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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1971

BILLIE JEAN JENNINGS HILL v. BERNARD LARRY HILL, ALSO KNOWN AS BROADUS BUNK HILL

No. 7126DC50

(Filed 28 April 1971)

1. **Rules of Civil Procedure § 11— verification of pleadings — action based on written instrument for payment of money**

G.S. 1A-1, Rule 11(c) does not require verification of the pleadings when the action or defense is founded on a written instrument for the payment of money.

2. **Judgments §§ 14, 17; Rules of Civil Procedure § 55— default judgment — jurisdiction**

A judgment by default is void if the court is without jurisdiction.

3. **Judgments § 14; Rules of Civil Procedure § 55— default judgment against nonappearing defendant**

In order for a valid default judgment to be entered against a nonappearing defendant, there must be compliance with the requirement of Rule 55 that it appear by affidavit or otherwise that the party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by law, and with the requirement of G.S. 1-75.11 that there be proof of jurisdiction.

4. **Judgments § 14— default judgment against nonappearing defendant — establishment of jurisdiction**

In order to establish personal jurisdiction for entry of judgment against a nonappearing defendant, G.S. 1-75.11 requires, in addition to proof of service of summons, that an affidavit or other evidence be

made and filed of the existence of any fact needed to establish personal jurisdiction over a defendant which is not shown by a verified complaint.

5. **Courts § 2; Judgments § 14— default judgment — nonappearing defendant — jurisdiction**

Personal jurisdiction over a nonappearing defendant for the purpose of entry of a default judgment is not presumed by the service of summons and an unverified complaint but must be proven and appear of record as required by G.S. 1-75.11.

6. **Judgments § 14— default judgment — nonappearing defendant — failure to show personal jurisdiction**

The summons, the certificate of the officer serving it, and the unverified complaint were insufficient under G.S. 1-75.11 to show that the court had jurisdiction to enter a personal judgment by default against a nonappearing defendant.

APPEAL by plaintiff from *Gatling, District Court Judge,* 12 October 1970 Session of District Court held in MECKLENBURG County.

On 5 August 1970 plaintiff caused a summons to issue and filed an unverified complaint alleging that the defendant was indebted to the plaintiff in the sum of $6,960; that this indebtedness arose from a default in the payment by the defendant to the plaintiff of the sum of $20 per week for the support of a minor child born to the parties; that this was ordered on 27 November 1963 in a Decree of Absolute Divorce in the Circuit Court for the City of Roanoke, Virginia, entered in a proceeding between the parties; and that a copy of the decree was attached to the complaint as Exhibit A.

A copy of the summons and the complaint were served on the defendant personally by the sheriff of Mecklenburg County on 6 August 1970. The defendant failed to answer or otherwise defend against the unverified complaint and failed to appear personally or by an attorney at any of the proceedings either before or at the time of the "Entry of Default" by the clerk or the entry of the judgment by Judge Gatling, the district court judge, on 14 September 1970. That judgment reads as follows:

> "THIS CAUSE coming on to be heard before the Honorable Willard I. Gatling, Judge Presiding at the September 14, 1970, Non-Jury Civil Session of Mecklenburg County District Court Division of the General Court of Justice, and being heard on September 14, 1970, upon the Complaint filed in this action on August 5, 1970 praying for an award of future child support for Charlene Angela Hill, and for a

Judgment as to the child support arrearage under a Virginia divorce decree;

AND defendant having failed to answer or otherwise plead to said Complaint and having failed to appear at this hearing pursuant to a show-cause Order filed September 4, 1970, and served upon the defendant that date;

AND the Court having heard the matter upon the Complaint and evidence presented by plaintiff's attorney;

AND the plaintiff having taken a voluntary dismissal as to the future child support by reason of the child having been adopted as of February 17, 1970;

NOW, based upon the record in this case, the default of the defendant, and the evidence presented, the Court makes the following findings of fact:

1. The plaintiff is a citizen and resident of St. Petersburg, Pinellas County, Florida.

2. The defendant is a citizen and resident of Mecklenburg County, North Carolina.

3. The plaintiff and defendant were married to each other in Roanoke, Virginia, on or about December 23, 1960.

4. One child, Charlene Angela Hill, who is now eight years of age, was born of the marriage.

5. The plaintiff and defendant were divorced on November 27, 1963, by Decree of Absolute Divorce in the Circuit Court for the City of Roanoke, Virginia.

6. By the terms of said Decree of Divorce, the plaintiff was granted and presently has custody of said child; and the defendant was required to pay to the plaintiff for the support of said child the sum of Twenty and No/100 Dollars ($20.00) per week, beginning November 27, 1963.

7. Since the entry of said Divorce Decree, the defendant has made no payments for the support of said minor child, and he has failed and refused to pay any such installments or the arrearage due under said Divorce Decree.

8. Said minor child was adopted by the present husband of the plaintiff in the Circuit Court for Pinellas County, Florida, on February 17, 1970.

9. The defendant owes to the plaintiff for the support of said minor child until February 17, 1970, pursuant to the terms of said Divorce Decree, the amount of $6,460.00.

10. The plaintiff is a dependent spouse and has insufficient means to pay costs and counsel fees for the handling of this action.

11. A complaint was filed instituting this action on August 5, 1970, and together with a Summons was served on the defendant on August 6, 1970.

12. No Answer or other pleading has been filed by the defendant, no extension of time to file pleadings has been granted, and the time for pleading or otherwise defending this action has expired.

13. The defendant wilfully failed to appear personally or by counsel in Court on September 14, 1970, pursuant to the show-cause Order filed in this action on September 4, 1970.

14. The Clerk of Superior Court of Mecklenburg County, North Carolina, has made Entry of Default against the defendant.

NOW, THEREFORE, THE COURT CONCLUDES that the defendant owes to the plaintiff for the support of the minor child, Charlene Angela Hill, from November 27, 1963, until February 17, 1970, the amount of $6,460.00, and that the defendant is in contempt of this court for his failure to abide by the terms of said Show-cause Order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff have and immediately recover from the defendant the amount of $6,460.00, with interest thereon at the rate of six percent (6%) per annum on the unpaid principal balance from and after the date of this Judgment until paid.

2. An execution against the person of the defendant is hereby authorized if an execution against the property of the defendant is returned unsatisfied.

3. Pursuant to G.S. 50-13.4(e) and (f)(1) and (2), the Court orders the defendant to execute by September 29,

1970, if this Judgment has not been paid in full by that time, a Deed of Trust in the office of plaintiff's attorney, 807 Law Building, Charlotte, N. C., creating an interest in defendant's real property described as Lot 7, Hidden Valley Estates, Addition #1, Map Book 12, pages 575 and 577, Mecklenburg Registry, to secure payment of said $6,460.00 in child support plus interest, and if he fails to comply with this Judgment, the defendant shall be in wilful contempt of same and the Court, pursuant to Rule 70 of G.S. 1A-1, appoints as of September 30, 1970, Eugene C. Hicks, III, as Commissioner to execute said Deed of Trust to Richard F. Harris, III, Trustee for Billie Jean Jennings Hill, at the cost of the defendant, and when so done the same shall have the same effect as if done by the defendant.

4. If this Judgment has not been paid in full by September 29, 1970, the defendant shall execute in the office of plaintiff's attorney an assignment of wages, salary or other income due or to become due for payment of same as provided in G.S. 50-13.4(f) (1).

5. The defendant shall pay by September 29, 1970, directly to the plaintiff's attorney, 'Richard F. Harris, III,' at 807 Law Building, Charlotte, N. C. 28202, the sum of $250.00, plus 6% interest per annum on the unpaid principal balance after that date, in partial payment for legal services rendered to the plaintiff in this matter to date.

6. The defendant shall immediately pay the costs of this action.

7. If the defendant fails to comply with any of the provisions of this Judgment, he shall be immediately arrested for wilful contempt, without further Order of this Court and upon the written request to the Sheriff by plaintiff's attorney, and confined in the Mecklenburg County Jail until he does so comply or until further Orders of this Court are entered."

On 29 September 1970 the defendant filed a motion under G.S. 1A-1, Rules 60 and 62 to set aside the foregoing judgment and the execution issued thereon, asserting that the judgment was void because, *inter alia,* the decree of the Virginia court, attached to the complaint as Exhibit A, was not authenticated as provided in G.S. 1A-1, Rule 44, and the complaint was not

verified as provided in G.S. 1A-1, Rule 11(c). This motion was heard by Judge Gatling, and under date of 19 October 1970, an order was entered vacating the judgment dated 14 September 1970.

Plaintiff objected and excepted to the order vacating the judgment and appealed to the Court of Appeals.

Hicks & Harris by Richard F. Harris III for plaintiff appellant.

Olive, Howard & Downer by Carl W. Howard for defendant appellee.

MALLARD, Chief Judge.

Plaintiff contends that the court committed error in setting aside the default judgment entered on 14 September 1970. In the motion of the defendant to set aside the judgment, it is alleged that it was based upon an unverified complaint and did not comply with G.S. 1A-1, Rule 11(c) and G.S. 1-75.11.

[1] Under G.S. 1A-1, Rule 11(a), it is not necessary that pleadings be verified or accompanied by an affidavit unless otherwise specifically provided by the rules or by statute. Defendant appellee contends that the provisions of G.S. 1A-1, Rule 11(c) require verification of the pleadings when the action or defense is founded upon a written instrument for the payment of money. We do not agree. G.S. 1A-1, Rule 11(c) sets forth the circumstances and the manner in which pleadings *may be* verified by an agent or attorney of a party when the action or defense is founded upon a written instrument for the payment of money only, but it does not specifically require verification.

[2] A judgment entered contrary to the statutes and Rules of Civil Procedure is void. A judgment by default is void if the court is without jurisdiction. G.S. 1-75.1, *et seq.* Void judgments are legally ineffective. They have semblance but are lacking in an essential element or elements, and they may always be treated as nullities. *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460 (1958); *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283 (1934); *Wellons v. Lassiter,* 200 N.C. 474, 157 S.E. 434 (1931); 5 Strong, N. C. Index 2d, Judgments, § 16.

[3] In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance

with the provisions of G.S. 1A-1, Rule 55, as well as G.S. 1-75.11. G.S. 1A-1, Rule 55 requires that before the clerk can "enter his default" it must be made to appear by "affidavit or otherwise" that the party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by law. G.S. 1-75.11 requires that before entering a judgment against a nonappearing defendant, there must be proof of jurisdiction.

G.S. 1-75.11 reads in pertinent part as follows:

"Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, *require proof of service of the summons in the manner required by § 1-75.10 and, in addition, shall require further proof as follows:*

(1) Where Personal Jurisdiction Is Claimed Over the Defendant.—Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, *to be made and filed,* of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.

(2) Where Jurisdiction Is in Rem or Quasi in Rem.—Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show that the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require." (Emphasis added.)

The defendant did not appear in apt time after he was personally served with summons and unverified complaint. G.S. 1A-1, Rule 12(a)(1). The parties stipulated "that Summons and Complaint in this action were issued on the 5th day of August, 1970, and thereafter served on the defendant personally on the 6th day of August, 1970." The summons and the certificate of the officer showing the service are not contained in this record, and we therefore assume they were correct and proper in form. A proper summons gives no information as to the nature of an action. G.S. 1A-1, Rule 4(b).

[4] The certificate of the officer who served the summons and complaint herein showing the place, time, and manner of the personal service on the defendant may have been a part of the "evidence presented by plaintiff's attorney" referred to in the preface of the judgment. The summons and certificate of service, if properly presented, would have been proof of the first requirement of G.S. 1-75.11 with respect to proof of the service of summons on a natural person present in the State and not under disability. However, they would not meet the requirement that further proof of jurisdiction be offered before judgment against a nonappearing defendant may be entered. There is a distinction between obtaining jurisdiction by service of process and the proof of jurisdiction as required by G.S. 1-75.11 before entry of a judgment against a nonappearing defendant. Under G.S. 1-75.11, proof of service of summons is only part of the proof necessary to establish grounds for personal jurisdiction before entering the judgment.

[4, 5] The additional proof required is that an "affidavit or other evidence" *be made and filed* of the existence of any fact needed to establish grounds for personal jurisdiction over a defendant which is not shown by a verified complaint. The filing of the affidavit or other evidence is required under G.S. 1-75.11 and is necessary before jurisdiction is established and a judgment against a nonappearing defendant may be entered. Here we have no verified complaint and no affidavit or "other evidence" appears in this record as having been filed pertaining to the grounds for personal jurisdiction over the defendant.

> "Jurisdiction is the power of the court to decide a case on its merits and presupposes the existence of a duly constituted court with control over the subject matter and the parties. The issue must be brought before the court in a proper proceeding. * * *
>
> * * *
>
> The general rule is that the fact that a court of general jurisdiction has acted raises a prima facie presumption of rightful jurisdiction, and the burden is upon the party asserting want of jurisdiction to show it. * * *" 2 Strong, N. C. Index 2d, Courts, § 2.

However, personal jurisdiction over a nonappearing defendant for the purpose of the entry of a judgment by default is not

presumed by the service of summons and an unverified complaint but must be proven and appear of record as required by G.S. 1-75.11.

General jurisdictional requirements are set forth in G.S. 1-75.1, *et seq.* The question of jurisdiction over the subject matter is not presented on this record. The jurisdictional requirements for a judgment against a person are set forth in G.S. 1-75.3, the pertinent parts of which are:

> "* * * A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in § 1-75.4 or § 1-75.7 and in addition either:
>
> (1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) of the Rules of Civil Procedure; or
>
> (2) Service of a summons is dispensed with under the conditions in § 1-75.7."

The applicable jurisdictional grounds set forth in G.S. 1-75.4 are as follows:

> "A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * * In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State * * * ."

The provisions of G.S. 1A-1, Rule 4(j) read in part:

> *"Process—manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

* * * Except as provided in subsection (2) below, upon a natural person:

> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * * ."

[6] Assuming that the certificate of service of summons and unverified complaint is in compliance with the provisions of G.S. 1A-1, Rule 4(j)(1)(a), it is not sufficient to prove the added jurisdictional requirements of G.S. 1-75.11 before a valid judgment by default could be entered against this nonappearing defendant. An unverified complaint is not an affidavit or other evidence. There is no proof by affidavit or other evidence "made and filed" in this case showing that there was a claim arising within or without this State against a natural person, not under disability, and present within the State at the time of service of summons. (However, it does appear on the first page of the record under the heading "Plaintiff Appellant's Statement of Case on Appeal" that the defendant was personally served with process "at his residence in Charlotte.") We hold that the summons, the certificate of the officer serving it, and the unverified complaint are insufficient to establish the jurisdictional requirements for the judgment entered herein.

If the necessary proof required by G.S. 1-75.11 was "made," it was not filed as required. For the failure of the record to show, as required by G.S. 1-75.11, personal jurisdiction of the defendant by the court, the judgment entered herein was void and could be considered and treated as a nullity.

G.S. 1A-1, Rule 60 provides that the court may relieve a party from a final judgment when the judgment is void upon motion made within a reasonable time and upon such terms as are just. The trial judge properly set aside the default judgment entered herein upon motion of the defendant.

It is not necessary for decision in this case, and we do not decide whether a responsive pleading was necessary under the new Rules of Civil Procedure. Averments in pleadings are admitted when not denied in a responsive pleading, if a responsive pleading is required. G.S. 1A-1, Rule 8(d).

We do not deem it necessary to discuss whether the Virginia Decree of Absolute Divorce was properly authenticated as required by G.S. 1A-1, Rule 44. Neither do we discuss or rule on the other contentions made by the parties herein; nor do we rule on the questionable but unquestioned authority of the district court judge to order the defendant arrested and confined upon the written request of plaintiff's attorney to the sheriff.

The order entered herein vacating the judgment by default is affirmed.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. R. C. (DICK) McCLUNEY, SR.

No. 7027SC635

(Filed 28 April 1971)

1. **Obscenity— disseminating obscene magazine — sufficiency of evidence**

State's evidence was sufficient to be submitted to the jury in a prosecution for disseminating an obscene magazine in violation of G.S. 14-189.1.

2. **Obscenity— dissemination of obscenity**

Contention by defendant that no material may be declared obscene unless it is (1) provided for juveniles, (2) offered in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or (3) advertised and promoted in a manner that amounts to pandering, *held* without merit.

3. **Constitutional Law § 1— decision of lower federal court — effect on decision of Court of Appeals**

Decision of a three-judge federal court which held G.S. 14-189.1 to be unconstitutional is not binding on the Court of Appeals, since lower federal courts and state courts have the same responsibility in passing on federal constitutional questions and both sets of courts are governed by the same reviewing authority of the U. S. Supreme Court.

4. **Obscenity— disseminating obscenity — requisites for conviction**

In order to convict a defendant of disseminating obscene material in violation of G.S. 14-189.1, the jury must find beyond a reasonable doubt that (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards; and (3) the material is utterly without redeeming social value.

5. Obscenity— disseminating obscenity — statutory presumption — constitutionality

Presumption created by G.S. 14-189.1 that one who disseminates obscenity knows the existence of the parts, pictures or contents which render it obscene is not unconstitutional, since the presumption is not an absolute presumption of law but is simply an evidential fact to be considered by the jury along with other facts in evidence in determining whether the State has carried the burden of proof on the question of scienter.

APPEAL from *Ervin, Superior Court Judge,* 24 November 1969 Criminal Session of GASTON County Superior Court.

Criminal prosecution on indictment charging defendant with the dissemination of obscenity in violation of G.S. 14-189.1. The case was tried during the 24 November 1969 Criminal Session of Gaston County Superior Court. The jury returned a verdict of guilty as charged and judgment was continued until 25 June 1970. At that time judgment was entered imposing a prison sentence which was suspended for a period of two years upon the payment of a fine and upon condition defendant remain of general good behavior. Defendant appealed.

Attorney General Morgan by Staff Attorney Mitchell and Staff Attorney Lloyd for the State.

Norman B. Smith for defendant appellant.

GRAHAM, Judge.

This charge arises out of defendant's sale of a magazine entitled *Young Beavers.* The sale took place on 10 November 1969 at the City News Stand in Gastonia. Only the cover of the magazine was displayed. When the magazine was purchased defendant took the contents from under the counter and inserted them in the cover.

[1] Defendant contends the material contained in the magazine is, as a matter of law, not obscene. We see no purpose in describing the details of the magazine's contents. Suffice to say, we have examined the contents and are of the opinion that the question of whether the material is obscene was one of fact to be passed upon by the jury and not a question of law to be determined by the court. Evidence presented by the State included the testimony of a practicing psychiatrist, a physician and surgeon, a professor of English, a skilled laborer and others. Their

testimony was sufficient to permit the jury to find that: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. The able trial judge correctly instructed the jury as to these three elements and as to every other material facet of the case.

[2] Defendant, citing and relying upon *Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542, and *Redrup v. New York,* 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515, argues that no material may be declared obscene unless it is: (1) provided for juveniles, (2) offered in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or (3) advertised and promoted in a manner that amounts to "pandering." There was no evidence that State's Exhibit 1 was used in any of these ways. However, we have studied with care the five separate opinions filed by Justices of the Supreme Court of the United States in the two cases cited. As pointed out in *Redrup,* one Justice is clearly of the opinion that the Constitution dictates the application of the restrictive standards urged here by defendant. Two other Justices would apparently insist that the First Amendment and Fourteenth Amendment impose absolute restrictions upon the federal and state governments in the regulation of any written material, including obscene material. However, we fail to find that the Supreme Court of the United States, either in the cases cited or in any other case, has held that obscene materials may be regulated, only when used in one of the three ways contended by defendant. Nor do we find that the opinions filed by the various Justices in these cases suggest that a majority of the members of the Supreme Court of the United States would so hold. We therefore reject defendant's argument that this case should have been dismissed because the magazine in question was not provided for juveniles, or offered or promoted in an "obtrusive" or "pandering" manner.

Defendant attacks as unconstitutional G.S. 14-189.1.

While this case was pending on appeal, a three-judge federal court considered the constitutionality of this statute in an action brought by different parties. *Shinall v. Worrell,* 319 F. Supp. 485 (E.D. N.C. 1970). That three-judge panel held the statute unconstitutional on its face "because it abridges the

Freedom of Speech Clause of the First Amendment made applicable to the states by the Fourteenth Amendment." No appeal was taken from that decision. Previously, a different three-judge panel, from the same circuit, had upheld the Virginia obscenity statute which is similar in essential respects to G.S. 14-189.1. *Grove Press, Inc. v. Evans,* 306 F. Supp. 1084 (E.D. Va. 1969). A similar Texas statute was stricken down by a three-judge federal court as unconstitutional on its face. *Stein v. Batchelor,* 300 F. Supp. 602 (N.D. Tex. 1969). This case was appealed and arguments were heard in the Supreme Court of the United States in November of 1970. We awaited a decision in that case in the hope some stable approach to the obscenity problem would come forth. However, by recent decision, the Supreme Court remanded the case on the ground "that federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, is proper only where irreparable injury is threatened." In the *per curiam* majority opinion the court held that there had been no showing that irreparable injury was threatened. *Dyson v. Stein,* 401 U.S. 200, 91 S. Ct. 769 (1971). Three other cases, arising from other states, were remanded on the same day on the same grounds. *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971); *Samuels v. Mackell,* 401 U.S. 66, 91 S. Ct. 764 (1971); and *Boyle v. Landry,* 401 U.S. 77, 91 S. Ct. 758 (1971). In *Younger* the court held that a threat of irreparable injury might be shown where the state criminal statute involved is *patently* and *flagrantly* unconstitutional on its face. We take this to mean that the court majority did not regard the Texas obscenity statute involved in *Stein* as *patently* and *flagrantly* unconstitutional on its face.

