. *Johnson v. Simmons*, 113.

§ 52. Setting Aside Verdict for Excessive Award

Trial court did not abuse its discretion in refusing to set aside as excessive verdict of $5000 for injuries to plaintiff's left hand. *Williams v. Hayes*, 275.

TRUSTS

§ 10. Termination of Trust and Distribution of Corpus

Trustee of testamentary trust was authorized but not compelled to make an actual partition of lands comprising the trust corpus when it distributed the corpus upon termination of the trust. *Trust Co. v. Carr*, 610.

§ 13. Creation of Resulting Trust

Plaintiff's evidence that her brother purchased and received title to the land more than one year *prior* to the time that payment was made on behalf of plaintiff for the land, *is held* to preclude the existence of a resulting trust. *Bryant v. Kelly*, 208.

In an action to impose a parol trust on land held by the heirs of plaintiff's brother, plaintiff's evidence that her brother acquired title to the land more than one year *prior* to the time that she and her brother made an oral agreement whereby the brother was to purchase the land and hold title for the benefit of plaintiff, *is held* to preclude the existence of a parol trust. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 3. Application

The Uniform Commercial Code became effective in this State at midnight 30 June 1967. *Music House v. Theatres*, 242.

Uniform Commercial Code has no bearing upon action based upon sale of tomato seeds which occurred in January 1966. *Gore v. George J. Ball, Inc.*, 310.

UNIFORM COMMERCIAL CODE—Continued

§ 4. Definitions

The holder of a perfected security interest in after-acquired property qualifies as a "good faith purchaser." *Trust Co. v. Archives*, 619.

§ 13. Form and Formation of Sales Contract

Defendants cannot raise for first time on appeal the defense of the statute of frauds under the Uniform Commercial Code. *Grissett v. Ward*, 685.

§ 15. Warranties Under Sales Contract

Defendant was entitled to have counterclaim for breach of implied warranty of merchantability of a "Mr. Slushy" machine submitted to the jury. *Trio Estates v. Dyson*, 375.

§ 16. Good Faith Purchasers; Title, Creditors

The secured creditor of an insolvent microfilming firm had superior rights over certain schools in the firm's inventory, which included bound volumes of periodicals that the schools had sold to the firm in exchange for the microfilmed equivalents of the volumes. *Trust Co. v. Archives*, 619.

§ 20. Breach, Repudiation and Excuse

Defendant's denial of any indebtedness to plaintiff for a "Mr. Slushy" machine presented an issue for the jury as to whether defendant accepted the machine within the meaning of G.S. 25-2-606. *Trio Estates v. Dyson*, 375.

§ 21. Buyer's Remedies

In order for a buyer to recover goods which are in the possession of an insolvent seller, the seller must have become insolvent within ten days after the receipt of the first installment of the purchase price. *Trust Co. v. Archives*, 619.

§ 22. Seller's Remedies

Plaintiff's evidence was sufficient for jury in action for breach of contract to purchase plaintiff's sweet potato crop. *Grissett v. Ward*, 685.

§ 70. Secured Transactions; Contract Rights in General

The "inventory" of a microfilming firm included bound periodical volumes that had been sold to it for microfilming. *Trust Co. v. Archives*, 619.

§ 71. Particular Transactions or Security Devices

A lien on personal property granted to a lessor by contract is not excluded from the Uniform Commercial Code. *Music House v. Theatres*, 242.

Lease agreement between lessor and lessee *is held* to create a security interest in favor of lessor, upon the lessee's default under the lease, in a piano and organ that was acquired by the lessee for use on the premises. *Ibid.*

A promissory note and two financing statements were insufficient to create an enforceable security interest in farm crops. *Evans v. Everett*, 435.

UNIFORM COMMERCIAL CODE—Continued

§ 73. Security Agreement

A security agreement under the Uniform Commercial Code must contain a grant of the security interest. *Evans v. Everett*, 435.

§ 75. Perfecting of the Security Interest

In an action to determine the right of possession to a piano and organ as between a landlord under a lease agreement and a music company under a conditional sales contract, the landlord, who perfected its security interest by taking possession of the property, has priority over the music company. *Music House v. Theatres*, 375.

USURY

§ 6. Recovery of Double Amount of Usurious Interest Paid

Plaintiff's evidence was insufficient to show that one percent "service charge" or "construction loan fee" and a "discount" or "points" paid on permanent loans constituted usurious interest on construction loan. *Hodge v. First Atlantic Corp.*, 632.

UTILITIES COMMISSION

§ 3. Jurisdiction and Authority of Commission—Carriers

The Utilities Commission properly granted a contract carrier permit to an applicant who sought to carry liquified petroleum gas in eastern North Carolina. *Utilities Comm. v. Transport Co.*, 626.

§ 9. Appeal and Review

Findings of fact by the Utilities Commission are conclusive and binding when supported by competent evidence. *Utilities Comm. v. Transport Co.*, 626.

VENUE

§ 4. Actions Against Municipalities and Public Officers

The venue of an automobile collision case against a town policeman who was driving his automobile in the performance of his official duties was properly removed to the county where the collision occurred. *Galligan v. Smith*, 536.

§ 7. Motion to Remove as Matter of Right

Superior court had no authority to rule upon plaintiff's motion for summary judgment while defendant's motion for change of venue to proper county was pending. *Capital Corp. v. Enterprises*, 519.

§ 8. Removal for Convenience of Witnesses

Motion for change of venue for convenience of witnesses is addressed to sound discretion of trial judge. *Piner v. Truck Rentals*, 742.

WILLS

§ 8. Revocation of Wills

A showing of defacement or obliteration by testatrix is not alone sufficient to show revocation. *In re Will of Hodgin,* 492.

Trial court abused its discretion in failing to set aside jury verdict finding that pen marks through certain provisions of a typewritten attested will were made by testatrix and that testatrix intended to revoke part of the provisions through which pen marks had been made. *Ibid.*

§ 24. Issues and Verdict

Trial judge may in his discretion set aside the verdict in a caveat proceeding when it is against the greater weight of the evidence. *In re Will of Hodgin,* 492.

§ 35. Time of Vesting of Estates

Devised property vested in the devisees, subject to the liens of deeds of trust on such property, at the time the will was probated; consequently, the devisees owned the equity of redemption in the devised property at the time the property was foreclosed after the death of the testatrix. *Cable v. Oil Co.,* 569.

§ 56. Sufficiency of Description of Land

Devise to testatrix' daughter of a tract of 25 acres to be selected by her out of a larger tract is not void for vagueness. *Cable v. Oil Co.,* 569.

§ 67. Ademption

The theft of testator's silverware prior to his death was not an ademption of the bequest of the silverware to legatees named in the will, and the legatees were entitled to the insurance proceeds that were paid to testator's estate for the theft of the silverware. *Reading v. Dixon,* 319.

Devises of land were not adeemed when testatrix executed deeds of trust on the land after execution of her will or by foreclosure sale of the land after death of testatrix. *Cable v. Oil Co.,* 569.

§ 68. Title and Right of Devisees and Legatees

Devises of a tract of land to testatrix' son and a portion of another tract to testatrix' daughter do not fail because of the "mingling of funds" resulting from foreclosure sale of the two tracts as a single tract after testatrix' death. *Cable v. Oil Co.,* 569.

WITNESSES

§ 3. Credibility of Witness Interested in the Event

The fact that the witness is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to the jury. *Lee v. Shor,* 231.

§ 7. Direct Examination

A judge may ask a witness clarifying questions. *Wells v. Insurance Co.,* 584.

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