[3] We have great respect for the three-judge federal court which held G.S. 14-189.1 to be unconstitutional. We have given substantial consideration to its opinion. However, we are not bound to follow that decision since lower federal courts and state courts have the same responsibility in passing on federal constitutional questions and both sets of courts are governed by the same reviewing authority of the Supreme Court of the United States. United States, *ex rel. Lawrence v. Woods,* 432 F. 2d 1072 (7th Cir. 1970); *Owsley v. Peyton,* 352 F. 2d 804 (4th Cir. 1965). See also, *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404; *Iowa Nat. Bank v. Stewart,* 214 Iowa 1229, 232 N.W. 445; *State v. Coleman,* 46 N.J. 16, 214 A. 2d 393.

It is to be noted that no injunction accompanied the federal court's opinion with respect to the unconstitutionality of G.S. 14-189.1. Even where a federal court has issued an injunction against prosecution under a state statute, the injunction can be lifted and prosecution may follow if state courts give a constitutionally acceptable construction to the statute involved. *Dombrowski v. Pfister,* 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22. "Thus, in *Dombrowski* itself the Court carefully reaffirmed the principle that even in the direct prosecution in the State's own courts, a valid narrowing construction can be applied to conduct occurring prior to the date when the narrowing construction was made, in the absence of fair warning problems." *Younger v. Harris,* 401 U.S. at 51, 91 S. Ct. at 754.

The opinion of the three-judge panel recognizes the unquestioned power of a state's highest court to authoritatively interpret (interpolate) a state statute: "We have carefully considered whether, by interpolation, we may save the Statute in whole or in part, and have decided that it is beyond redemption. We are not so free as are state courts to interpret state statutes *nor may we do so with finality.*" (Emphasis added.) 319 F. Supp. at p. 487.

The Supreme Court of this State has had no opportunity to interpret G.S. 14-189.1 in the light of certain tests that are apparently now required before the distribution of written material may be constitutionally inhibited. We must therefore undertake this task. We do so without any absolute understanding as to what constitutes essential constitutional tests. The federal panel recognized this difficulty in noting that in this particular area "the power of the state to censor and proscribe such materials has not yet been clearly determined." 319 F. Supp. at p. 489.

[4] For purposes of this opinion we agree with the federal panel that this State may not constitutionally inhibit the distribution of literary material as obscene unless "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." A Book Named *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1.

G.S. 14-189.1(b) defines obscene as:

"(b) Obscene Defined; Method of Adjudication.—A thing is obscene if considered as a whole its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or presentation of such matters. A thing is obscene if its obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other especially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such an audience. In any prosecution for an offense under this section, evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) Artistic, literary, scientific, educational or other merits of the material;

(4) The degree of public acceptance of the material throughout the United States;

(5) Appeal to prurient interest, or absence thereof, in advertising or to the promotion of the material.

Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible."

G.S. 14-189.1 was enacted in 1957. Shortly thereafter, in *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, the Supreme Court of the United States held that obscene material was not within the area of free speech and press protected by the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment. In that case the Supreme Court prescribed standards for determining obscenity which are essentially the same as those

embodied in our G.S. 14-189.1(b). (See 36 N.C.L. Rev. 189.) Those standards were later explained and amplified in *Memoirs,* wherein it is stated:

> "We defined obscenity in Roth in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US, at 489, 1 L. ed 2d at 1509. *Under this definition,* as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Memoirs, 383 U.S., at 418, 16 L. Ed. 2d, at 6. (Emphasis added.)

Thus the Supreme Court has held that its definition of obscenity in *Roth,* which is essentially that of our definition in G.S. 14-189.1(b), includes the three elements set forth in *Memoirs.* Following this same logic, we hold that the definition of obscenity set forth in our statute includes these three elements. The trial judge interpreted the statute in this manner and the jury was instructed specifically that in order to find the material obscene they must find, beyond a reasonable doubt, the existence of all three of the essential tests. Construed in this manner, the constitutional objections raised here and before the federal court with respect to the omission in our statute of one test and the inadequate statement of another are removed.

The Supreme Court of Appeals of Virginia interpreted that State's similar obscenity statute to the same effect. *House v. Commonwealth,* 210 Va. 121, 169 S.E. 2d 572. A federal three-judge court thereafter concluded that the definition of obscenity adopted by the Virginia court "fully complies with the constitutional standards prescribed by the Supreme Court." *Grove Press, Inc. v. Evans, supra.* The following statement in the opinion of that federal court is particularly pertinent to the case at hand:

> "We are not persuaded by the plaintiffs' suggestion that only the legislature can amend the statutory definition of 'obscene.' For the purpose of testing the constitutionality of Virginia's statute, the interpretation by the Supreme

> Court of Appeals is as definitive as if the statute had been amended by the legislature. See *Winters v. New York,* 333 U.S. 507, 514, 68 S. Ct. 665, 92 L. Ed. 840 (1948)."

[5] Defendant also attacks as unconstitutional subsection (f) of G.S. 14-189.1, which provides that a person who disseminates obscenity is presumed to know the existence of the parts, pictures or contents which render it obscene. If this were an absolute presumption of law we would agree that the provision would be unconstitutional. *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205. It is clearly not. We find, as did the trial judge, that the presumption raised by this proviso is simply evidentiary and to be considered by the jury along with other facts in evidence in determining whether the State has carried the burden of proof on the question of scienter.

This presumption is no different from the many presumptions that arise in various criminal cases. For instance: Possession of stolen property shortly after it is stolen raises a presumption of the possessor's guilt of the larceny of such property. *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578. Possession of a forged instrument raises the presumption that the possessor either forged it or consented to the forgery. *State v. Peterson,* 129 N.C. 556, 40 S.E. 9. Where a married woman has committed a criminal act in the presence of her husband, there is a presumption that she was acting under his influence or coercion. *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915; *State v. Williams,* 65 N.C. 398. A person is presumed to intend the natural and normal consequences of his conduct. *State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37. Presumptions arising from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree. *State v. Miller,* 197 N.C. 445, 149 S.E. 590; *State v. Floyd,* 226 N.C. 571, 39 S.E. 2d 598. If there be 0.10 percent or more alcohol in a person's blood, it shall be presumed that the person was under the influence of intoxicating liquor. G.S. 20-139.1.

The trial judge correctly charged the jury with respect to this presumption when he instructed:

> "Now, this statute does provide in subsection 'F' that 'a person who unlawfully disseminates obscenity is presumed to know the existence of its parts, features, or contents of the material which render it obscene.' This statement from

the statute, however, is merely a presumption of fact. It is what we sometimes call in law *prima facie* evidence. And *prima facie* evidence is simply evidence which is sufficient to permit but not to compel a finding of the ultimate fact to be proved.

This presumption must be weighed by you, the jury, like any other evidence and considered along with all the other evidence in the case before you reach your verdict in this case.

In other words, this presumption of fact that I have read to you does not overcome the presumption that the defendant is innocent and it does not relieve the state of the burden of establishing his guilt of each and every element of this offense beyond a reasonable doubt, including the element of knowledge of the character of the material. . . ."

To hold this portion of the statute unconstitutional, in the light of the construction we have given to it, would be to cast doubt upon the constitutionality of the presumptions mentioned above, most of which are well established in the criminal laws of virtually every state in the Union. This we are unwilling to do.

Defendant assigns numerous errors based upon exceptions taken to various rulings on the admission of evidence. We find none of these assignments of error sufficiently prejudicial to warrant a new trial and they are therefore overruled.

We conclude that defendant received a fair trial, free from prejudicial error, and that he was convicted under a statute that is free from constitutional defect.

No error.

Judges BROCK and MORRIS concur.

LIBERTY/UA, INC. v. EASTERN TAPE CORPORATION, G & G SALES, INC., J. M. PETTUS AND JOHN DOE 1 THROUGH JOHN DOE 200

No. 7126SC259

(Filed 28 April 1971)

1. **Unfair Competition— record piracy — taping and selling recorded performance — injunctive relief**

It is unfair competition for a company to copy on magnetic tapes the phonograph records that were produced by a recording company and to sell the taped performances in competition with the recording company; such conduct may be temporarily enjoined.

2. **Unfair Competition— record piracy — effect of statute allowing unrestricted use of records**

The 1939 statute providing that any phonograph record sold for use in this State may be played privately, publicly, and commercially without restriction does not permit the unfair commercial practice of record piracy. G.S. 66-28.

APPEAL by defendants from *Snepp, Superior Court Judge,* 4 January 1971, Schedule "D" Session, Superior Court of MECKLENBURG County.

Plaintiff is a California corporation engaged in the manufacture and sale of phonograph recordings. It has written contracts with Bobby Goldsboro, "Canned Heat," "Sugarloaf" and other individual and groups of singers and performers wherein the performers grant plaintiff the exclusive right to manufacture, reproduce and sell phonograph recordings embodying their performances.

In this action, filed 11 December 1970, plaintiff alleges that defendants "pirate" or appropriate performances embodied in plaintiff's recordings by acquiring a copy of the recordings and transposing the performance onto magnetic tapes which are then sold by defendants in competition with plaintiff. The transposition is accomplished by the simple method of playing plaintiff's recordings before electrical recording equipment which transposes the performances onto defendants' tapes. Plaintiff alleges that this conduct by defendants amounts to unfair competition and asks that defendants be temporarily and permanently restrained from these practices.

The record does not reflect any answer filed by defendants. However, in various affidavits and in briefs filed in Superior

Court and here, defendants admit the conduct alleged in the complaint, but they deny that it constitutes a basis for injunctive relief.

Plaintiff's motion for a temporary restraining order was granted by Judge Snepp in an order dated 6 January 1971. Defendants appealed.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and Harold N. Bynum for plaintiff appellee.

Richards & Shefte by Francis M. Pinckney and Levine, Goodman & Murchison by Alton G. Murchison III and Sol Levine for defendant appellants.

GRAHAM, Judge.

[1] Plaintiff claims no statutory or common law copyrights in its recordings. Consequently, the principal question presented is whether the defendants' conduct in appropriating the performances recorded by plaintiff and selling them in competition with plaintiff amounts to unfair competition which may be enjoined. We answer in the affirmative.

In *Steak House v. Staley,* 263 N.C. 199, 203, 139 S.E. 2d 185, 189, Justice Sharp quoted from the opinion by Denny, Justice (later Chief Justice), in *Extract Co. v. Ray,* 221 N.C. 269, 273, 20 S.E. 2d 59, 61, as follows: " 'The test (of unlawful competition) is simple and lies in the answer to the question: Has plaintiff's legitimate business been damaged through acts of the defendant's which a court of equity would consider unfair?' "

The damage occurring to plaintiff's business from the conduct of defendants is easily apparent. Plaintiff expends substantial sums of money in obtaining the services of popular artists and in recording their performances. As found by the trial court, "[i]n order to sell the recordings embodying performances to which plaintiff possesses exclusive rights, and to build good will, such performances, the names of the artists, and the recordings produced by plaintiff are advertised and promoted at great expense to plaintiff." In appropriating the fruits of plaintiff's initiative, skill, effort and expense to their own use, defendants obviously circumvent a great portion of the cost of engaging in the recording business. They thereby gain

substantial competitive advantage over plaintiff. This conduct, it seems to us, amounts to unfair competition and is subject to restraint.

We find the decision in *Internat'l News Serv. v. Asso. Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L. Ed. 211 (1918), particularly applicable to the instant case. There, the International News Service (I.N.S.) was enjoined by a U. S. District Court from copying from bulletin boards and early editions, news gathered by the Associated Press, and then selling the news in competition with Associated Press editions. In affirming the order granting the injunction, the United States Supreme Court stated:

> "The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant,—which is what defendant has done and seeks to justify, — is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money and which is salable by complainant for money, and that defendant, in appropriating it and selling it as its own, is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not, with special advantage to defendants in the competition because of the fact that it is not burdened with any part of the expense of gathering the news."

Defendants contend that during the more than fifty years since the *I.N.S.* decision, the case has lost its significance. They cite many cases supporting the proposition that the *I.N.S.* case must be limited to its own particular set of facts. If this be

conceded, it nevertheless appears that the conduct of defendants here is so remarkably similar to the conduct condemned in the *I.N.S.* case as to bring it within even a limited application of the principles of that case.

The recent companion cases of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784, 11 L. Ed. 2d 661 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779, 11 L. Ed. 2d 669 (1964), are cited by defendants as conclusively establishing the present ineffectiveness of the *I.N.S.* decision. Defendants also urge that these cases permit the type of record piracy in which they admittedly engage. In the *Sears* case, Sears manufactured, and sold at a lower price, lamps similar to those manufactured and sold by Stiffel. In *Compco,* Compco manufactured and sold fluorescent lighting fixtures similar to those manufactured and sold by Day-Brite. Neither product was patented. It was admitted that defendants had copied plaintiffs' designs. The United States Supreme Court held that the copying of unpatented products is permissible despite any state laws to the contrary, saying in effect, that to permit a state to prevent the copying of an article which could not be patented would be to allow the state to keep from the public something which federal law has said belongs to the public.

No case from any jurisdiction has been brought to our attention which holds the *Sears* and *Compco* decisions applicable to a factual situation similar to the one we are now considering. There is an abundance of authority to the contrary.

In *Capitol Records, Inc. v. Spies,* ____ Ill. App. 2d ____, 264 N.E. 2d 874, the Illinois Appellate Court considered an attempt by a record producer to enjoin a defendant from the identical practices engaged in by defendants in the instant case. In ordering an injunction that Court stated:

> "We believe that the facts of the instant case are clearly distinguishable from the *Sears* and *Compco* decisions, and we find that the trial court erred in denying Capitol's motion for a temporary injunction. Whereas in those cases the court was concerned with the copying of products which were not patented, in the instant case Spies was actually appropriating another's property. Rather than the *Sears*

and *Compco* decisions, we find that the case of *International News Service v. Associated Press* . . . is controlling."

In *Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc. 2d 878, 252 N.Y.S. 2d 553, a New York trial court enjoined defendants from making records from plaintiff's record albums. There, as here, defendants' opposition was based upon the *Sears* and *Compco* decisions. The court stated: "Such reliance is ill-placed, as these cases are not applicable to the subject matter and devious conduct of defendants which this court is presently called upon to deal with." After noting that *Sears* dealt with the sale of a substantially identical lamp and *Compco* dealt with the sale of an imitation of a lighting fixture, the court said: "Neither of those learned decisions stands for the proposition that this plaintiff is not entitled to protection against the unauthorized appropriation, reproduction or duplication of the actual performances contained in its records."

Other cases, decided subsequent to *Sears* and *Compco* and enjoining activities of the type here involved, include: *Flexitized, Inc. v. National Flexitized Corp.*, 335 F. 2d 774 (2d Cir. 1964), *cert. denied*, 380 U.S. 913 (1965); *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F. Supp. 603 (C.D. Cal. 1967); *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*, 247 F. Supp. 578 (E.D. Pa. 1965); *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798; *Columbia Broadcast. Sys., Inc. v. Documentaries Unlim., Inc.*, 42 Misc. 2d 723, 248 N.Y.S. 2d 809.

We find the numerous decisions distinguishing the *Sears* and *Compco* cases from cases similar to the one at hand to be sound. Defendants here are not copying a design or concept. They have not obtained the same artist to record the same song in an identical manner. This type of "copying" would presumably be protected by the decisions of *Sears* and *Compco*. Conduct of that sort, however, is a far cry from appropriating, for use in competition with plaintiff, the very product which plaintiff produced with its own resources.

We find no North Carolina cases dealing with the question presented on this appeal. However, in other states where the question has arisen, courts have, without exception, condemned record piracy as unfair competition. *Tape Industries Association of America v. Younger*, 316 F. Supp. 340 (C.D. Cal. 1970); *Capitol*

Records, Inc. v. Spies, supra; Capitol Records, Inc. v. Erickson, supra; Capitol Records, Inc. v. Greatest Records, Inc., supra; Gieseking v. Urania Records, Inc., 17 Misc. 2d 1034, 155 N.Y.S. 2d 171; *cf. Columbia Broadcast. Sys., Inc. v. Documentaries Unlim., Inc., supra; Metropolitan Opera Ass'n. v. Wagner-Nichols R. Co.*, 199 Misc. 786, 101 N.Y.S. 2d 483.

[2] Defendants argue that the provisions of G.S. 66-28 preclude us from following the unanimous authority of other jurisdictions which have passed upon the precise issue which is now before us. The provisions of G.S. 66-28 are as follows:

> *"Prohibition of rights to further restrict or to collect royalties on commercial use.*—When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.
>
> Nothing in this section shall be deemed to deny the rights granted any person by the United States Copyright Laws. The sole intendment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof."

The above statute was enacted in 1939. Apparently record piracy did not become a problem until sometime later. In an article on the subject published in the Stanford Law Review in 1953 it is stated: " 'Pirating,' in this instance, describes the practice of re-recording a phonograph record manufactured by another company and then selling the duplicates. Record piracy mushroomed in the last five years from relative obscurity to a

point where two dozen labels were being sold in various parts of the country. A few 'pirates' circulated catalogs of their booty. Some labels received a national distribution and were handled in the most legitimate stores. Occasionally, 'dubs' were even used in local juke boxes." 5 Stan. L. Rev. 433. It is unlikely that in 1939 the legislature had heard of this type of conduct, and we cannot conceive that one of its purposes in enacting G.S. 66-28 was to make legitimate such unfair competitive practice.

G.S. 66-28 was enacted shortly after the Federal District Court for the Eastern District of North Carolina held that Fred Waring had a common law property right in his orchestra's recordings and could prevent defendant from playing the recordings over a radio station without his permission. *Waring v. Dunlea,* 26 F. Supp. 338 (E.D. N.C. 1939). The effect of G.S. 66-28 was to overrule the *Waring* decision by eliminating any common law right to restrict the use of a recording sold for use in this State. However, we interpret "use," as employed in the statute, to mean the use for which a recording is intended; *i.e.,* the playing of the recording. Thus, under the statute, any record sold in commerce for use in this State may be played privately, publicly, and commercially without restriction. It does not follow, however, that the performance contained on the record can be re-recorded onto another record and the re-recording sold in competition with the original producer. To so hold would, in our opinion, give a construction to the statute that was never intended.

[1] Defendants assign as error the court's findings that if they were not temporarily enjoined, plaintiff would suffer irreparable damage. In our opinion there was plenary evidence to support that finding and this assignment of error is overruled.

Affirmed.

Judges CAMPBELL and BRITT concur.

RUTH MOORE LEE v. BILL T. ROWLAND, D/B/A ROWLAND TRUCKING AND GRADING COMPANY, AND EUGENE WILLIAM ADAMS

No. 7110SC69

(Filed 28 April 1971)

1. **Appeal and Error § 39— failure to docket record in apt time**

Appeal is subject to dismissal for failure to docket the record on appeal within the time required by Court of Appeals Rule 5 where the record on appeal was docketed more than 90 days after the date of the judgment appealed from and no order extending the time for docketing appears of record.

2. **Rules of Civil Procedure § 50— motion for directed verdict — failure to state rule number**

Defendants' motions for a directed verdict failed to comply with Rule 6 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure where the motions failed to state the rule number under which they were made.

3. **Sales § 22— negligence in modification of truck — liability of seller**

One who sells a truck which he has modified by welding to the body of the truck a steel brace of his own design is liable to those he should expect to be in the vicinity of the truck for injuries caused by defects in the design and weld of the steel brace when the truck is being used in the manner for which it was intended.

4. **Automobiles § 68; Sales § 22— defective addition to truck — negligence of former owner — failure of present owner to inspect**

In an action for injuries allegedly sustained by plaintiff when a steel brace which had been welded to a dump truck by its former owner fell from the truck and was propelled through the windshield of plaintiff's car, plaintiff's evidence was sufficient to require submission to the jury of issues (1) as to the negligence of the former owner in the design and installation of the steel brace, and (2) as to the negligence of the present owner in failing properly to inspect the altered truck and to discover and remedy the defective condition of the brace.

APPEAL by plaintiff from *Cowper, Superior Court Judge,* August 1970 Regular Civil Session of Superior Court held in WAKE County.

In the complaint plaintiff alleges that she was injured and damaged by the actionable negligence of both Bill T. Rowland (Rowland) and Eugene William Adams (Adams). She alleges that Adams was negligent, among other things, in designing and welding braces to the top of the dump body of the 1966 model truck owned by him and subsequently bought and used

by Rowland; that Rowland was negligent, among other things, in failing to inspect the truck and in failing to discover and remedy the defective condition of the welded braces; and that as a result of the negligence of Adams and Rowland, a brace fell off the truck while it was being operated on a public street by Rowland's agent and struck the wheels of the truck, which propelled the brace through the windshield of plaintiff's oncoming vehicle, striking her on the head.

At the close of plaintiff's evidence, both defendants moved for a directed verdict "on the grounds of no negligence." From the entry of the judgment allowing the motions of the defendants, the plaintiff appealed, assigning error.

Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., and John N. Fountain for plaintiff appellant.

Smith, Anderson, Dorsett, Blount & Ragsdale by C. K. Brown, Jr., for defendant appellee Rowland.

G. Earl Weaver for defendant appellee Adams.

MALLARD, Chief Judge.

[1, 2] The judgment in this case is dated 4 August 1970. The record on appeal was docketed in the Court of Appeals on 13 November 1970, which was more than 90 days after the date of the judgment. No order extending the time for docketing appears of record. The appeal is subject to dismissal for failure to docket within the time required by Rule 5 of the Rules of Practice in the Court of Appeals. The motions of the defendants for a directed verdict were insufficient. By failing to state the rule number under which the parties were making their motions, they did not comply with Rule 6 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure adopted by the Supreme Court of North Carolina pursuant to G.S. 7A-34. However, none of the parties have raised either of these questions, and we treat the appeal as a petition for a writ of *certiorari,* allow it, and consider the case on its merits.

Briefly stated, the evidence, admission, and stipulations tended to show: On 29 May 1969 at about noon, Ruth Moore Lee was operating her automobile southwardly on Peartree Road, a public street in the City of Raleigh. Peartree Road had

a posted speed limit in that area of 35 miles per hour and, although paved, was "a rough road." A 1966 model truck with a dump body (used for hauling asphalt, owned by defendant Rowland, and being operated northwardly by his agent at a speed of about 25 or 30 miles per hour) was meeting plaintiff's vehicle. Adams, former owner of the truck, had altered it by welding two steel braces along the top outside edge of the metal dump body to hold boards in place on top of the body which thus increased the load capacity of the truck. (The evidence does not reveal the date this was done or when Adams owned or sold the truck.) At the time of the occurrence complained of, Rowland's truck was empty and was "bouncing" along the road. Plaintiff's Exhibit 1, which was a flat piece of metal, fell off the dump truck, struck one of the truck wheels, was propelled through the windshield of plaintiff's oncoming automobile, and struck plaintiff in the head, causing injuries. (Although the record does not so indicate, when weighed, this piece of metal weighs slightly over one and one-quarter pounds, is roughly one-half inch thick, and measures about three inches across.) Plaintiff's expert witness in the field of welding referred to this metal brace as a "pad" and testified:

> "What happens to the metals when you make the weld with similar metals is through the application of intense heat and through a filler metal, electrode, you melt the two pieces of metal to be joined and apply filler metal to bridge the opening and build up the weld, so to speak, to maximum size. As to whether there is an actual flowing of the metal, the metal at the point of application of heat, it is made into a liquid moulten state in which you cause the two pieces of metal to be joined, plus the filler metal to flow as one. The weld that has been applied is commonly known as a welding bead.
>
> Looking at Plaintiff's Exhibit No. 1, I have seen it before. * * * There is a bead on there. It is located in this particular area here (indicating). It is at one end of the piece of metal. The bead that is there is a little erratic in size and shape and not very consistent as to penetration. When I say not consistent as to penetration, I mean it is not uniform in thickness and width and depth. Non-consistency means that when you go down into a thin area, you leave a weak spot along the length of the bead.
>
> * * *

* * * This is a weld from an overhead position. The fact that a weld is in an overhead position doesn't make any difference in the weld when it is properly applied. The uniformity of the weld and the penetration of the weld would make a difference in the overhead weld. As to whether it would affect it more in an overhead weld than it would a weld below, an irregular weld makes a contribution to weakness in any position.

As to whether the joint weld design that I have testified to and diagramed on the board is adequate, in my opinion, due to the amount of stress and strain that is placed against the pad and inasmuch as the pad is placed in a root bend position and the weakest fatigue factor, it was inadequate to withstand the load for which it was designed."

Plaintiff contends that the trial court committed error in allowing the motion of Adams for a directed verdict. She also contends that the act of Adams in designing and attaching the brace in the manner as shown by the evidence, admission in the pleadings, and stipulations constituted negligence.

In 6 Strong, N. C. Index 2d, Sales, § 22, it is said:

"The liability of a seller or manufacturer for resulting injuries when he knows that the article is to be used for a specific purpose, when by reason of defective construction injury may be reasonably apprehended from such use, rests upon general principles of negligence and does not arise out of the contract. * * *

* * *

A manufacturer is not an insurer of the safety of chattels designed and manufactured by him, but is under obligation to those who use his product to exercise that degree of care in its design and manufacture which a reasonably prudent man would use in similar circumstances. Thus, the manufacturer is liable to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for injuries caused by defects in the chattel in its use in the manner for which it was supplied, when such injury could have been reasonably anticipated."

The question of a manufacturer or seller's liability for injury to third persons has been recently determined in *Dupree*

v. Batts, 276 N.C. 68, 170 S.E. 2d 918 (1969). There it was alleged that The Chrysler Corporation, one of three defendants, was negligent in manufacturing and placing on the market a defective automobile which broke down under road use. At the conclusion of plaintiff's evidence, the trial court entered judgment dismissing the action as to all defendants. Plaintiff's evidence tended to show that one of the other defendants placed an oversized, unbalanced tire on the right rear wheel of the vehicle sold by Chrysler which would cause the vehicle to shimmy and vibrate during road use. This wheel broke down on a curve, and the driver admitted he was driving at a speed of 60 miles per hour in a 55 miles per hour zone. The evidence tended to show that this wheel broke loose when the five lug nuts pulled through and ruptured the metal hub which attached the rim to the axle, that the type of metal used in the structure of the damaged wheel was of the softest and weakest commercially available grade of steel, and that it contained non-metallic impurities and slag inclusions which made the wheel less resistant to deformation. The impurities could have been discovered by an inspection at the time of manufacture. In holding that the evidence was sufficient to go to the jury, the Court said:

> " * * * The use of a stronger steel, free of impurities, or the use of a greater thickness of the type used would have increased the load-carrying capacity of the wheel and could or might have prevented the loss of the wheel.
>
> A manufacturer's negligence may be found over an area quite as broad as his whole activity in preparing and selling the product or in designing the article—*Corprew v. Chemical Corp.,* 271 N.C. 485, 157 S.E. 2d 98; Negligence may arise by selecting materials for use in the manufacturing process—*Wilson v. Hardware Co.,* 259 N.C. 660, 131 S.E. 2d 501; . . . (I)n failing to make reasonable inspection for hidden defects—*Gwyn v. Motors, Inc.,* 252 N.C. 123, 113 S.E. 2d 302."

The case of *Kalinowski v. Truck Equipment Co.,* 237 App. Div. 472, 261 N.Y.S. 657 (1933), approaches the circumstances of the case before us. There the defendant Truck Equipment Company rebuilt a truck belonging to another defendant. Subsequently, the rear axle broke as the truck was being driven down a street, and a wheel came off, injuring the infant plaintiff who was walking down a sidewalk. The question decided was

whether the repairing company should have anticipated that a broken axle, resulting from failure to use proper material or do proper work, was reasonably likely to cause injury to lawful users of the streets. The court, in holding that it was a question for the jury, said:

> "The situations of this plaintiff and the truck were neither strange nor remote from reasonable expectation—the girl walking along a public sidewalk, the truck being driven along a public street. Negligence (under the pleading) caused the truck to break down. The sequel was something unusual, but was of a type which might be expected. And that is the test."

In 2 Restatement of Torts 2d, § 404, the rule is stated:

> "One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels."

[3] In this case Adams, the seller and the one who modified the truck body by designing and welding the steel brace in question to the body of the truck, is in a position analogous to a repairman and a manufacturer and is liable to those whom he should expect to be in the vicinity of the truck for injuries caused by defects in the design and weld of the steel brace when the truck was being used in the manner for which it was intended, if such injury could have been reasonably foreseen.

[4] We are of the opinion and so hold that the evidence was sufficient to require submission of an issue to the jury as to the negligence of Adams in designing and installing an inadequate brace on the truck. Whether Adams used that degree of care in designing and installing the brace which a reasonably prudent person would use in similar circumstances, whether the inadequate installation and design of the brace was a proximate cause of plaintiff's injuries, and whether it was foreseeable that this brace, if improperly designed and welded to the body of the truck, might fall off and be propelled through the windshield of plaintiff's automobile, injuring her, are questions for the jury.

Plaintiff contends that the trial court committed error in allowing Rowland's motion for a directed verdict. She asserts

that Rowland was negligent in failing to properly inspect the altered truck and in operating it over a rough road equipped with a defectively designed and installed brace.

In 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 699, p. 249, it is said:

> "The owner or operator of a motor vehicle is not liable for injuries resulting from the defective condition of such vehicle in the absence of negligence on his part, unless a statute so imposes liability. But although, in the absence of such a statute, he has no absolute duty to other users of the highway to see that the vehicle is in a safe and proper condition, he is required to exercise reasonable care to see that the vehicle is in such condition, and is generally held liable for injuries which are shown to have resulted from the operation of the vehicle which he knew, or in the exercise of reasonable care ought to have known, was in such an unsafe condition as to endanger others. The owner or operator of a motor vehicle must exercise reasonable care in the inspection of the vehicle to discover any defects that may prevent its proper operation, and is chargeable with knowledge of any defects which such inspection would disclose."

In 2 Blashfield Auto Law 3rd Ed., § 107.3, p. 459, the rule with respect to the duty to inspect a motor vehicle is stated in the following language:

> "The owner or driver of a motor vehicle owes to himself and to others a duty of inspection. He must exercise reasonable care in this inspection to discover any defects which may prevent the proper operation of the vehicle, and is chargeable with knowledge of any defects which such inspection would disclose."

[4] The evidence in this case tended to show that the truck was empty and that no pressure was being exerted against the brace by virtue of a load on the truck. The truck was traveling at a speed of about 25 or 30 miles per hour over a rough asphalt road when the brace apparently fell off. From these and the other circumstances the jury could have reasonably inferred that the brace had gradually become loose because of the inadequacy of its design and installation, that the defendant Rowland had failed to exercise reasonable care in the inspection of

the vehicle and failed to discover and remedy the defective condition of the brace. Absent negligence in inspection, operation, or maintenance, a large piece of metal such as struck the plaintiff in this case does not ordinarily fall off an empty truck being operated over a rough asphalt road. The circumstantial evidence is sufficient to require submission to the jury of an issue as to Rowland's negligence on the questions of whether he failed to exercise reasonable care in the inspection of the vehicle and whether he failed to discover and remedy the defective condition of the brace.

Plaintiff has other assignments of error, some of which may have merit; but in view of our disposition of the case, we do not consider them.

We hold that the case should have been submitted to the jury and that the court committed error in allowing the motions of the defendants for a directed verdict.

Reversed.

Judges PARKER and GRAHAM concur.

LEO BEASLEY v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 7114DC62

(Filed 28 April 1971)

Insurance §§ 84, 103— assigned risk insurance — coverage on replacement vehicle — forwarding of summons and suit papers to insurer

A car owner who did not apply for assigned risk insurance was not an assigned risk insured with respect to a policy voluntarily issued by the insurer to afford coverage to the owner's car, a replacement vehicle; consequently, the plaintiff in an accident case involving the owner's car was not required to forward a copy of the summons and complaint to the insurer. G.S. 20-279.21(f)(1); G.S. 20-279.34.

APPEAL by plaintiff from *Lee, District Court Judge,* 26 August 1970 Session of District Court, DURHAM County.

At trial the parties stipulated that this action presented questions of law only and that the facts essential to decision were not

in dispute. Both parties had moved for summary judgment under Rule 56, Rules of Civil Procedure, and it was stipulated, in writing, that the court might render judgment based on agreed facts, essentially as follows:

Carolyn Rogers Brunson and Thomas Brunson, Jr., were married on 20 November 1965, and at that time Carolyn Brunson owned a 1964 Ford automobile. On 8 August 1966, she filed application for liability insurance under the North Carolina Assigned Risk Plan to provide coverage for the 1964 Ford and her risk was assigned to the Hartford Accident and Indemnity Company, hereafter referred to as Hartford, and an assigned risk number was given to her. At that time she and her husband were separated. Hartford issued its policy naming Carolyn Rogers Brunson as the insured and describing the 1964 Ford as the automobile covered by the policy. All policies written by Hartford under the North Carolina Assigned Risk Plan contain the letters "AZ" in the number of the policy. The policy issued by Hartford was numbered 22AZ116084. At the end of the first year, the policy was renewed by Hartford and the renewal policy was numbered 22AZ132986 covering the period from 2 September 1967 until 2 September 1968. On 5 February 1968, Hartford was advised by the Protective Agency, Inc., that it had purchased the business of the producer of record for both policies and in the future would be producer of record with respect to policy No. 22AZ132986. Prior to 31 May 1968, the Brunsons were reunited as husband and wife and became members of the same household. Also prior to that date the Ford automobile was sold and a 1964 Pontiac was bought and registered with the North Carolina Department of Motor Vehicles in the name of Thomas Brunson, Jr. The Brunsons notified Protective Agency, Inc., that the Ford had been sold and the Pontiac registered in the name of Thomas Brunson, Jr., had been acquired. Protective Agency, Inc., producer of record, notified Hartford to make certain changes in Policy No. 22AZ132986, to wit: delete the 1964 Ford as the described vehicle and substitute the 1964 Pontiac and add Thomas Brunson, Jr.'s, name as a named insured as he would drive the automobile about 50% of the time. At the end of the first renewal period, the policy as changed, was renewed to run from 2 September 1968 until 2 September 1969, and was numbered 22AZ153249.

On 20 April 1969, Thomas Brunson, Jr., while driving the 1964 Pontiac had an accident in which plaintiff Leo Beasley was allegedly injured. Prior to the date of the accident Thomas Brunson, Jr., had not applied to the North Carolina Assigned Risk Plan to have his risk assigned.

On 20 November 1969, Leo Beasley instituted a civil action against Thomas Brunson, Jr., alleging negligent operation of the Pontiac by Brunson and seeking recovery for injuries sustained. Summons and complaint were duly served on Brunson, but plaintiff's counsel did not forward to Hartford, or one of its agents, by registered mail, return receipt requested, a copy of summons and complaint in the action. Beasley obtained judgment by default and inquiry against Brunson and subsequently, after inquiry by the jury, a judgment was entered awarding plaintiff the sum of $1500 plus costs of court. The judgment has not been paid. In reply to an inquiry to the Commissioner of Motor Vehicles made by plaintiff's counsel on 30 April 1970, the Supervisor of the Safety Responsibility Division advised by letter dated 6 May 1970 that the records of his Department did not show whether Thomas Brunson, Jr., secured his liability insurance through the North Carolina Assigned Risk Plan. In response to an inquiry to the North Carolina Assigned Risk Plan by plaintiff's counsel on 25 May 1970, the Manager thereof notified plaintiff's counsel by letter dated 1 June 1970 that the North Carolina Assigned Risk Plan had no record of having assigned to Hartford an application for insurance submitted in the name of Thomas Brunson, Jr. The policy issued by Hartford naming Carolyn Rogers Brunson and Thomas Brunson, Jr., as insureds contain the standard provisions required by the State of North Carolina.

On these facts the court concluded that the policy issued by Hartford was written under the North Carolina Assigned Risk Plan and was an assigned risk policy within the meaning of G.S. 20-279.21(f) (1) and G.S. 20-279.34, was in force on 20 April 1969, and that Thomas Brunson, Jr., was an assigned risk insured under the policy issued by Hartford (No. 22AZ153249). The court denied plaintiff's motion for summary judgment and allowed defendant's motion for summary judgment.

C. Horton Poe, Jr., for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick and Murray, by E. C. Bryson, Jr., for defendant appellee.

MORRIS, Judge.

This case presents a novel question in this State, nor do we find that any other State having the assigned risk plan has had the question presented.

G.S. 20-279.34 provides that:

"Every person required to file proof of financial responsibility under the provisions of this article who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods shall have the right to apply to the Commissioner of Insurance to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this State, and the insurance carrier shall issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article."

The statute further requires the insurance carriers, as a prerequisite to the further engaging in selling motor vehicle liability insurance in this State, when the risk has been assigned to it, "to issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article." The statutory requirement of issuing assigned risk motor vehicle liability policies as a condition of continuing to transact liability insurance business in North Carolina has been held not to constitute a denial of due process in violation of State and Federal constitutional provisions. *Jones v. Insurance Co.*, 270 N.C. 454, 155 S.E. 2d 118 (1967).

Pertinent provisions of G.S. 20-279.21 defining "Motor vehicle liability policy" are as follows:

"(a) A 'motor vehicle liability policy' as said term is used in this article shall mean an owner's or an operator's policy of liability insurance, certified as provided in § 20-279.19 or § 20-279.20 as proof of financial responsibility, and issued, except as otherwise provided in § 20-279.20, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to such motor vehicle, as follows: Ten thousand dollars ($10,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, twenty thousand dollars ($20,000.00) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars ($5,000.00) because of injury to or destruction of property of others in any one accident; . . .

. . .

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) Except as hereinafter provided, and with respect to policies of motor vehicle liability insurance written under the North Carolina assigned risk plan, the liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. As to policies issued to insureds in this State under the assigned risk plan, a default judgment taken against an assigned risk insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its

agents, by registered mail with return receipt requested, a copy of summons, complaint, or other pleading, filed in the action. The return receipt shall, upon its return to plaintiff's counsel, be filed with the clerk of court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with the knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word 'agent' as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer in the State as insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position, or the North Carolina Commissioner of Insurance; provided, where the return receipt is signed by an employee of the insurer or an employee of an agent for the insurer, shall be deemed for the purposes of this subsection to have been received. The term 'agent' as used in this subsection shall not include a producer of record or broker, who forwards an application for insurance to the assigned risk bureau. The Commissioner of Motor Vehicles and the North Carolina assigned risk bureau, shall, upon request made, furnish to the plaintiff or his counsel the identity and address of the insurance carrier as shown upon the records of the Department or the bureau, and whether the policy is an assigned risk policy. Neither the Department of Motor Vehicles nor the assigned risk bureau shall be subject to suit by reason of a mistake made as to the identity of the carrier and its address in response to a request made for such information."

Plaintiff admits that he did not forward to Hartford, or one of its agents, by return receipt requested, a copy of summons, complaint, or other pleadings, filed in the action. It is

clear from the record that plaintiff did not, prior to obtaining judgment, inquire of the Commissioner of Motor Vehicles and the North Carolina Assigned Risk Bureau whether Thomas Brunson, Jr., was an assigned risk. It is also clear from the record that had plaintiff done so, he would have been advised that neither agency had any record indicating that Thomas Brunson, Jr., owner of the vehicle, was an assigned risk. Under the facts in this case, if Thomas Brunson, Jr., was in fact an assigned risk, that information could have been obtained only from Hartford. Thomas Brunson, Jr., had never applied to have his risk assigned.

The policy issued by Hartford to Carolyn Rogers Brunson and Thomas Brunson, Jr., as insureds contained the provisions required by the statute but also contained the following provisions which were not required by statute:

"III. DEFINITION OF INSURED: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, . . .

. . .

IV. AUTOMOBILE DEFINED, TRAILERS, PRIVATE PASSENGER AUTOMOBILE, TWO OR MORE AUTOMOBILES:

(a) AUTOMOBILES. Except with respect to division 2 of coverage B and except where stated to the contrary, the word 'automobile' means:

(1) DESCRIBED AUTOMOBILE—the motor vehicle or trailer described in this policy;

. . .

(4) NEWLY ACQUIRED AUTOMOBILE—an automobile, ownership of which is acquired by the named insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned by either and covered by this policy, or the company insures all automobiles owned by the named insured and such spouse on the date of its delivery, and (ii) the named insured or such spouse notifies the company within thirty days following such delivery date; but such notice is not required if the newly acquired automobile replaces an owned automobile covered by this policy. The in-

surance with respect to the newly acquired automobile does not apply to any loss against which the named insured or such spouse has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

Defendant argues that this standard form policy issued by Hartford to Mrs. Brunson and renewed every year provides coverage not only for the named insured in the policy but the spouse of the named insured if the spouse is a resident of the same household. This, of course, is true. Had plaintiff been injured by the alleged negligence of Thomas Brunson, Jr., while he was driving the automobile owned by Carolyn Brunson and insured under the policy, plaintiff would most certainly have been able to determine by statutory procedures that this was an assigned risk and would have been put on notice that it would be advisable to follow the statutory requirement of notice to the carrier. The statute requires the carrier to which the risk is assigned to insure "the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured . . . "

Defendant calls attention to certain sections of the North Carolina Automobile Assigned Risk Plan as follows: Section 9, *Eligibility,* providing that a risk not be entitled to insurance if applicant *or anyone who usually drives the automobile* becomes involved in carrying on an illegal enterprise, is convicted of a felony, etc.; Section 16, *Rates,* providing that an applicant *or anyone who usually drives the motor vehicle* must pay an additional charge under certain circumstances; Section 22, *Recertification of Operator's License of Applicant or Principal of the Motor Vehicle,* providing that the designated company, after investigation of the risk applying for coverage, believes that there is reasonable doubt as to whether the applicant or *principal operator of the vehicle* could continue to operate a motor vehicle in this State, the company can request the Motor Vehicle Commission to recertify the ability of such applicant to continue to hold a license. Defendant urges that these sections and the insurance agreements which are standard in form imply that persons other than the applicant are to be classified as "assigned risk insureds" under the statute. We do not agree. The

sections cited certainly indicate that coverage will extend to a driver or drivers other than the applicant. This is indicated by G.S. 20-279.21 defining "Motor vehicle liability policy" quoted herein. However, we find nothing in the statute requiring any carrier to extend the coverage of an assigned risk policy to a replacement vehicle owned by and registered to a person other than the original named insured owner of the vehicle originally described and insured. Conceding the policy issued may be a standard form policy, it goes far beyond the statutory requirements. Conceding that under the insurance agreement between Hartford and Carolyn Brunson, Hartford was obligated to insure Thomas Brunson, Jr., as owner and insured of the Pontiac registered to him replacing the Ford automobile owned by and registered to Carolyn Brunson and described as the insured vehicle; nevertheless, this provision of the policy is not required by the State of North Carolina and it was made a part of the contract voluntarily by Hartford. In other words, Hartford, in order to be allowed to continue writing automobile liability insurance in North Carolina, was required to insure Carolyn Brunson and the Ford automobile owned by her. It was not required to insure Thomas Brunson, Jr., and the Pontiac automobile owned by him unless and until his risk was assigned to it. There is nothing in the record indicating that Thomas Brunson, Jr., was unable to obtain insurance coverage by contract.

We are of the opinion, and so hold, that plaintiff was not required to give Hartford the registered notice required by G.S. 20-279.21(f)(1) because Thomas Brunson, Jr., was not an "assigned risk insured" under that statute. To hold otherwise would require every plaintiff to send copy of summons and complaint by registered mail to the carrier of the liability insurance of the owner of the vehicle involved in every accident resulting in litigation to avoid the pitfall of the possibility of the vehicle involved being a replacement vehicle registered in a different name than the applicant for assignment of risk. This was obviously not intended by the General Assembly. Under the provisions of G.S. 20-279.21, section (f) provides that except with respect to liability insurance written under the assigned risk plan, the liability of the insurance carrier shall to the extent of coverage required by the Act become absolute when the injury or damage covered by motor vehicle liability occurs, and no violation of said policy shall defeat or void said policy. *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482 (1960).

It follows, therefore, that the court erred in denying plaintiff's motion for summary judgment and allowing defendant's motion for summary judgment.

Reversed.

Judges BROCK and VAUGHN concur.

MYRTIE KELLER, LUCRETIA K. WELCH, DAISY K. BATEMAN, MYRLE C. KELLER (WIDOW), AND CHARLES H. KELLER v. W. C. HENNESSEE AND WIFE, STELLA B. HENNESSEE AND J. M. CLODFELTER (SINGLE) AND ROSE A. CLODFELTER (SINGLE)

No. 7130SC23

(Filed 28 April 1971)

1. **Trespass to Try Title § 2— burden of proof**

In an action in trespass to try title, defendant's denial of plaintiff's allegations of title and trespass places the burden on plaintiff to establish each of these allegations.

2. **Trespass to Try Title § 2— burden of proof**

Plaintiff must rely on the strength of his own title, which he must prove by some method recognized by law.

3. **Trespass to Try Title § 1— cross-action of trespass — burden of proof on defendant**

Where, in an action in trespass to recover for the cutting of trees, defendant denies plaintiff's title and alleges title in himself and prays that he be adjudged the owner of the disputed land, the answer amounts to a cross-action in trespass to try title and defendant has the burden of proving title in himself.

4. **Appeal and Error § 57; Reference § 10— referee's findings approved by trial judge — appellate review**

Findings of fact by the referee which are approved by the trial judge are conclusive on appeal when supported by any competent evidence.

5. **Reference § 8— hearing upon exceptions to referee's report — authority of trial court — appellate review**

Upon the hearing of exceptions to the referee's report, the trial court may affirm, overrule, modify or make additional findings of fact, and such action by the court affords no ground for exception on appeal unless there is error in receiving or rejecting evidence or the findings of the court are not supported by the evidence.

6. **Adverse Possession § 25; Trespass to Try Title § 4— insufficiency of evidence of adverse possession**

In this action in trespass in which both parties claimed title to the disputed land, the trial court's findings and conclusions that neither party could prevail under any theory of adverse possession are supported by competent evidence.

7. **Trespass to Try Title § 4— connected chain of title from State — failure of proof**

Plaintiffs failed to show a connected chain of title from the State where they introduced an 1896 deed conveying the property to their immediate predecessors in title but offered no evidence of ownership of the disputed property by the grantors in the 1896 deed.

8. **Trespass to Try Title § 4— commissioner's deed — failure to introduce judgment roll**

There was a break in defendants' chain of title where defendants introduced a commissioner's deed conveying the property to their predecessors in title but failed to offer the *judgment roll* in the action appointing the commissioner to establish the commissioner's judicial authority to convey, the judgment appointing the commissioner being insufficient by itself to establish such authority. G.S. 1-232.

9. **Trespass to Try Title § 4— failure to introduce deed from trustee in bankruptcy**

Where a judgment introduced by defendants determined that a conveyance from a bankrupt to his minor son was void and that the property was owned by the trustee in bankruptcy, and the judgment also appointed a commissioner to convey whatever interest the minor son may have had in the property, there was a break in defendants' chain of title where they introduced the commissioner's deed conveying the property to their predecessors in title but failed to introduce any deed from the trustee in bankruptcy to their predecessors in title.

10. **Ejectment § 7; Trespass to Try Title § 2— fitting description to land claimed**

Where title to land is in dispute, claimant must show that the area claimed lies within the area described in each conveyance in his chain of title and must fit the description contained in his deed to the land claimed.

APPEAL by plaintiffs from *Froneberger, Superior Court Judge,* June 1970 Term, JACKSON Superior Court.

Plaintiffs filed a complaint on 2 October 1964 alleging that they are the owners in fee of a certain tract of land in Jackson County, and that the defendants claimed some interest in that tract of land. The complaint further alleged that the defendants Hennessee were in the process of cutting timber and constructing roads, and that the defendants Clodfelter were in

the process of constructing roads on the land. Plaintiffs also alleged that the defendants did not leave plaintiffs' property when they were asked to leave, and that if the defendants are permitted to cut timber and construct roads through plaintiffs' lands, plaintiffs will be irreparably injured. The plaintiffs prayed that they be declared owners of the tract and that defendants be enjoined from trespassing on it.

On 14 July 1966, defendants answered, denying that plaintiffs are the owners in fee of the land described in the complaint, denying that plaintiffs are entitled to be declared owners in fee, and expressly denying that plaintiffs are owners in fee of any part of the tract which laps upon or is embraced within the lands allegedly owned in fee by defendants. Defendants further denied that they claimed any interest in, or have removed any timber from, or have built any roads on property not owned by them in fee. Defendants admitted that plaintiffs notified them that they were trespassing on lands owned by plaintiffs. Defendants also denied doing irreparable injury or damage to lands owned by the plaintiffs.

The further answer and defense of the defendants Hennessee is stated separately from the further answer and defense of the defendants Clodfelter, but except for the names of the alleged owners and the description of the properties allegedly owned by each the further answer and defense of the defendants Hennessee is identical to that of the defendants Clodfelter. Each first describes the property they allege they own, and then alleges that they can trace their title to a grant from the State. Defendants allege that they and their predecessors in title have been in adverse possession of the property described therein for more than 80 years under known and visible boundaries, for more than 30 years under known and visible boundaries, for more than 21 years under color of title and under known and visible boundaries, and for more than 20 years under known and visible boundaries, and for more than 7 years under color of title and under known and visible boundaries. The defendants then prayed that they be declared owners in fee of the property described in their respective answers, free of the claims of the plaintiffs.

On 11 August 1966, Judge Farthing entered an order of reference which recited that a referee had already been appointed, but that the referee "is now ill and unable to perform

the duties required." The consent order released that referee and appointed another. The report of the latter referee, signed 26 February 1969, was filed 16 June 1969. The plaintiffs filed exceptions to rulings on objections and to the report of the referee 28 July 1969.

On 29 July 1970, Judge Froneberger filed a judgment in the cause which incorporated all of the referee's report, including his findings of fact and conclusions of law. The judgment declared that the defendants were the fee simple owners of that property described in their respective further answers. From that judgment, plaintiff appealed.

Stedman Hines for plaintiff appellants.

Monteith, Coward and Coward by Kent Coward for defendant appellees.

VAUGHN, Judge.

[1, 2] This is an action in trespass to try title; therefore, plaintiffs must allege and prove both title in themselves and trespass by defendants. 7 Strong, N. C. Index 2d, Trespass To Try Title, § 1, p. 249. "Defendants' denial of plaintiffs' allegations of title and trespass places the burden on plaintiffs to establish each of these allegations. *Day v. Godwin,* 258 N.C. 465, 128 S.E. 2d 814." *Pruden v. Keemer,* 1 N.C. App. 417, 161 S.E. 2d 783. Plaintiff must rely on the strength of his own title, and not on the weakness of defendant's title. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593. Plaintiff may meet his burden of proof by various methods which are set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142.

[3] The rules set forth above have been recited and applied in numerous cases. In most of the cases, the question was whether plaintiff's proof of title was sufficient to withstand defendant's motion for nonsuit. In the case at hand the defendants alleged and attempted to prove their own title. "Where, in an action in trespass to recover for the cutting of trees, defendant denies plaintiff's title and alleges title in himself and prays that he be adjudged the owner of the tract described in the answer, the answer amounts to a cross-action in trespass to try title, and the question of title is involved and the defendant has the right to have it adjudicated." 7 Strong, N. C. Index 2d, Trespass To Try Title, § 1, p. 250, citing *Andrews v. Bruton,* 242 N.C. 93,

86 S.E. 2d 786. "Where defendant sets up title to a part of the land, to entitle him to affirmative relief he must prove the facts constituting this title, and as to such facts the burden is on him . . . ." 87 C.J.S., Trespass To Try Title, § 51, p. 1160.

Our Supreme Court has very recently discussed the effect of the failure of a party to carry his burden of proof in an action in trespass to try title:

> "A failure of one of the parties to carry his burden of proof on the issue of title does not, *ipso facto,* entitle the adverse party to an adjudication that title to the disputed land is in him. He is not relieved of the burden of showing title in himself. *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627. 'The plaintiff must recover on the strength of his own title, and upon failure of proof by him the jury may well find that he is not the owner of the land, although satisfied that the defendant has no title.' *Wicker v. Jones,* 159 N.C. 103, 116, 74 S.E. 801, 806. This statement is, of course, equally applicable to a defendant who has set up a cross action in which he claims title to the land in dispute. . . . There are cases involving a disputed title to land in which neither party can carry the burden of proof." *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297.

To apply the foregoing principles to this case, we set out relevant findings of fact and conclusions of law from the judgment appealed from.

> 1. That the plaintiffs in this action are claiming under that deed, dated November 28th, 1896, recorded in Deed Book V-22, at Page 4, in the office of the Register of Deeds of Jackson County from John Joyce and wife, Polly Joyce, to William Keller and wife, R. M. Keller, both of the grantees being deceased, and the plaintiffs being their heirs at law.
>
> . . . .
>
> 3. That no chain of title was introduced by the plaintiffs other than the deed recorded in Deed Book V-22, Page 4.
>
> . . . .
>
> 6. That the Hennessee property title derives from State Grant No. 586, and the chain of title, as introduced by the defendant Hennessee, is continuous and unbroken

from State Grant No. 586, until title vested in the defendants in their deed from the Davey Tree Expert Co., Inc. . . .

7. That none of the plaintiffs and none of the defendants have shown any open, notorious or adverse possession under known metes and bounds, and that no party to this action may prevail under any theory of adverse possession.

. . .

8. That the defendants, Clodfelters introduced a chain of title continuous and unbroken to State Grant No. 1246, as recorded in Deed Book H-8, Page 329, dated 21st day of September, 1882.

. . . .

BASED UPON THE FOREGOING FINDINGS OF FACT, THE REFEREE CONCLUDES AS A MATTER OF LAW:

1. That under the law in our State every person is charged with the knowledge of what a title search would disclose.

2. That a title search in 1896 would have disclosed that a disputed area between the plaintiffs and the Hennessees was a portion of State Grant No. 586, and that at said time title was vested in other persons.

3. That a title search would have disclosed that the disputed area between the plaintiffs and the Clodfelters was a portion of State Grant No. 1246, and that at said time was in the possession of other persons.

4. That no authority or ownership of any of the disputed portion was shown to have been in John Joyce and wife, Polly Joyce, at the time they convey to William H. Keller and wife, R. M. Keller, nor was any evidence shown that any of the Clodfelter property was vested in any person with authority to convey to William H. Keller and wife, R. M. Keller.

. . . .

6. That the defendants W. C. Hennessee and wife, Stella B. Hennessee, are the owners in fee simple of that property described in their further answer.

7. That the defendant, J. M. Clodfelter (single), and Rose A. Clodfelter (single), are the owners in fee simple of that property set forth in their further answer.

These findings and conclusions can be summarized as follows: The plaintiffs have not proved good title to the property they claim, and the defendants have proved good title to the property they claim.

[4, 5] Findings of fact made by a referee and approved by the trial judge are not subject to review on appeal if they are supported by any competent evidence. "Likewise the judge, upon hearing and considering exceptions to a referee's report and supplemental report, may affirm, overrule, modify or make different or additional findings of fact. This affords no ground for exception on appeal, unless such action by the judge is not supported by sufficient evidence, or error had been committed in receiving or rejecting testimony upon which they are based." *Caudell v. Blair,* 254 N.C. 438, 119 S.E. 2d 172.

[6, 7] In the present case, the findings and conclusions that neither party could prevail under any theory of adverse possession are supported by competent evidence. The evidence also supports the conclusion that there was no evidence of ownership of any of the disputed portion by John Joyce and wife, Polly Joyce, at the time they conveyed to William H. Keller and wife, R. M. Keller. No chain of title going back further than the 1896 deed from the Joyces to the Kellers was introduced. There is no chain of title connecting plaintiffs' title to a State grant, no allegation or proof of any form of adverse possession, no allegation or proof of title from a common source, nor any allegation or proof of title by estoppel. The plaintiffs have, therefore, failed to carry the burden of proving title in themselves.

[8] We now consider whether the findings and conclusions adjudging title in the defendants are supported by competent evidence. The evidence discloses that one of the deeds in the defendants Hennessee's chain of title is from C. J. McConnell, Commissioner, to Davey Tree Expert Company. Plaintiff assigns as error the failure of defendant to introduce the judgment roll of the action in which C. J. McConnell was appointed commissioner to sell the land described in the defendants Hennessee's answer. The purpose of introducing the judgment roll is to show the commissioner's judicial authority to convey. The judgment roll is defined by N. C. Gen. Stat. 1-232 to include "the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the

merits and necessarily affecting the judgment." Nothing was introduced before the referee to show the authority of C. J. McConnell to convey the land. When Judge Froneberger heard the report of the referee, and before judgment was entered in this case, the judgment in which McConnell was allegedly appointed commissioner was introduced. But the requirement is not that the judgment be introduced, but that the *judgment roll* be introduced to show the judicial authority. The plaintiffs' assignment of error is well taken. Where a party is seeking to establish his chain of title and introduces into evidence a deed executed by a commissioner, but fails to offer in evidence the judgment roll to establish that the person named was in fact a commissioner, and had authority to convey, there is a break in the chain of title. *Sledge v. Miller*, 249 N.C. 447, 106 S.E. 2d 868.

[9] There is, however, a more serious defect in defendants Hennessee's chain of title, and that defect can be seen from the following recitals in the judgment appointing a commissioner:

> IT IS, THEREFORE . . . ORDERED, DECREED AND ADJUDGED that the deed of conveyance dated the 24th day of June, 1940, executed by John R. Brinkley and wife, M. T. Brinkley, to their minor son, John R. Brinkley, Jr. . . . was not supported by a good and valuable consideration, was made with intent to defraud the creditors of the said John R. Brinkley and is, therefore, void as against his Trustee in Bankruptcy, M. Coppard, the Petitioner in this action, and that the said Trustee in Bankruptcy be, and he is hereby, declared the owner of and entitled to the immediate and exclusive possession of that certain 6500 acre tract of land . . . .
>
> AND IT ALSO APPEARING that the said M. Coppard, Trustee in Bankruptcy of John R. Brinkley, in a bankruptcy cause now pending in the United States Courts for the Western District of Texas, Del Rio Division, has sold said 6500 acre tract of land to Davey Tree Expert Company of Kent, Ohio, for the consideration of $66,000.00, the greater portion of which has been retained pending the termination of this action and contingent upon the ability of the said Trustee to execute and deliver a proper deed of conveyance, free and clear of all liens and encumbrances, and as the defendant John R. Brinkley, Jr., is a minor it is considered advisable by the Court and Counsel represent-

ing said purchaser, that in addition to this judgment, such interest as he may have in said tract of land be conveyed by an officer of this Court appointed for said purpose.

It is apparent that after it was determined that the property was not owned by John R. Brinkley, Jr., but was in fact owned by the trustee in bankruptcy, M. Coppard, the judge appointed a commissioner, presumably out of an abundance of precaution, to sell whatever interest in the land John R. Brinkley, Jr. had. If, as the judgment recites, the property was owned by the trustee in bankruptcy, John R. Brinkley, Jr. had no interest in the property that a commissioner could sell. Although the judgment mentions a sale from Coppard to these defendants' predecessors in title, no such deed was introduced. The defendants Hennessee have failed to introduce a valid chain of title. The evidence therefore does not support the conclusion that they are owners of the property described in the answer by virtue of a chain of title unbroken to a grant from the State, nor by any other method of proving title.

[10] The evidence offered in the case is also insufficient to support an adjudication that title to the disputed land was in the defendants Clodfelter. "Where title to land is in dispute, claimant must show that the area claimed lies within the area described in each conveyance in his chain of title and he must fit the description contained in his deed to the land claimed." *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519. In this respect, among others, all parties to this lawsuit have failed to carry their respective burdens of proof.

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. DARLENE BUZZELLI

No. 7126SC172

(Filed 28 April 1971)

1. **Embezzlement § 6— embezzlement prosecution — sufficiency of evidence**

Evidence of a bookkeeper's guilt of embezzlement was properly submitted to the jury, where there was evidence that on 14 April 1969 the bookkeeper received $7,820.79 of her employer's money in the course of her capacity as bookkeeper, and that the bookkeeper deposited only $7,200.79 in her employer's account and deposited the remaining $600.00 in her own account.

2. **Embezzlement § 5— competency of evidence — purchases by embezzler**

In a prosecution charging a bookkeeper with twelve separate embezzlements, the last two occurring on 7 and 29 October 1969 for $3,200.00 and $200.00 respectively, it was proper to admit evidence that on 1 November 1969 the bookkeeper had made a cash purchase of an organ for $1,498.35.

3. **Embezzlement § 6; Criminal Law § 168— instructions — harmless error**

Trial court's error in charging that embezzlement exhibits had been introduced in evidence, when in fact they had not, *held* harmless error in this embezzlement prosecution, where evidence as to the contents of the exhibits was before the jury either by testimony or by stipulation.

APPEAL by defendant from *Copeland, S.J.*, 19 October 1970 Schedule "C" Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in twelve bills of indictment with embezzling various sums of money from her employer, Waters Insurance & Realty Company, Inc., on twelve different dates during the period from 14 April to 29 October 1969. The twelve cases were consolidated for trial and defendant pleaded not guilty in all cases.

The State offered evidence tending to show: Defendant was employed as a bookkeeper by Waters Insurance & Realty Company, Inc. from June, 1968 through 20 November 1969. Her starting salary was $350.00 per month, which was subsequently raised to $365.00 and then, beginning July, 1969, to $380.00 per month. On a counter in the office where defendant worked, the company kept a Burroughs Bookkeeping Machine, which also served as a cash register. In addition to doing the posting and bookkeeping work, according to the president of the company, defendant's duties included the following:

"It is Mrs. Buzzelli's job to take the cash from the machine and prepare deposit slips. It was no one else's job. It was Mrs. Buzzelli's job to determine how much money was to be deposited in the company's bank account. . . .

* * * * *

"Along with other employees in the office, Mrs. Buzzelli took rents over the counter, punched the proper buttons, etc., to effectuate the recordation of rents and the giving of receipts to tenants. In addition to that, other instructions given to her were to empty the cash drawer or cash receptacle and remove it, in effect, from the front counter where the machine was and take it to her desk and at her desk she tabulated the money, she counted it, she packaged up in packages of $500 or $250. She added the checks and totaled them, she made out a deposit slip in her own handwriting and in effect bundled the money up for deposit. In addition, she was instructed to leave in the cash—in the office, a sum of money, roughly $1,200 to $1,500, based on her judgment, to be used from that point forward as working capital for the office, because we need that much money to cash checks and make change for other payments that would come in after the deposit was made up.

"With reference to the $1,200 to $1,500 which I mentioned which was left to make change after determining how much was needed for working capital by Mrs. Buzzelli, it was left in her desk, operating change was left in the machine for the next day or after the money was counted. When the original major portion of cash was removed from the machine back to her desk, which she did, then she took another cash receptacle and put it at the machine which had always $200 in it at the time to give the machine working money while she was tabulating the big cash receptacle."

After a desposit slip was returned to defendant from the bank, she had two places of entry where she recorded the deposit. The first was a Daily Deposit Book, which was a memorandum form of book used to post to the checkbook. The second place of entry was in a Cash Journal in a column headed "Bank." A certified public accountant, testifying as a State's witness, testified that normal accounting procedure would require that the amount shown on the deposit slips for a particular day be the same as

the amount shown in the Daily Deposit Book and under the column headed "Bank" in the Cash Journal for the same day. "That is because the bank has got to agree with the books."

An entry was made in defendant's handwriting in the column headed "Bank" in the Cash Journal under date of 14 April 1969 showing the amount of $7,820.79. Entries also in defendant's handwriting on the bank deposit slip and in the Daily Deposit Book for the same date showed $7,220.79, which was $600.00 less than appeared in the Cash Journal. On 14 April 1969 a cash deposit of $600.00 was made in defendant's personal bank account. Defendant never mentioned to her immediate supervisor or to the president of the company that there was a difference in the entries appearing in her handwriting in the company's books under date 14 April 1969. When, on 12 November 1969, the president of the company asked defendant for an explanation, she did not deny that all entries for that date were in her handwriting, but offered no explanation as to why the figure in the Cash Journal differed from the figure in the deposit slip and in the Daily Deposit Book.

There was also evidence of discrepancies in the figures relating to cash deposits in her employer's bank account entered in defendant's handwriting in her employer's books for other dates during the period from April to 29 October 1969.

In case No. 70-Cr-15597, in which defendant was charged with embezzling $600.00 on 14 April 1969, the jury found defendant guilty. In the eleven remaining cases the jury found defendant not guilty. From judgment imposing a prison sentence of not less than three nor more than five years in case No. 70-Cr-15597, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Howard P. Satisky for the State.

Mraz, Aycock & Casstevens, by Nelson M. Casstevens, Jr., for defendant appellant.

PARKER, Judge.

[1] Appellant first assigns as error the denial of her motions for nonsuit. To convict a defendant of embezzlement in violation of G.S. 14-90, our Supreme Court has declared that "four distinct propositions of fact must be established: (1) that the

defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use." *State v. Block,* 245 N.C. 661, 97 S.E. 2d 243; *State v. Blackley,* 138 N.C. 620, 50 S.E. 310.

When the evidence in the case before us is viewed in the light most favorable to the State and the State is given the benefit of every reasonable inference which may be fairly drawn therefrom, as the courts of this State are required to do when passing on a motion for nonsuit, *State v. Block, supra,* there was in this case evidence tending to show, or from which reasonable inferences may be drawn as tending to show, every essential element of the crime of embezzlement within the purview of the statute, G.S. 14-90. The State's evidence would support a jury finding of the following facts: (1) Defendant was the employee of Waters Insurance & Realty Company, Inc. who was charged with the duty of receiving money of her employer each day, deciding how much should be deposited each day in her employer's bank account, and recording the amount thereof in a Cash Journal, on a bank deposit slip, and in a Daily Deposit Book. (2) Defendant's handwriting in making these entries under date 14 April 1969 show circumstances from which a jury could legitimately find that defendant did receive on that date her employer's money in the amount of $7,820.79, which is the figure she entered in the Cash Journal in the column headed "Bank." (3) Defendant received this money in the course of her employment in her capacity as bookkeeper for her employer. (4) Defendant, knowing the money was not her own, caused only $7,220.79 thereof to be deposited in her employer's bank account and deposited the remaining $600.00 in her own account, from which the jury could legitimately find that defendant fraudulently embezzled and converted to her own use the sum of $600.00 of her employer's funds.

Appellant's contention that her motion for nonsuit should have been granted, else any bookkeeper might be convicted of embezzlement upon a mere showing of the making of an incorrect entry in the employer's books, is without merit. It is, of course, true that "[t]he mere making of false entries in books of account is not sufficient evidence of an act of conversion constituent to the crime of embezzlement, regardless of the defendant's fraudulent intent at the time of making such a false

entry. But depositing funds of another in one's own account, together with the making of incorrect entries in books of account, and failing to turn the other's funds over to him at a time when obligated to do so, is sufficient evidence of conversion." 26 Am. Jur. 2d, Embezzlement, § 56, p. 609. There was no error in denying defendant's motion for nonsuit.

[2] Defendant asserts error by the trial court in denying her motion to suppress evidence that on 1 November 1969 she had made a cash purchase of a Gulbranson organ for the sum of $1,498.35. "Evidence that during a period in which a defendant had allegedly been guilty of embezzling money from his employer the defendant spent money considerably in excess of his known income or made large bank deposits has been held admissible." Annotation, 91 A.L.R. 2d 1056, § 7. Had the embezzlement of $600.00 on 14 April 1969 been the only charge against defendant, the evidence that she made a large cash purchase on 1 November 1969 might possibly be considered as too remote and conjectural to have probative value. In this case, however, defendant was charged with twelve separate embezzlements, the last two of which were alleged to have occurred on 7 and 29 October 1969 for $3,200.00 and $200.00 respectively. As to those two charges, the evidence of her large cash purchase made on 1 November 1969 was clearly not too remote and was admissible at least as bearing on those charges. Since the jury found her not guilty on those two charges, we cannot see how she was prejudiced by the admission of this evidence in the case charging embezzlement on 14 April 1969, as to which she was found guilty.

[3] Defendant's final assignment of error is that the trial judge committed error in charging the jury that certain exhibits referred to in the testimony of the witnesses for the State had been introduced in evidence when the record does not reveal that these exhibits were in fact so introduced. The exhibits in question, which were bank deposit slips and pages from the employer's books and records, would have been admissible in evidence had they been introduced. The reason they were not introduced, whether from inadvertence or for other cause, does not appear in the record. While it was error for the court to charge the jury that these exhibits had been introduced in evidence when in fact they had not, it was nonprejudicial error in this case. The State's Exhibit No. 16, which was the deposit slip showing the deposit of only $7,220.79 in the employer's bank

account on 14 April 1969, was introduced and admitted in evidence, and the State's witnesses testified without objection at length and in detail as to the contents of all of the other exhibits. During the course of the trial the State and the defendant even stipulated and agreed that State's Exhibit No. 29, which was the page from the Cash Journal showing entries for 14 April 1969, indicated a figure that is $600.00 more than is shown on State's Exhibit No. 16 (see page 30 of the record on appeal). Since evidence as to the contents of all of the State's exhibits was before the jury, either by testimony of State's witnesses which had been admitted without objection or by stipulation of the parties, defendant could have suffered no prejudice when the trial judge inadvertently referred to the exhibits as having been offered in evidence.

In the trial and judgment appealed from, we find

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

DOROTHY FORD CROWDER v. RANDY JENKINS, DEPUTY SHERIFF, AND DAMON HUSKEY, SHERIFF OF RUTHERFORD COUNTY, NORTH CAROLINA

No. 7129DC90

(Filed 28 April 1971)

1. **Process §§ 4, 5— action to recover penalty for false return — prejudicial admissions — amendment of return**

A judicial admission by a sheriff and his deputy that the return on a show-cause order was untrue in fact precludes them from thereafter amending the return.

2. **Process § 4— what constitutes a false return**

A return untrue in fact is a false return within the meaning of the statute allowing recovery of a penalty for a false return. G.S. 162-14.

3. **Rules of Civil Procedure § 8— admissions in pleadings — stipulations**

Admissions in the pleadings and stipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge. G.S. 1A-1, Rule 8(d).

APPEAL by plaintiff from *Gash, District Court Judge,* 2 September 1970 Session of District Court held in RUTHERFORD County.

This action was brought to recover damages and the penalty of $500 under G.S. 162-14 against Randy Jenkins and Damon Huskey, Deputy Sheriff and Sheriff of Rutherford County, North Carolina, respectively (defendants), for making a false return on a show-cause order issued by a judge of the district court and directed to plaintiff. The show-cause order was issued in the case of "Dorothy Ford Crowder, Plaintiff v. James Thomas Crowder, Defendant" at the instance of the defendant. In it Dorothy Ford Crowder (Mrs. Crowder) was ordered to appear in district court on 9 June 1969 and show cause why she should not be punished as for contempt of court for wilfully disobeying a court order issued therein relating to the custody of the children of the parties. (When Mrs. Crowder did not appear as directed in the order, the sheriff was ordered to take her into custody.) The return of the sheriff on the order to show cause (marked plaintiff's Exhibit "B") reads: "Served a copy of this Order on the plaintiff, Dorothy Ford Crowder this 4 day of June, 1969. s/ Randy Jenkins, Deputy Sheriff." During the course of the trial of the case at bar, the court allowed defendant's motion to amend this return by adding after the name of Mrs. Crowder the following: "By delivering a copy to her husband James Thomas Crowder."

In paragraph five of the complaint plaintiff alleged:

> "5. That thereafter the said Randy Jenkins, deputy sheriff as aforesaid, returned said order to the District Court marked served by delivering a copy thereof to this plaintiff as shown by copy of said return marked Exhibit 'B' attached hereto and made a part hereof."

Defendants answered this paragraph of the complaint by saying "(t)hat Paragraph Five of the Complaint is admitted."

In paragraph eight of the complaint it is alleged:

> "8. That the said Randy Jenkins did not serve the original order of the District Court upon this plaintiff and that this plaintiff had no knowledge whatsoever that any order had been issued directing her to appear in the District Court at the time and place therein mentioned, the return on said order being a false return by the said Randy Jenkins, deputy sheriff."

Defendants answered this paragraph of the complaint as follows:

"8. In answer to Paragraph Eight, it is admitted that Randy Jenkins did not serve the original Order of Court upon the plaintiff. However, Randy Jenkins had just joined the Sheriff's Department and made a mistake and served the Order of Court on the defendant and not on the plaintiff in the custody suit, thinking that he had served the right person. That this was a mistake of Randy Jenkins, due to inexperience, was discovered by Deputy Sheriff Russell Duncan, an experienced officer, and the matter was taken care of without any arrest of this plaintiff. Defendants do not have sufficient information to ascertain the truth or falsity of the other allegations contained in Paragraph Eight and therefore denies same."

At a pretrial conference the parties stipulated, among other things:

"(a) At all times mentioned in the complaint defendant Damon Huskey was Sheriff and the defendant Randy Jenkins was Deputy Sheriff of Rutherford County.

(b) The order in the case of Dorothy Ford Crowder against James Thomas Crowder dated June 4, 1969 was not delivered to Dorothy Ford Crowder, and the return dated June 4, 1969 showing that it was delivered to Dorothy Ford Crowder was not correct."

A jury trial was demanded, and at the trial the judge submitted the following four issues to the jury:

"1. Did defendant make a false return as alleged in the Complaint?

ANSWER: .....

2. If so, what amount of penalty under G.S. 162-14 is the plaintiff entitled to recover of the defendant, Damon Huskey?

ANSWER: .....

3. Was plaintiff damaged as a result of the wrongful acts of the defendants as alleged in the complaint?

ANSWER: .....

4. What amount of damages, if any, is plaintiff entitled to recover of the defendants?

ANSWER:_____"

From a jury verdict answering the first issue "No" and leaving unanswered the last three issues, the plaintiff appealed, assigning error.

Jones & Jones by B. T. Jones and Robert Jones for plaintiff appellant.

Hamrick & Hamrick by J. Nat Hamrick for defendant appellees.

MALLARD, Chief Judge.

[1] Plaintiff assigns as error the allowance by the court of the defendants' motion made during the trial to amend the sheriff's return in question. According to its location in the record on appeal, this motion was made and allowed at the close of all the evidence.

The pertinent part of G.S. 162-14, the statute upon which this action is based, reads as follows:

> "For every false return, the sheriff shall forfeit and pay five hundred dollars, one moiety thereof to the party aggrieved and the other to him that will sue for the same, and moreover be further liable to the action of the party aggrieved, for damages."

When enacted in the year 1777, this portion of the statute read as follows:

> " * * * (A)nd for every false return the sheriff shall forfeit and pay fifty pounds, one moiety thereof to the party grieved, and the other moiety to him or them that will sue for the same; to be recovered with costs, by action of debt, bill, or plaint, in any court of record, and moreover be further liable to the action of the party grieved for damages * * * ."

Very little change has occurred in the wording of this statute over the years. In fact, since the Revised Code of 1854, the only change made in this portion of the statute changed the word "grieved" as used therein to "aggrieved" as used in the

present statute. The Supreme Court held in the case of *Manufacturing Co. v. Buxton,* 105 N.C. 74, 11 S.E. 264 (1890), that the correct procedure under this statute to recover the penalty from a sheriff for making a false return was by civil action.

It is established law in North Carolina that the court has the discretionary power, in proper cases, to allow a sheriff to amend his return of process to speak the truth, even though the amendment will defeat the penalty for a false return. *Lee v. Hoff,* 221 N.C. 233, 19 S.E. 2d 858 (1942); *State v. Lewis,* 177 N.C. 555, 98 S.E. 309 (1919); *Swain v. Burden,* 124 N.C. 16, 32 S.E. 319 (1899); *Stealman v. Greenwood,* 113 N.C. 355, 18 S.E. 503 (1893). In *Swain v. Burden, supra,* the Court said:

> "We must assume that the power will be used only in *proper cases,* and in all others it will be withheld." (Emphasis added.)

The rule is stated in *Finley v. Hayes,* 81 N.C. 368 (1879):

> "The stringent rule has been adopted in this State, that every return untrue in fact is a false return within our statute upon the subject of false returns, although the officer may be mistaken in the matter or insert the fact in his return by inadvertence. *Albright v. Tapscott,* 53 N.C., 473; *Peebles v. Newsom,* 74 N.C., 473. It is immaterial that the officer had no selfish purpose to subserve, or was unmoved by any criminal intent. If in returning to the Court his action under an execution, his return is false in its facts or any of the facts touching the things done under it, he is as well exposed to the penalty of $500 denounced against a false return, as if the false facts were wilfully and corruptly inserted."

The question arises whether under the circumstances of this case, it was proper for the trial judge to permit the defendants to amend the return during the course of the trial.

The plaintiff alleged and the defendants admitted that the return had been marked "served by delivering a copy thereof to this plaintiff." The plaintiff alleged and the defendants admitted that the sheriff "did not serve the original Order of Court upon the plaintiff." The parties stipulated at a pretrial conference that the return showing *"that it was delivered* to Dorothy Ford Crowder was not correct."

An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury. *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966); *Champion v. Waller*, 268 N.C. 426, 150 S.E. 2d 783 (1966); *Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E. 2d 176 (1952); *Wilson v. Chandler*, 235 N.C. 373, 70 S.E. 2d 179 (1952); *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970). Issues in a case arise only upon the controverted material facts raised by the pleadings and supported by the evidence. G.S. 1A-1, Rule 49(b); *Wheeler v. Wheeler*, 239 N.C. 646, 80 S.E. 2d 755 (1954).

In Stansbury, N. C. Evidence 2d, § 166, it is said:

> "The word 'admission' is used to describe two distinct things which differ materially in their function and effect, but which, because of the common designation and of superficial similarities of form, are often confused.
>
> The first of these to be noted is the *judicial* or *solemn* admission, which is a formal concession made by a party (usually through counsel) in the course of litigation, either in a pleading or by way of stipulation before or at the trial, for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact. In short the subject matter of a judicial admission ceases to be an issue in the case, and evidence thereafter offered by either party in affirmance or denial of the admitted fact is objectionable on the ground of irrelevancy. * * * "

It could be successfully argued, under proper circumstances, that it was not necessary in a case of this kind to submit to the jury the factual question of the falsity of the return and that the statute establishes the amount of the penalty. Plaintiff, however, did not object or except to the four issues submitted. Plaintiff did not move for summary judgment on the first two issues prior to the trial under the provisions of G.S. 1A-1,

Rule 56. Neither did she move for a directed verdict on the first two issues at the trial under the provisions of G.S. 1A-1, Rule 50(a). Therefore, we are not called upon to rule on these questions.

[1-3] Under the admissions in the pleadings and the stipulations, it was judicially admitted that the return of the sheriff was untrue in fact. A return untrue in fact is a false return within the intent and meaning of the statute. See Annotation of North Carolina cases on false returns in 157 A.L.R. 207-209. When the falsity of the return was alleged and not controverted, the issue of the truth or falsity of the return was removed from the case. McIntosh, N. C. Practice 2d, § 994; *Bonham v. Craig,* 80 N.C. 224 (1879); *Moss v. Moss,* 24 N.C. 55 (1841). Admissions in the pleadings and stipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge. *Quinn v. Thigpen,* 266 N.C. 720, 147 S.E. 2d 191 (1966); *Gregory v. Cothran,* 262 N.C. 745, 138 S.E. 2d 634 (1964); *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460 (1958); *NASCAR, Inc. v. Midkiff,* 246 N.C. 409, 98 S.E. 2d 468 (1957); G.S. 1A-1, Rule 8(d); McIntosh, N. C. Practice 2d, §§ 993, 994.

The admissions and stipulations herein relating to the return were binding on the defendants and prevented them from introducing evidence to dispute it. The admissions in the pleadings (that the sheriff did not serve the original order upon the plaintiff and that the return had been marked served by the delivery of a copy thereof to Mrs. Crowder) and the stipulation (that the return showed that it was delivered to Mrs. Crowder) were not attacked and were not amended. We hold that under the circumstances, this was not a "proper case" in which to allow an amendment to the return of the sheriff, and the trial judge committed error in allowing the amendment over the objection of the plaintiff.

In view of the foregoing, we do not discuss the plaintiff's contention (which has merit) that even the return as amended reveals that it is false for that the process could not be *served on* Mrs. Crowder by delivering a copy to her husband who was her adversary in the case. Neither do we discuss plaintiff's other contentions.

For error committed in the trial, the plaintiff is entitled to a new trial.

New trial.

Judges PARKER and VAUGHN concur.

IN RE: JOHN J. TEW, JR.

No. 7110SC184

(Filed 28 April 1971)

Insane Persons § 11— release of person acquitted of crime because of insanity — certificate of State Hospital superintendents

Portion of G.S. 122-86 providing that no judge issuing a writ of *habeas corpus* upon application of a person committed to a hospital under the provisions of G.S. 122-84 "shall order his discharge until the superintendents of the several State Hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public," *held* not violative of due process.

Judge BRITT dissenting.

ON *certiorari* to review the order of *Hall, Superior Court Judge,* 3 November 1970 Session of WAKE County Superior Court.

Petitioner, through his application for a writ of *habeas corpus,* seeks his unconditional release from Dorothea Dix Hospital. Petitioner was committed to Dorothea Dix Hospital on 17 September 1965 pursuant to an order signed by Judge Leo Carr following an inquisition with regard to the mental condition of petitioner. The inquisition was held as a result of the acquittal by reason of insanity of the petitioner of the capital charge of murdering his former wife.

The trial judge issued a writ of *habeas corpus* directing the Superintendent and Director of the Forensic Unit of Dorothea Dix Hospital to bring petitioner before the court for a hearing on the restraint of petitioner. A hearing was held on 5 November 1970 and the trial judge made the following findings of fact and conclusions of law:

"(1) That in 1965 the petitioner was acquitted of the capital felony of murder by reason of insanity, and was thereafter lawfully committed to the Dorothea Dix Hospital pursuant to G.S. 122-84, by order of Judge Leo Carr entered in Harnett County on September 17, 1965;

(2) That since his commitment the petitioner received excellent care and treatment; that since February 1969 he has worked in the supply room of the hospital, has been in the presence of men and women, and has not at any time shown any disposition to harm himself or anyone else;

(3) That the petitioner's mental condition has considerably improved since his commitment, his drug treatment having been discontinued over two years ago, and recent psychiatric examinations by qualified experts reveal no evidence of any mental disorder;

(4) That the petitioner has now been restored to his right mind, is now sane, and his mental condition is not now such as to render him dangerous to himself or other persons;

(5) That the petitioner has had symptoms of paranoia, which are now in remission; and the Superintendent of Dorothea Dix Hospital does not recommend his unconditional release;

(6) That the Superintendents of the several State Hospitals have not certified that they have examined the petitioner and found him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public;

Upon the foregoing facts the Court concludes that the petitioner is now sane, and his detention is no longer necessary for his own safety, or the safety of the public; and his further detention can serve no useful purpose; and that while the Court has some doubt as to the validity of the proviso of G.S. 122-86, it is the Court's opinion that this Court is not authorized to discharge the petitioner until after the Superintendents of the several State Hospitals have certified that they have examined him and found him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public;"

The trial judge then ordered that petitioner be remanded to the custody of Dorothea Dix Hospital. To review this order, petitioner applied to this Court for a writ of *certiorari,* which was allowed on 11 December 1970.

The State represented by Eugene Boyce.

Yarborough, Blanchard, Tucker & Denson by Irvin B. Tucker, Jr., for petitioner appellant.

CAMPBELL, Judge.

The sole issue presented on this appeal is the validity of the portion of G.S. 122-86 providing that no judge, issuing a writ of *habeas corpus* upon application of a person committed to a hospital under the provisions of G.S. 122-84, "shall order his discharge until the superintendents of the several State Hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public."

Petitioner contends that the provision of the statute requiring a certificate from the superintendents of the several State Hospitals is violative of due process of law as guaranteed by the Federal and State Constitutions. We do not agree. Clearly, the General Assembly has the power to establish mental institutions and rules and regulations for the care and custody of the insane. *State v. Craig,* 176 N.C. 740, 97 S.E. 400 (1918); see also N. C. Const. art. XI, §§ 7 & 10.

In the case of *In re Boyett,* 136 N.C. 415, 48 S.E. 789 (1904), the petitioner Boyett had been tried for the capital offense of murder of his wife. On his trial he was acquitted by the jury on the ground of insanity. The trial judge, without any inquisition of lunacy, committed Boyett to the hospital for the dangerous insane and ordered him retained there until discharged. In the Boyett *habeas corpus* proceeding, the statute authorizing the commitment was held to be invalid as not conforming to due process of law since Boyett had not been given notice or an opportunity to be heard before the commitment. Likewise, an attack was made for that there was no provision by which in a judicial proceeding his mental condition could be inquired into, and the sole power to grant relief was conferred upon the legislature. The court held that the proceeding was

invalid in both respects. In connection with the original commitment, Judge Connor for the court stated:

> " . . . We do not wish to be understood as saying that a person acquitted of a grave crime upon the ground of insanity may not be detained for a reasonable time, so that by some appropriate proceedings the condition of his mind may, either under the direction of the Judge presiding or some other judicial officer, *or commission,* be examined into for the purpose of ascertaining whether his own safety and that of other persons, or the public generally, requires that he be committed to the hospital for treatment and care. It is well settled that it is not necessary that a jury trial be had—it is sufficient if the inquiry be had in some way by some tribunal conforming to the constitutional requirement of due process of law. . . . " (Emphasis added.)

In the instant case Tew was not committed until after an inquisition as to his mental condition. Thus, this aspect of the *Boyett* case was rectified. The attack now being made is under the second aspect of the *Boyett* case, namely, the release from the hospital of a person lawfully committed.

In enacting the provision now complained of, the General Assembly has merely followed the guidelines laid down in the *Boyett* case, *supra.* The "superintendents of the several State Hospitals" have been designated to determine whether the person committed is sane and "that his detention is no longer necessary for his own safety or the safety of the public." The superintendents thus constitute a commission as suggested in the *Boyett* case, *supra.* If, as suggested by the *Boyett* case, *supra,* a commission could make the determination at the time of the initial commitment proceeding and thus constitute due process, the same proceeding should be sufficient to constitute due process in determining whether or not the commitment should terminate.

While the passage of time since the enactment of G.S. 122-86 and the increase in the number of superintendents of the several State Hospitals increases the difficulty of procuring the necessary certificate, this in no way violates due process. Any change in the procedure is a matter for the legislative branch of

the government and not the judicial. We think the proceeding as now enacted provides due process.

Other states, having similar provisions, have considered this same problem and have upheld the requirement of a certificate, either from several heads of institutions or the head of the institution where the mentally ill person is committed, before the mentally ill person can be released. See *In re Clark,* 86 Kans. 539, 121 P. 492 (1912); *Parker v. People,* 108 Colo. 362, 117 P. 2d 316 (1941); *Bartosik v. People,* 155 Colo. 219, 393 P. 2d 571 (1964); *Blalock v. Markley,* 207 Va. 1003, 154 S.E. 2d 158 (1967); and *Rogers v. State,* 459 S.W. 2d 713 (Tex. Civ. App. 1970). For an annotation of various views and situations see 95 A.L.R. 2d 54 (1964).

Petitioner does not allege and makes no attempt to show that the failure to obtain the required certificate was the result of arbitrary or capricious action on the part of the superintendents.

For the reasons stated, the order of the trial judge remanding petitioner to the custody of Dorothea Dix Hospital is

Affirmed.

Judge GRAHAM concurs.

Judge BRITT dissents.

Judge BRITT dissenting.

The first sentence of G.S. 122-86 reads as follows: "No person acquitted of a capital felony on the ground of mental illness, and committed to the hospital designated in § 122-83 shall be discharged therefrom unless an act authorizing his discharge be passed by the General Assembly." The Supreme Court of North Carolina in the case of *In re Boyett,* 136 N.C. 415, 48 S.E. 789 (1904), in holding this proviso unconstitutional, said:

> It is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer. The judicial department of the government cannot by any legislation be deprived of this power or relieved of this duty. It must

afford to every citizen a prompt complete and adequate remedy by due process for every unlawful injury to his person or property. This is absolutely essential to a constitutional government. The Legislature may make laws, prescribe rules of action and provide remedies not provided by the Constitution, the judiciary alone can administer the remedy.

Thereafter, the General Assembly enacted what is now the last sentence of G.S. 122-86 reading as follows: "No judge issuing a writ of *habeas corpus* upon the application of such person shall order his discharge until the superintendents of the several State hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public." Petitioner contends this proviso is also unconstitutional as violative of "due process" and I agree with the contention.

It appears to me that by enacting the last quoted proviso, the General Assembly merely substituted another nonjudicial group to pass upon the legality of a person's detention under G.S. 122-86. Our state and federal constitutions guarantee our citizens "due process of law"; this term is defined in Black's Law Dictionary, Fourth Edition, as "law in its regular course of administration through courts of justice."

Passing upon the mentality of a person is a complex task and in performing this duty, the courts should rely heavily upon persons who are specially trained in the field of mental health. Nevertheless, the courts should not be deprived of the power and duty to determine ultimately if a person is legally and properly detained.

I vote to reverse the order appealed from and to remand this cause to the superior court for further appropriate proceedings.

N. CALHOUN ANDERSON AND WIFE, SUE S. ANDERSON v. G. JAY WILLIARD AND WIFE, BESSIE M. WILLIARD AND COLTRANE CONSTRUCTION CO., INC.

No. 7118SC22

(Filed 28 April 1971)

1. **Contempt of Court § 3— landowner enjoined from building a carport — landowner's mailing of postcards depicting the carport**

A landowner who was temporarily enjoined from constructing a carport was not guilty as for contempt in mailing to 125 persons, including the judge who signed the injunction, a postcard bearing a picture of the partially completed carport and a message reading in part: "Wishing You a Prosperous New Year—Williard's Future Car Shed . . . The unfinished part of our car shed shows where work stopped after a court order signed by our next door neighbor was served . . . Our side will be heard next year in court." G.S. 5-8.

2. **Contempt of Court § 3— landowner enjoined from building a carport — landowner's mailing of messages**

A landowner who was temporarily enjoined from constructing a carport was not guilty as for contempt in mailing to the directors of an athletic club, whose president had signed an affidavit in support of the injunction, a copy of the president's affidavit and the following message: "Enclosed you will find a copy that will explain why I can't support the Blue and White Club. Your president does not even live on Wynnewood Avenue [the landowner's address]." G.S. 5-8.

3. **Contempt of Court § 3— threats by landowner — intimidation of witnesses — punishable as for contempt**

A landowner's threats that were designed to intimidate the plaintiffs and their witnesses from testifying in support of plaintiffs' efforts to enforce a restrictive covenant against the landowner, *held* punishable as for contempt.

4. **Contempt of Court § 6— show cause hearing — evidence of threats — sufficiency of notice to contemnor**

A landowner who was cited as for contempt had sufficient notice that the plaintiffs would offer testimony of threats that the landowner had made to them, notwithstanding there was no allegation of threats either in the plaintiff's petition for a show-cause order or in the show-cause order itself.

5. **Contempt of Court § 3— landowner's guilt as for contempt — threats to adjoining landowner**

Landowner's threats to the plaintiffs that, if the plaintiffs carried out their suit to enforce a restrictive covenant against the building of defendant's carport, the landowner would sell to an undesirable person or would build a brick wall 20 feet high along the plaintiffs' adjoining property line, *held* sufficient to support an order finding the landowner guilty as for contempt.

Anderson v. Williard

APPEAL by male defendant from *Collier, Judge of Superior Court,* 22 June 1970 Session, High Point Division of GUILFORD Superior Court.

This action was instituted by plaintiffs on 18 September 1969 to restrain defendants from constructing a carport in violation of the restrictive covenants applicable to the lots in the subdivision. Specifically, plaintiffs allege that the restrictive covenants prevent construction on the lots in the subdivision nearer than ten (10) feet of the side lines of the lots, and that defendants are building the carport within two (2) feet of the side line of defendants' lot.

A restraining order and order to show cause were issued 18 September 1969. A hearing was held upon return to the show cause order, and an order was entered 15 October 1969 continuing the restraining order in effect until the trial of the action on the merits.

In November 1969 one Bill McKenzie, acting as president of the High Point Blue-White Club (an organization promoting athletics in high school), sent out numerous letters soliciting contributions. One was sent to defendant G. Jay Williard. Defendant Williard typed the following message in the margin of the letter he had received: "Gentlemen: Enclosed you will find a copy that will explain why I can't support the Blue and White Club. Bill McKenzie does not even live on Wynnewood Avenue. /s/ G. Jay Williard."

The same Bill McKenzie who sent the above-described letter had also executed an affidavit which was used by plaintiff in securing the restraining order heretofore issued. In the affidavit McKenzie stated, among other things, the following: ". . . that in his opinion the construction of said garage by G. Jay Williard and wife within two feet of their west property line will irreparably damage the property of N. Calhoun Anderson and wife, and will diminish the value of his property to an extent in proportion to the nearness of his property to the property of G. Jay Williard and wife . . ."

Defendant prepared photo copies of the letter from McKenzie, along with defendant's message in the margin; he attached thereto photo copies of the affidavit executed by McKenzie in this lawsuit; and he mailed copies to directors and officers of the Blue-White Club.

In January 1970 defendant prepared a 6 x 9 inch postcard with a picture of the partially completed carport on one side of the card. On the same side of the card the following message appeared above the picture: "Wishing you a prosperous New Year." Below the picture the following message appeared: "Williard's future car shed—1109 Wynnewood Ave." On the reverse side of the card, printed in the left one-half was the following message:

"WISHING YOU A PROSPEROUS NEW YEAR
WILLIARD'S FUTURE CAR SHED
1109 WYNNEWOOD AVE.

This is a picture of our car shed as it stands today. The completed part was built by Coltrane Construction Company after a permit was issued by the city of High Point to do exactly what we have done. The city permit department wrote our neighbors telling them that a permit for such a building was about to be issued, and asked for any objections, if any. None were given.

The unfinished part of our car shed shows where work stopped on September 18 after a court order, signed by our next door neighbor, Sue and Calhoun Anderson, was served. Mr. Anderson represents Life Insurance Company of Virginia.

Our side will be heard next year in court."

A card as described above was sent to about 125 persons living in and around High Point, including many who had signed affidavits for plaintiffs, the male plaintiff's employer, and Judge Walter E. Crissman who had signed the restraining order in this case.

On 15 January 1970, plaintiffs filed a motion in the cause alleging the above-described conduct of defendant and asking that an order issue to defendant G. Jay Williard requiring him to appear and show cause why he should not be adjudged in contempt for mailing the Blue-White Club letter and the picture card described above.

A hearing was conducted before Judge Collier on 16 February 1970 at which time affidavits were offered and the plaintiffs and defendant G. Jay Williard testified under oath. Following receipt of the affidavits and the testimony the matter was continued from time to time upon agreement of the parties.

Thereafter on 22 June 1970, the parties and the attorneys appeared before Judge Collier and stated that they were unable to reach a settlement, that they had no further evidence or arguments to make, and that they were ready for the court to enter its findings and judgment.

There was plenary evidence at the 16 February 1970 hearing that defendant in fact mailed the Blue-White Club letter with his notation thereon, and that he mailed the picture card with the message thereon. Also, there was testimony from plaintiff of threats made by defendant to plaintiff and to prospective witnesses concerning what he would do if they persisted with this lawsuit. Judge Collier found facts in accordance with the evidence and concluded as follows:

> "The court further finds that said acts and conduct on the part of the said defendant were made for the purpose and with the intent, and that the same had a tendency, of embarrassing and intimidating witnesses and prospective witnesses in said law suit, to mislead prospective jurors and the public before said cause was heard upon its merits; to harass, annoy, and embarrass the plaintiffs before their friends and the public and to intimidate and threaten them from further prosecuting their law suit, and to interfere with the orderly processes of judicial procedure by misrepresenting, misleading and prejudicing the public and the court and were of such nature as tended to defeat, impair, impede, or prejudice the rights or remedies of the plaintiffs in said law suit.
>
> The court further finds that said defendant failed to publish the full facts in the cause, but colored said facts so as to bring into contempt and ridicule the court, and especially Judge Walter E. Crissman, who granted the temporary injunction."

Based upon his conclusions, Judge Collier adjudged that defendant was guilty as for contempt and imposed punishment. Contemnor appealed.

Attorney General Morgan, by Staff Attorney Blackburn, for the State.

Morgan, Byerly, Post & Herring, by William L. Johnson, Jr., for contemnor.

BROCK, Judge.

Our statute provides that "[e]very court of record has power to punish as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court . . ." and that such power shall extend to all cases ". . . where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this State to enforce the civil remedies or protect the rights of any party to an action." G.S. 5-8. "This principle is applied in numerous decisions. It has been held, for example, that a person who presents to the court a fraudulent claim for the payment of money, or willfully interposes a false answer, or decoys a witness or dissuades him from attending the trial, or insults, on account of an adverse verdict, a juror who has been discharged, or willfully does any other act which tends to defeat the rights of any party to a pending action may be punished as for contempt. [citations]." *Snow v. Hawkes,* 183 N.C. 365, 111 S.E. 621.

[1, 2] We are inclined to agree with defendant that his acts in mailing the Blue-White Club letter cannot fairly be considered as intimidating or dissuading witnesses from appearing for trial. Also we are inclined to agree with defendant that his mailing of the 125 picture cards with his message thereon cannot fairly be considered as intimidating or dissuading witnesses or the plaintiffs. Nor do we consider the message on the picture card as a coloring of the facts so as to bring the court or Judge Crissman into ridicule. Obviously contemnor's acts with respect to both the Blue-White letter and the picture card were brought on because he was disgruntled with having been stopped from doing what he wanted to do. Both acts seem to us to be rather intemperate responses to an order denying him the right to use his property as he pleased, and their prime tendency seems to be to bring on disrespect for the author, not the court.

[3] The verbal threats to plaintiffs and other witnesses are, however, quite another matter. It is obvious that those threats were designed to intimidate plaintiffs and their witnesses and to dissuade them from testifying in the case or otherwise pursuing the enforcement of the restrictive covenants. Such conduct is punishable as for contempt.

[4] Defendant contends that the testimony concerning the threats was incompetent and should not be considered because

neither the petition for the order to show cause, nor the order to show cause, advised defendant that he would be required to answer as to the threats. It is true that only the mailing of the publications was mentioned in the petition or the order, however the hearing at which the testimony of the threats was given was held on 16 February 1970. Thereafter defendant was on notice of the charge of the threats, but he voluntarily offered no further evidence concerning them. On 22 June 1970 he appeared before Judge Collier and announced that he had no further evidence or argument to present and that he was ready for judgment to be entered. We hold that defendant was on notice from 16 February 1970 until 22 June 1970 that he was charged with contempt for having threatened the plaintiffs and several witnesses, and that this was sufficient notice. *cf. Erwin Mills v. Textile Workers' Union,* 235 N.C. 107, 68 S.E. 2d 813.

The order appealed from does not have numbered paragraphs and is not broken into findings of fact and conclusions of law. Nevertheless from looking at a copy of the original of the order appealed from its appears that there are five unnumbered paragraphs. The order appealed from is modified as follows: By striking from the fourth paragraph of the order the last sentence appearing in said paragraph reading as follows: "The court further finds that said defendant failed to publish the full facts in the cause, but colored said facts so as to bring into contempt and ridicule the court, and especially Judge Walter E. Crissman, who granted the temporary injunction." The order is further modified by striking from the next to the last sentence of the fourth paragraph all of the said next to the last sentence *appearing after* that part reading as follows: "The court further finds that said acts and conduct on the part of the said defendant were made for the purpose and with the intent, and that the same had a tendency, of embarrassing and intimidating witnesses and prospective witnesses in said lawsuit."

[5] Judge Collier found in the fourth paragraph of his order as follows: ". . . that said defendant also made threats to the plaintiffs and to some of the neighbors that, if the suit were prosecuted, he would sell to an undesirable person or would build a brick wall 20 feet high along his property line which abuts the east property line of the plaintiffs." This finding is amply supported by the evidence and in turn supports the entry finding G. Jay Williard guilty as for contempt.

The order appealed from is modified as above set out and as so modified is affirmed.

Modified and affirmed.

Judges MORRIS and VAUGHN concur.

HALLIE SMITH, MOTHER; EDWARD SMITH, FATHER; JERRY SMITH, DECEASED EMPLOYEE, PLAINTIFFS v. ALLIED EXTERMINATORS, INC., EMPLOYER AND BITUMINOUS CASUALTY CORPORATION, CARRIER, DEFENDANTS

No. 7114IC109

(Filed 28 April 1971)

1. **Master and Servant § 91— workmen's compensation — failure to file claim — cause commenced by insurance carrier**

Father was not barred by G.S. 97-24(a) from participation in a workmen's compensation award for the death of his son by his failure to file a claim within one year from the time of the accident, where the cause was commenced by application of the insurance carrier for a hearing pursuant to G.S. 97-83.

2. **Master and Servant § 79— workmen's compensation — abandonment of child — right to participate in award for child's death**

Provision of G.S. 31A-2 barring a parent who has abandoned his child from all right to intestate succession in the child's estate does not prohibit a father who abandoned his son during the son's minority from recovering workmen's compensation benefits for death of the son.

3. **Master and Servant § 79— parent who abandoned employee during minority — right to share in compensation award**

In absence of statute, a parent who abandoned his child during its minority will not be barred from participating in a workmen's compensation award for death of the child.

Judge BROCK dissenting.

APPEAL by defendants from North Carolina Industrial Commission Opinion and Award of 14 September 1970.

This proceeding under the North Carolina Workmen's Compensation Act, G.S. 97-1, *et seq.*, was begun by Bituminous Casualty Corporation, carrier, when it filed application for hearing on 24 October 1969 pursuant to G.S. 97-83. Jerry Smith is

the deceased employee, and Allied Exterminators, Inc., is the employer. Hallie Smith and Edward Smith, the deceased's mother and father are the next of kin of the deceased.

The cause was initially heard before former Commissioner William F. Marshall, Jr. at Durham. Commissioner Marshall filed an opinion and award on 31 March 1970 at which time defendants gave notice of appeal to the Full Commission. The Full Commission filed an Opinion and Award on 14 September 1970, finding the following facts, among others. The employee had never married, had no children, and had no dependents, whole or partial. He was survived by his mother, father, and two brothers. The father and mother of the deceased had been separated approximately twelve years prior to the date of the hearing, and the father had not supported any of the children for a period of time in excess of eleven years. The father had wilfully abandoned the care and maintenance of the deceased employee during his minority. Included in the Opinion and Award of the Full Commission were stipulations that an employment relationship existed between the deceased employee and the employer at the time of the injury by accident arising out of and in the course of his employment. The parties also stipulated that they were subject to and bound by the provisions of the Workmen's Compensation Act, and that the only question for determination was to whom compensation should be paid. The Opinion and Award contained the following conclusions of law, among others:

> 1. The father of the deceased having willfully abandoned the care and maintenance of deceased during his minority has lost all right to intestate succession in any part of deceased's estate. G.S. 31A-2.
>
> 2. Father not having filed a claim with the North Carolina Industrial Commission within one year from the date of the death of the deceased and, in fact, not having filed a claim as of the date of the filing of this Opinion is barred forever from filing a claim in the instant case. G.S. 97-24A.
>
> 3. Deceased was survived by neither whole nor partial dependents. Deceased was survived by his mother as his 'next of kin' whose rights are governed by the general law applicable to the distribution of personal estates of persons

dying intestate. In such capacity mother is entitled to compensation. . . .

From the Opinion and Award, defendants appeal.

Powe, Porter and Alphin by Willis P. Whichard for plaintiff appellees.

Walter L. Horton, Jr., for defendant appellants.

VAUGHN, Judge.

Appellants' position on this appeal is that the mother of the deceased should have received no more than one-half the amount which she did receive. Appellant arrives at that conclusion by the following reasoning. G.S. 97-40 provides that if the deceased leaves no whole or partial dependents, then the compensation is to be commuted to its present value and paid to the next of kin, and the order of priority among the next of kin "shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate." The applicable provision of the intestate succession act is G.S. 29-15(3), which provides that where a deceased is survived by both parents, and not by a child, children or any lineal descendant of a deceased child or children, the parents take in equal shares. Appellants contend that the rights of the father were properly before the Full Commission, and that they have been adjudicated. They further contend that the father's rights were not barred by G.S. 97-24(a), but that the father's rights are barred by the common law maxim that no man can profit by his own wrong. Appellants contend that since the mother and father take equal shares, and since the father's right to his share of the award is barred, the mother should receive only her equal share, which would amount to one-half of the award given her by the Full Commission.

[1] Appellants contend that the Full Commission erred in concluding that G.S. 97-24(a) bars recovery by the father because he did not file a claim within one year from the time of the accident, and that the Commission had jurisdiction to determine the rights of both father and mother. The record on appeal discloses that "[j]urisdiction in the North Carolina Industrial Commission arises and this cause therein commenced by application of Bituminous Casualty Corporation, Carrier, for a hearing in the Industrial Commission pursuant to the provisions of

G.S. 97-83. . . ." In *Hardison v. Hampton,* 203 N.C. 187, 165 S.E. 355, an accident report and the employee's claim for compensation were filed by the employer in proper time. No hearing was held by the Commission until after a claim was filed by the employee, more than one year after the date of the accident. The Court affirmed an award, saying:

> "There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation for his injury with the North Carolina Industrial Commission . . . When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of section 24."

Although the Supreme Court has distinguished *Hardison* on several occasions, we believe that the point quoted above remains the rule. When the Commissioner held a hearing pursuant to the carrier's request, it had jurisdiction to determine the rights of the father, and as designated in its notice of hearing, "all matters involved." It was, therefore, error for the Full Commission to conclude that G.S. 97-24(a) bars the rights of the father.

[2] We now consider the Commission's conclusion that any rights the father might have are barred by G.S. 31A-2, which provides, in relevant part, "[a]ny parent who has wilfully abandoned the care and maintenance of his or her child shall lose *all right to intestate succession in any part of the child's estate* . . ." (Emphasis ours.) We cannot interpret the statute, clear on its face, to apply to the situation at hand. "The amount payable to the death beneficiaries never becomes a part of the estate of the deceased, and is not liable for his debts, but is the exclusive property of the beneficiaries." 58 Am. Jur., Workmen's Compensation, § 167, p. 689. See *Crawford v. Realty Co.,* 266 N.C. 615, 146 S.E. 2d 651. It is true that G.S. 97-40 provides as between nondependent next of kin (defined as including only "child, father, mother, brother or sister"), that the order of priority shall be governed by the general law applicable to the distribution of personal property of persons dying intestate. This statute does not change the nature of the proceeds so as to convert them into assets of the estate and the designated beneficiaries do not take by any right of intestate succession. The statute does not make the "general law" applicable to determine

eligibility; it makes the "general law" applicable only to determine "the order of priority" among those who by the statute are specified as eligible for participation in the proceeds. We hold, therefore, that G.S. 31A-2, dealing with intestate succession of the estate, does not apply.

[3] Appellant contends that if there is no statutory bar to recovery of Workmen's Compensation death benefits by an abandoning parent, the parent should be barred by the maxim that no man shall take advantage of his own wrong. This maxim of law is indeed the public policy of this state. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807. We have not been made aware, however, of cases which hold that in the absence of statute, a beneficiary is disqualified for unworthiness. In *Avery v. Brantley,* 191 N.C. 396, 131 S.E. 721, our Supreme Court held that in the absence of statute, a parent who had abandoned his child would not be barred from participating in proceeds received for the wrongful death of his child. Several writers suggest that the present G.S. 31A-2 was enacted as a result of the decision in *Avery.* T. Atkinson, *Handbook of the Law of Wills,* § 37, p. 148 (2d Ed. 1953); *Bolich, Acts Barring Property Rights,* 40 N.C. L. Rev. 174, 184. It is also generally held elsewhere that, in the absence of statute, a claimant will not be barred because of misconduct toward decedent. Atkinson, *supra; Anderson v. Anderson,* 211 Tenn. 566, 366 S.W. 2d 755; *Cullison v. Hartman,* 9 PA D&C 2d 359.

G.S. 31A-2, under certain conditions bars a parent who has abandoned his child from all right to intestate succession in any part of the child's estate. In the absence of a similar provision with reference to Workmen's Compensation death benefits, the Court cannot judicially impose a forfeiture, no matter how unworthy the beneficiary.

This cause is remanded to the Full Commission for entry of an award in accordance with this opinion.

Reversed and remanded.

Judge MORRIS concurs.

Judge BROCK dissents.

Judge BROCK dissenting.

In my opinion the majority has given too narrow a construction to the provisions of G.S. 97-40 with respect to the application of the general law of intestate succession. G.S. 97-40 provides in part as follows: " . . . For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, *the order of priority among them* shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. . . . " (Emphasis added.) It seems to me that in determining the order of priority in accordance with the laws of intestate succession it is necessary to take into consideration G.S. 31A-2 which specifically applies to the right to a distribution of personal property of persons dying intestate. This latter statute establishes priority between the mother and the father of the deceased employee in this case; it excludes the father thereby giving priority to the mother alone.

I agree with the majority that Conclusion of Law No. 2 by the Industrial Commission, which would bar the father from recovery because he failed to file a claim, is error. The employer having already filed a claim I don't think it is necessary for the father also to file one. Otherwise I vote to affirm the award of the Industrial Commission.

STATE OF NORTH CAROLINA v. JOHNNIE BON SAWYER

No. 7124SC282

(Filed 28 April 1971)

1. **Criminal Law § 26; Homicide § 13— involuntary manslaughter arising out of car accident — plea of former jeopardy**

An acquittal on charges of reckless driving and speed competition does not bar a subsequent prosecution for involuntary manslaughter arising out of the same occurrence.

2. **Homicide § 12— involuntary manslaughter — sufficiency of indictment**

Indictment sufficiently charged the defendant with involuntary manslaughter arising out of the violation of the motor vehicle laws.

3. **Automobiles § 113— involuntary manslaughter — sufficiency of evidence**

In a prosecution charging defendant with involuntary manslaughter arising out of the violation of the speeding and reckless

driving statutes, the State's evidence was sufficient to be submitted to the jury.

4. **Automobiles § 114— involuntary manslaughter — speed competition — instructions on proximate cause**

In a prosecution charging defendant with involuntary manslaughter arising out of an unlawful automobile speed competition, an instruction that would permit the jury to find defendant guilty of the manslaughter without first finding beyond a reasonable doubt that the speed competition was a proximate cause of the collision, *held* reversible error.

5. **Automobiles § 114— instructions on proximate cause**

Instructions in an involuntary manslaughter case that did not require the jury to find beyond a reasonable doubt that the intentional violation of the speed statutes was a proximate cause of the death, as was charged in the indictment, *held* reversible error.

APPEAL by defendant from a trial by *McLean, J.*, June 1970 Session of MADISON Superior Court.

The defendant Johnnie Bon Sawyer was tried before McLean, J., and a jury, at the Regular June 1970 Session of Madison Superior Court on a bill of indictment, proper in form, charging the defendant with involuntary manslaughter arising out of an automobile accident occurring on 24 October 1969. The defendant was tried and acquitted on 19 November 1969 in the District Court of Madison County of reckless driving, a violation of G.S. 20-140, and unlawful speed competition, a violation of G.S. 20-141.3(b), arising out of the same automobile accident occurring on 24 October 1969.

Before pleading to the bill of indictment, the defendant interposed a plea in abatement on the grounds of former jeopardy, and moved to quash the bill of indictment. The plea in abatement and the motion to quash were denied by Judge McLean, and the defendant pleaded not guilty.

The State offered evidence tending to establish the following facts: At approximately 11:30 p.m. on 24 October 1969, the defendant, in a 1968 yellow Torino, and one William McKinley Ramsey III, in a blue Camaro, were observed driving side by side in a northerly direction on U.S. Highway 25-70 where it is known as the Marshall Bypass in Madison County. There was testimony that both automobiles had "taken off" from a position directly in front of a Sinclair service station which was some 300 to 400 feet south of Plemmons' Cafe. The automobiles

traveled side by side until they went out of sight around a curve which was approximately one quarter of a mile north of the Sinclair station. The defendant's automobile was in the right-hand, eastern lane when both automobiles went out of sight around the curve, at which point opinions as to their speed varied from 80 to 100 mph.

A collision which involved the automobile of the defendant, a pickup truck, and the automobile operated by the deceased, occurred 600 feet south of the intersection of the bypass and the Walnut Creek Road. The investigating officer, Highway Patrolman A. L. Feldman, testified that the collision occurred "a quarter of a mile or a little more" north of Plemmons' Cafe.

Larry Christopher Huey, a passenger in the automobile driven by the deceased, testified that "we passed a car and were in the middle lane going south. We were meeting some cars and one pulled out to pass coming directly toward us. . . . The vehicle we first saw coming toward us was in the middle lane. There was another vehicle coming toward us in the east lane. . . . Then we started to get in the west lane to the far outside and a car came around the one that was in the middle lane that was coming toward us, so there was a car in each lane coming toward us. We tried to go between the two that were in the two passing lanes. We hit the one that was coming toward us in the middle lane."

Ronnie Shelton, driving approximately 500 feet behind the deceased, testified: "I seen this bluish car go flying by and then I seen Terry Bryan's lights come on, his tail lights, and he was sitting sideways in the road. . . .

* * *

"I saw a bluish-colored car. When I seen him, he was flying by on his side of the road. The bluish car looked like it was going about 100."

There was evidence that Terry Allen Bryan died as a result of injuries sustained in the collision. The defendant offered no evidence. The jury found the defendant guilty as charged. Judge McLean continued prayer for judgment until the Regular 28 September 1970 Session of Madison Superior Court. From a judgment entered on the verdict on 9 October 1970 by Judge Thornburg, the defendant appealed.

Attorney General Robert Morgan, Assistant Attorney General I. Beverly Lake, Jr., and Staff Attorney Ronald M. Price for the State.

Mashburn and Huff, by Joseph B. Huff, for defendant appellant.

HEDRICK, Judge.

[1] The defendant's first assignment of error raises the question of whether an acquittal on charges of reckless driving and speed competition will bar a further prosecution for involuntary manslaughter when all charges arise out of the same occurrence. This question was answered in the negative in *State v. Midgett,* 214 N.C. 107, 198 S.E. 613 (1938), where our Supreme Court held that an acquittal of reckless driving in a court having jurisdiction to try the defendant for that offense would not bar the prosecution of the defendant in the superior court for involuntary manslaughter arising out of the same occurrence. Reckless driving and speed competition are not lesser included offenses of the charge of involuntary manslaughter. *State v. Midgett, supra; State v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312 (1955). This assignment of error is overruled.

[2] The defendant next assigns as error the court's denial of his motion to quash the bill of indictment. The bill charged that the defendant "did, unlawfully, willfully and feloniously kill and slay one Terry Allen Bryan. . . . "

> "Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty." 4 Strong, N.C. Index 2d, Homicide, Sec. 6., p. 198.

For an indictment to be valid, it must allege all the essential elements of the offense with sufficient certainty so as to (1) identify the offense, (2) protect the accused from being put in jeopardy twice for the same offense, (3) enable the accused to prepare for trial, and (4) support the judgment upon conviction and plea. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897

(1970); *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953).

Applying the foregoing test, it is our opinion that the motion to quash was properly denied.

[3] The defendant assigns as error the court's denial of his motion for judgment as of nonsuit. There is sufficient competent evidence in the record which would permit, but not compel, the jury to find that the death of Terry Allen Bryan proximately resulted from injuries sustained in an automobile collision which occurred on 24 October 1969 at about 11:30 p.m. on the Marshall bypass approximately one-fourth of a mile north of Plemmons' Cafe, and that the defendant intentionally and recklessly drove a 1968 Ford Torino automobile in willful speed competition with another motor vehicle, in violation of G.S. 20-141.3(b), and that he intentionally and recklessly drove the said automobile at an excessive and unlawful rate of speed, in violation of G.S. 20-144, and that either or both of these violations of the highway safety statutes was a proximate cause of the collision and death of Terry Allen Bryan. This assignment of error is overruled.

[4] The defendant excepted to and assigns as error the following portion of the court's instructions to the jury:

> "So the Court instructs you, members of the jury, that if you should find from this evidence and beyond a reasonable doubt that the defendant, driving a yellow Torino automobile along Highway 25-70 from the vicinity of the Sinclair filling station on the bypass of 25-70 here around Marshall, was operating his automobile in speed competition with McKinley or Mack Ramsey, driving a blue Camaro, and that as a result of this speed competition between the two, they had a collision with a car or cars, either one or both of them, had a collision with a truck or car or cars and that as a result of that Terry Bryan came to his death—if you find those facts beyond a reasonable doubt, it would be your duty to return a verdict of guilty as charged in this bill of indictment upon that aspect of the case."

This instruction is erroneous in that it would permit the jury to find the defendant guilty of involuntary manslaughter without first finding beyond a reasonable doubt that the speed competition was a proximate cause of the collision.

[5] With respect to the defendant's operating his motor vehicle in violation of the speed statutes, the court instructed the jury as follows:

> "So, the Court instructs you, members of the jury, that if you should find from this evidence, beyond a reasonable doubt, that the defendant was operating his yellow Torino automobile along Highway U.S. 25 and 70 on this night of October the 24th, 1969, and that he deliberately and intentionally operated his automobile at a speed greater than 65 miles per hour, as a result of which he was unable to control or stop his automobile and ran into and collided with another automobile—either a truck or automobile—which inflicted the injuries upon the body of the deceased, Terry Allen Bryan, proximately causing his death, then the Court instructs you that if you find those facts beyond a reasonable doubt, it would be your duty to return a verdict of guilty upon that aspect of the evidence. . . . "

This instruction is also erroneous in that it fails to require the jury to find beyond a reasonable doubt that the deliberate and intentional violation of the speed statute upon the part of the defendant was a proximate cause of the collision which inflicted the injuries resulting in death.

> "Mere proof of culpable negligence does not establish proximate cause. To culpable negligence must be added that the act was a proximate cause of death to hold a person criminally responsible for manslaughter." *State v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132 (1955).

We do not discuss the defendant's other assignments of error since they are not likely to occur upon retrial. For prejudicial error in the charge, the defendant is entitled to a new trial.

New trial.

Judges BROCK and MORRIS concur.

ETHEL L. McLEAN v. LIFE OF VIRGINIA

No. 7111DC43

(Filed 28 April 1971)

Insurance §§ 13, 37— life insurance — issuance of rated policy — counter offer — intervening death of applicant

No contract of life insurance became effective during the life of the applicant where it was an express condition of the "Advanced Payment Receipt" that the applicant be insurable "at the premium rate applied for" if the insurance was to take effect on the date the application, including the required medical examination, was completed, the insurer, after examining the application and medical examination results, issued a rated policy calling for a premium higher than that which would have been applicable in the policy applied for, and the applicant died before the rated policy was delivered, since the issuance of the rated policy constituted a rejection of the offer contained in the application and a counter offer which could not be accepted because of the applicant's death.

APPEAL by defendant from *Morgan, District Judge,* 12 August 1970 Session of HARNETT District Court.

This is an action to recover $5,000.00 alleged to be due plaintiff as beneficiary on a contract of life insurance.

On 15 April 1968 plaintiff and her husband, Charles N. McLean, made application to the defendant for a $5,000.00 joint whole life insurance policy on the lives of plaintiff and her husband and paid a premium of $15.70 for which they received an "Advanced Payment Receipt." This receipt was on a printed form of the defendant and provided in part as follows:

> "If . . . the completed application, including any medical examination required, and such other information as may be required by the Company are received by the Company at its Home Office and if the Company determines to its satisfaction that the Proposed Insured was insurable on the date the application, including any medical examination required, was completed, for the amount and at the premium rate applied for, in accordance with the Company's rules, limits and standards for the policy applied for, the insurance shall take effect, in accordance with and subject to the provisions of the policy applied for, as of the date such application, including any medical examination required, was completed. . . . If the insurance applied

for is not effective under the exact conditions specified in this receipt, the insurance shall not take effect until a policy therefor is delivered to and received by the Applicant and the first premium paid while the Proposed Insured is insurable according to the Company's rules and standards for such policy."

On 21 May 1968 a medical examination of Charles N. McLean was performed by Dr. H. D. Mabe, Jr. in Erwin, N. C. As part of this examination Charles N. McLean answered questions which the examining doctor asked him and his answers were recorded by the doctor on a printed form of the defendant which bears at the top the following printed notation:

"In continuation of and forming a part of my application for insurance to The Life Insurance Company of Virginia—Part VI—Medical History."

Charles N. McLean signed this form on 21 May 1968 on the line entitled "Signature of proposed insured." The medical examination revealed that in December, 1967, Charles N. McLean had been admitted to the hospital for three days for treatment of a peptic ulcer. On 22 May 1968 a medical examination of plaintiff was also made by Dr. Mabe. The results of both medical examinations were forwarded by Dr. Mabe to the home office of the defendant in Richmond, Virginia, where the report on Charles N. McLean was received on 22 May 1968 and the report on Mrs. McLean was received on 23 May 1968. Charles N. McLean died on 24 May 1968 of a heart attack, his death being unconnected in any manner with a peptic ulcer.

The defendant, after examining the application and the results of the medical examinations, "rated" Charles McLean "B" because of his history of a peptic ulcer within one year from the date of the application for the policy. On 28 May 1968 the defendant issued a rated policy calling for monthly premiums of $17.60, as contrasted with monthly premiums of $15.70 which would have been applicable in the policy which plaintiff and her husband had applied for. The rated policy was never delivered because of the intervening death of Charles N. McLean. The defendant tendered to plaintiff return of the $15.70 which had been paid as an advance premium, but the tender was refused and the $15.70 was paid into court.

The jury returned a verdict finding that the defendant had entered into a binding contract of insurance on the life of Charles N. McLean prior to his death. From judgment that plaintiff recover the face amount of the policy, defendant appealed.

Bryan, Jones, Johnson, Hunter & Greene by James M. Johnson for plaintiff appellee.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for defendant appellant.

PARKER, Judge.

The "Advanced Payment Receipt" given by the insurance company in this case provides that the insurance shall take effect on the date the application is completed only if, among other things, the defendant insurance company determines to its satisfaction that on that date the proposed insured is insurable "at the premium rate applied for, in accordance with the Company's rules, limits and standards for the policy applied for. . . . " The receipt further expressly provides that "[i]f the insurance applied for is not effective under the exact conditions specified in this receipt, the insurance shall not take effect until a policy therefor is delivered to and received by the applicant and the first premium paid while the Proposed Insured is insurable according to the Company's rules and standards for such policy."

All of the evidence in this case indicates that the application which plaintiff and her husband made for an insurance policy to be issued at standard premium rates was not accepted by the defendant insurance company because it determined on the basis of information contained in the medical examination of Charles N. McLean, one of the proposed insureds, that he was not insurable at the premium rate applied for in accordance with its rules, limits and standards for the policy applied for. There was no evidence that in making this determination the insurance company acted unreasonably, arbitrarily, or in bad faith. There is no dispute but that the medical examination, which was made for the insurance company by the proposed insured's own personal physician, correctly revealed that the proposed insured had been hospitalized within the year for treatment of a peptic ulcer. The defendant presented uncontra-

dicted evidence in the testimony of an Assistant Manager of its Underwriting Department and from the pertinent page of its Underwriting Manual which established the rating applicable for an individual 45 years of age, as was Charles McLean, who is shown to have had peptic ulcer hospitalization within one year of the application. That the plaintiff wife, who had also previously had an ulcer, was not rated was explained by the fact that her ulcer occurred in 1963, some five years before the application, and did not require hospitalization. While there was some evidence that the defendant's local agent may have learned of Charles McLean's death a day or two after it occurred, there was evidence that the personnel in defendant's Underwriting Department learned of his death only on 3 or 4 June, some six or seven days after the rated policy was issued.

It was an express condition of the advance payment receipt that the proposed insured be insurable *at the premium rate applied for* if the insurance was to take effect on the date the application, including the required medical examination, was completed. All of the evidence shows that Charles N. McLean was not insurable at the premium rate applied for. Accordingly, this condition precedent was not complied with. The subsequent issuance of a policy calling for a higher than standard premium constituted, in effect, a rejection of the offer contained in the application and a counter offer by the insurance company. *Novellino v. Life Insurance Co. of North America,* 216 A. 2d 420 (Del. 1966). Because of Charles McLean's death, the counter offer could not be accepted by him. Thus, all of the evidence in this case established that no contract of insurance became effective during the life of Charles N. McLean. *Cheek v. Insurance Co.,* 215 N.C. 36, 1 S.E. 2d 115; *Gulf Life Insurance Company v. Bohannon,* 101 Ga. App. 58, 112 S.E. 2d 801; See Annotation, 2 A.L.R. 2d 943.

The case of *Wright v. Pilot Life Insurance Company,* 379 F. 2d 409 (4th Cir. 1967), cited and relied on by the plaintiff, is distinguishable from the case before us. In that case Wright had applied for insurance, had paid his first monthly premium, and had been given a "Conditional Receipt" which provided that by making such advance payment the insurance would be placed "immediately in full force and effect" provided he was insurable. Before any medical examination was made and before the insurance company had either approved or declined the applica-

tion, Wright was killed in an accident. The trial judge dismissed the claim. The Circuit Court reversed and remanded the case for a jury trial on the issue of Wright's insurability on the date of issuance of the conditional receipt. In the case before us a medical examination of the proposed insured was made during his lifetime and it was on the basis of the facts disclosed in this examination that it was determined that the proposed insured was not insurable at standard rates.

The language employed by the defendant insurance company in its "Advanced Payment Receipt" in the present case is, in our opinion, clear and unambiguous. Therefore, we do not find it susceptible to the interpretation, which plaintiff urges, that it provided temporary insurance until the proposed insured receives notice of its acceptance or rejection. The rule of liberal construction of insurance policies does not extend so far as to permit the courts to rewrite them.

Defendant's motions for a directed verdict and for judgment n.o.v. should have been allowed.

Reversed.

Chief Judge MALLARD and Judge GRAHAM concur.

PETROLEUM TANK SERVICE, INC. v. MELVIN FORTNER, d/b/a DELTA MAINTENANCE CO.

No. 7126SC167

(Filed 28 April 1971)

1. **Appeal and Error § 57— nonjury trial — review of findings and judgment**

Where a jury trial is waived, the court's findings of fact are conclusive if supported by any competent evidence, even though there is evidence *contra*, and a judgment supported by such findings will be affirmed.

2. **Money Received § 3— indebtedness for advancements made — testimony by auditor**

Trial court's finding that defendant was indebted to plaintiff for advances made was supported by the testimony of an auditor selected by the referee to audit plaintiff's books.

3. Evidence § 33— hearsay evidence — failure to object

Hearsay evidence admitted without objection may be considered with the other evidence and given any evidentiary value which it may possess.

APPEAL by defendant from *Martin, Superior Court Judge,* 14 September 1970, Schedule A, Civil Session of MECKLENBURG County Superior Court.

Plaintiff instituted this action to recover amounts allegedly due under an agreement whereby defendant was to obtain contracts for plaintiff to paint towers. Plaintiff alleged that the profits or losses from the contracts would be shared seventy-five percent (75%) by plaintiff and twenty-five percent (25%) by defendant; that defendant did obtain contracts; that the contracts for those jobs have been completed at a loss and defendant's share of that loss comes to $3,363.95; and that plaintiff, at the request of defendant, advanced defendant the sum of $5,151.00 with the understanding that said sum would be paid back out of the profits, if any; otherwise, defendant would reimburse plaintiff for the advances.

Defendant admitted the existence of the agreement with plaintiff for the procuring of contracts to paint towers but denied that he was liable for any of the losses arising out of such contracts. Defendant also denied being indebted to plaintiff on any advances made by plaintiff to defendant. By way of counterclaim, defendant alleged that plaintiff had, in fact, made a profit on the various contracts and that, as his share, defendant is entitled to the sum of $28,077.08. Defendant further alleged that he is entitled to the sum of $15,000.00 as the amount that he lost when the plaintiff arbitrarily reduced one contract by $60,000.00.

The court, of its own motion, referred the matter to a referee to hear evidence and report his findings of fact and conclusions of law. Based on the final report of the referee and the evidence presented at the hearing conducted by the referee, the court found as a fact:

> "14) That the plaintiff and the defendant agreed to procure and perform contracts to paint towers being constructed in Greenville, North Carolina, and in Cutler, Maine.

15) It was a part of the agreement between the plaintiff and the defendant that the plaintiff would receive seventy-five percent (75%) of the profits and the defendant would receive twenty-five percent (25%) of the profits from such contracts.

16) The total contract price, including change orders, for the job in Cutler, Maine, was Two Hundred Twenty-Two Thousand Three Hundred Thirty Dollars ($222,330.00).

17) The total contract price, including change orders, for the job in Greenville, North Carolina, was Twenty-Six Thousand Nine Hundred Seventy-One Dollars ($26,971.00).

18) According to the testimony of the defendant, the job overhead factor to be used in computing plaintiff's profit and loss on each job was ten percent (10%).

19) According to the testimony of the auditor, the plaintiff's actual job overhead factor for computing profit and loss was between twenty-four percent (24%) and twenty-six percent (26%).

20) On the basis of a ten percent (10%) overhead factor there would have been a profit on the Greenville, North Carolina, job of Four Thousand One Hundred Twenty-One Dollars and Fifty-Three Cents ($4,121.53), one-fourth (¼) of which, or One Thousand Thirty Dollars and Thirty-Eight Cents ($1,030.38), would be due the defendant.

21) On the basis of a ten percent (10%) overhead factor there would have been a profit on the Cutler, Maine, Job of Ten Thousand Two Hundred Seven Dollars and Sixty-Six Cents ($10,207.66), one-fourth (¼) of which, or Two Thousand Five Hundred Fifty-One Dollars and Ninety-Two Cents ($2,551.92) would be due the defendant.

22) During the period from March 10, 1967 through June 9, 1967, the plaintiff advanced to the defendant the sum of Five Thousand One Hundred Fifty-One Dollars ($5,151.00)."

The judgment recited that the defendant had waived his right to a jury trial, and that plaintiff had filed a waiver for the purposes of the proceeding, of any judgment in excess of One Thousand Five Hundred Sixty-Eight Dollars and Seventy-Cents

($1,568.70), that being the amount which would be due plaintiff after first deducting from the advances of Five Thousand One Hundred Fifty-One Dollars ($5,151.00) defendant's share of profits if computed on the basis of a ten percent (10%) overhead factor. The court then concluded as a matter of law that there was no evidence to support the contention of plaintiff that defendant is liable for twenty-five percent (25%) of losses, if any, on either of the subject jobs; and that defendant is indebted to plaintiff in the amount of $1,568.70 for monies advanced. Judgment was entered in favor of plaintiff in the amount of $1,568.70.

From the judgment in favor of plaintiff, defendant appeals to this Court.

Sanders, Walker & London by Arnold M. Stone for plaintiff appellee.

B. Kermit Caldwell for defendant appellant.

CAMPBELL, Judge.

[1] The defendant was not represented by counsel before the referee. Defendant's first assignment of error is directed at the finding of the trial judge that the defendant was indebted to the plaintiff in the amount of $5,151.00 for advances made from 10 March 1967 to 9 June 1967. Where a jury trial is waived, the court's findings of fact are conclusive if supported by any competent evidence, even though there is evidence *contra,* 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); *Goldman v. Parkland,* 7 N.C. App. 400, 173 S.E. 2d 15 (1970).

[2, 3] We are of the opinion that the testimony given by J. T. Hendrix, the auditor selected by the referee to audit the books of the plaintiff, provides sufficient evidence to sustain the findings of fact. This testimony, in part, is as follows (as summarized in the record):

> "Mr. Hendrix then traced the contract amounts into the Petroleum Tank Service cash journal and found them to be in agreement with the contract figures stated. For the payroll, Hendrix added all payroll sheets for both jobs and cross-checked them and traced these amounts to disbursements.

* * *

Hendrix also made an audit with regard to advances made to Mr. Fortner by Petroleum Tank Service and substantiated $5,150.00 in disbursements to Mr. Fortner, all endorsed by Mr. Fortner in the period of March, 1967, through June, 1967. Included in this amount was a check for $376.00 which was actually disbursed in September of 1967. These checks were not entered as salary. All the checks were for round figures, $100, $400, $300, except for the $376.00 check, previously mentioned.

During the subject period Mr. Fortner was receiving approximately $225.00 per week in gross salary which salary was included in the audit as an expense item, $900.00 having been entered on the Greenville, North Carolina, job. There was $450.00 entered on the Cutler, Maine, Job and eight weeks of salary paid by Midwest Construction Company.

* * *

There was nothing in the books and records to indicate that any of the sums paid to Fortner went to any other employee on any other job or to reimburse any travel expenses Fortner had while soliciting work for this company.

With respect to the questions asked of me by Mr. Fortner about whether some of the checks about which I have testified had been for the purpose of reimbursement, I would like to say that I went to these checks which were claimed as advances. Now there were, I know at that time other checks which were written to Mr. Fortner which I did not vouch and which had been entered, I recall from memory, as reimbursement for expenses. As I stated before I was told only to go along the line and validate the $5,150.00 which I did, but this does not mean that these were the only checks written to Mr. Fortner during the period involved.

* * *

. . . I also have on there that the checks were written for Melvin Fortner and the checks were signed. I did not find that any portion of this was advances to employees. . . . "

At one point during the hearing, in referring to the checks written to Mr. Fortner, Mr. Hendrix stated that " . . . These checks were claimed by Petroleum Tank Service, whose records he went over, to be advances to Mr. Fortner . . . . " While this testimony is hearsay, no objection was made to its admission, thus it may be considered with the other evidence and given any evidentiary value which it may possess. *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667 (1951); *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895 (1951).

Defendant's only other assignment of error is also directed at portions of the trial judge's findings of fact. We have examined the record and are of the opinion that the evidence is sufficient to support all of the findings of fact and that the findings of fact support the conclusions of law.

Affirmed.

Judges BRITT and GRAHAM concur.

PAUL HEINZ GROHMAN v. N. LINWOOD FRANKIE JONES, HANDI-CLEAN PRODUCTS, INC., AND DIXIE RENTAL SERVICE, INC.

— AND —

VIRGINIA SHARON GROHMAN v. N. LINWOOD FRANKIE JONES, HANDI-CLEAN PRODUCTS, INC., AND DIXIE RENTAL SERVICE, INC.

Nos. 7126SC209 and 7126SC210

(Filed 28 April 1971)

Process § 16— substituted service on Commissioner of Motor Vehicles — motorist establishing residence in another state — insufficiency of affidavit

Statement in an affidavit submitted by plaintiff's attorney that he is informed and believes that defendant has left the state and established residence elsewhere is hearsay and incompetent to support substituted service on the Commissioner of Motor Vehicles under [former] G.S. 1-105.1, and competent evidence in the affidavit showing only that summonses were returned unserved and that registered letters mailed to defendant by the Commissioner of Motor Vehicles were returned unclaimed was insufficient to support the substituted service.

Grohman v. Jones

APPEALS by defendants from *Fountain, Superior Court Judge,* 26 October 1970, Civil D Session of MECKLENBURG Superior Court.

These cases, which are consolidated for the purposes of this appeal, arose out of a collision between an automobile driven by plaintiff Paul Heinz Grohman, accompanied by plaintiff Virginia Sharon Grohman as a passenger, and an automobile owned by Dixie Rental Service, Inc., leased to Handi-Clean Products, Inc., and driven by N. Linwood Frankie Jones. Plaintiffs alleged that they suffered personal injuries as a result of the collision and that the collision was caused by the negligence of the defendants.

Summonses were issued and served on defendants Handi-Clean and Dixie Rental. N. Linwood Frankie Jones was not served with summons, and the summonses to both Mecklenburg County and Alamance County were returned with the notation that he was not to be found in either of those two counties. Alias summonses were then issued and served by delivering copies of the summonses and complaints in the office of the Commissioner of Motor Vehicles of North Carolina as the process agent for Jones under the provisions of G.S. 1-105 and G.S. 1-105.1 (repealed 1967 effective 1 January 1970).

On 5 September 1969, the attorney for the plaintiffs filed practically identical affidavits for each plaintiff in compliance with the statute. The affidavits stated:

> "2. That this Affiant is informed and believes and so states that N. Linwood Frankie Jones, one of the defendants in the above-entitled action, was a resident of Alamance County, North Carolina, at the time the plaintiff's alleged cause of action arose, to-wit: August 22, 1967, the said alleged cause of action involving an automobile accident on the public highways in the State of North Carolina whereby the said defendant was an operator of a motor vehicle involved in such collision, but that since August 22, 1967, the said defendant has removed himself from the State of North Carolina and has established residence outside the State of North Carolina, the said residence and whereabouts of the defendant, at all times, being unknown to the plaintiff;

3. That original Summons and copy of Complaint were directed to the Sheriff of Alamance County, North Carolina, on September 20, 1968, by the Clerk of Superior Court of Mecklenburg County, North Carolina, for service of the same upon the defendant, N. Linwood Frankie Jones, 1122 Graham Street, Burlington, North Carolina, and that said Summons and copy of Complaint were returned by the Sheriff of Alamance County, North Carolina, to the Clerk of Superior Court of Mecklenburg County, North Carolina, unserved on the defendant;

4. That thereafter Summons was extended at the requests of the plaintiff, by successive endorsements by the Clerk of Superior Court of Mecklenburg County, North Carolina, on each of the following days: December 17, 1968; January 31, 1969; and April 16, 1969;

5. That on April 16, 1969, the Clerk of Superior Court of Mecklenburg County, North Carolina, issued an Alias Summons to the Sheriff of Wake County, North Carolina, directing the said Sheriff to deliver a copy of said Summons and Complaint to N. Linwood Frankie Jones, whose last known address is 1122 Graham Street, Burlington, N. C., by serving Ralph L. Howland, Commissioner of Motor Vehicles for the State of North Carolina, as statutory agent for N. Linwood Frankie Jones; and that the said Sheriff of Wake County made said service on the said Commissioner, as said statutory agent for the defendant, on April 18, 1969;

6. That this Affiant is informed and believes and so states that the said Commissioner of Motor Vehicles forwarded, by registered letter, return receipt requested, copies of said Complaint and Summons in said action, to the defendant, N. Linwood Frankie Jones, 1122 Graham Street, Burlington, North Carolina, with directions to 'Deliver to Addressee Only,' under registered #12681 [#12682 in second action against defendants], said registered letter being posted in the United States Mail at Raleigh, North Carolina, on April 18, 1969;

7. That this Affiant is informed and believes and so states that the said registered letter #12681 [#12682] was not personally delivered to the defendant, N. Linwood

Frankie Jones, but was unclaimed at the aforesaid address, the said registered letter bearing postal markings of 'Unclaimed at this Address' and 'Addressee Unknown,' and that by reason of said registered letter being unclaimed, it was returned by the United States Post Office to the said Commissioner of Motor Vehicles on April 23, 1969, the said letter being received by said Commissioner of Motor Vehicles on April 23, 1969;

8. That this Affiant attaches hereto the aforesaid original envelope, bearing registered #12681 [#12682];

9. That this Affidavit is being made in compliance with the requirements of North Carolina General Statutes 1-105 and 1-105.1 and is appended to the Summons in this cause and filed therewith in the Office of the Clerk of Superior Court of Mecklenburg County, North Carolina."

Defendants, on 15 September 1969, filed a motion to quash the service of process on defendant Jones by service on the Commissioner of Motor Vehicles on the grounds that the affidavits filed by plaintiffs show no basis for the assertion that defendant Jones has left North Carolina, thus making him subject to service of process under G.S. 1-105 and G.S. 1-105.1.

On 2 November 1970, the trial judge granted a motion to dismiss as to defendant Dixie Rental Service, Inc., for failure to state a claim, but denied the motion to quash service of process as to defendant Jones.

From the order denying the motion to quash service of process as to defendant Jones, defendant Handi-Clean Products, Inc., appeals to this Court.

A. A. Canoutas for plaintiff appellee.

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., for defendant appellant (Handi-Clean Products, Inc.).

CAMPBELL, Judge.

Defendant Handi-Clean Products, Inc., assigns as error the denial of the motion to quash service of process as to N. Linwood Frankie Jones.

G.S. 1-105, at the time this action was commenced, set forth the procedures to be followed in effecting service on nonresident drivers of motor vehicles. Under G.S. 1-105.1, the provisions of G.S. 1-105 were made applicable "to a resident of the

State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for sixty (60) days or more, continuously whether such absence is intended to be temporary or permanent."

No question having been raised as to whether defendant Jones was a resident at the time of the accident complained of to obtain service of process under these statutes, plaintiffs must show either: (1) that defendant had established a residence outside the State subsequent to the accident or collision, or (2) that he left the State subsequent to the accident or collision complained of and remained absent from the State for sixty days or more, continuously.

Upon the motion to quash the service, it became incumbent upon the plaintiffs to present evidence to support the service of process. *Coble v. Brown,* 1 N.C. App. 1, 159 S.E. 2d 259 (1968). The answers to interrogatories served upon plaintiffs by defendant Handi-Clean indicated that neither plaintiff had any knowledge of the whereabouts of defendant Jones at any time subsequent to the accident and that any information concerning knowledge of the whereabouts of Jones must come from their attorney. The affidavit submitted by the attorney states that upon information and belief the defendant Jones has left the State and established residence elsewhere. But that statement is only hearsay and not competent evidence. *Coble v. Brown, supra.* When all incompetent evidence in the affidavit is disregarded, it states only that the summonses directed to the Sheriff of Alamance County were returned unserved and that the registered letters mailed by the Commissioner of Motor Vehicles to the defendant Jones at 1122 Graham Street, Burlington, North Carolina, were returned unclaimed.

There is no competent evidence to show that defendant Jones had in fact left the State, and in view of that, it was error for the trial judge to deny defendant Handi-Clean's motion to quash the service of process upon Jones. *Coble v. Brown, supra,* is controlling.

Reversed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. TED FLOYD PAYNE, JR.

No. 7124SC96

(Filed 28 April 1971)

1. **Criminal Law § 91— motion for continuance — missing defense witness**

Defendant's motion for continuance on the ground that the essential defense witness had been subpoenaed but not located *held* properly denied by the superior court judge in the exercise of his discretion, where (1) the sheriff testified that he and his deputies were unsuccessful in their attempts to locate the witness in the county and (2) the defendant had made no effort to secure the witness in the trial in the district court.

2. **Criminal Law § 128— mistrial — nonresponsive answer of State's witness**

Nonresponsive answer by the State's witness on cross-examination did not warrant an order of mistrial in this drunken driving prosecution.

Judge GRAHAM dissenting.

APPEAL by defendant from *Froneberger, Superior Court Judge,* 31 August 1970 Criminal Session, MADISON County Superior Court.

Defendant was charged in a warrant, proper in form, with driving an automobile on the highways of the State while under the influence of intoxicating liquor.

Evidence for the State tended to show that defendant was observed driving a pick-up truck on Rural Unpaved Road 1127 by a State Highway Patrolman and another witness. The patrolman turned around and began pursuing the defendant, who speeded up to a high rate of speed. After being pursued for almost two miles, defendant stopped the truck and got out of the driver's side and was placed under arrest by the patrolman. Defendant was taken to the Mars Hill Police Station and given a breathalyzer test, which showed a reading of .19.

Defendant's evidence tended to show that he was not driving the pick-up truck at the time in question, but was only a passenger, and the truck was driven by one Dean Henderson. When the truck stopped, defendant got out on the passenger's side and Dean Henderson got out on the driver's side and ran through the field toward the woods. Defendant attempted to

subpoena Dean Henderson, but he was never served and did not appear in court.

From a verdict of guilty and a sentence of six months, suspended for twelve months upon condition that he not operate a motor vehicle on the highways of North Carolina for at least twelve months and pay a fine of $100.00, defendant appeals to this Court.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and T. Buie Costen for the State.

Swain and Fowler by Robert S. Swain for defendant appellant.

CAMPBELL, Judge.

[1] Defendant's first assignment of error is directed at the court's refusal to grant defendant's motion for a continuance. The motion was based on the fact that an essential defense witness was not present in court, although a subpoena had been issued. A motion for a continuance is addressed to the discretion of the court and should not be disturbed absent a showing of an abuse of this discretion. *State v. Patton,* 5 N.C. App. 164, 167 S.E. 2d 821 (1969), *cert. denied,* 275 N.C. 597 (1969).

Here, no abuse of the trial judge's discretion is shown. The record discloses that the "essential defense witness" was Dean Henderson, the man that defendant claimed was driving the pick-up truck. Dean Henderson was not present nor was he subpoenaed for the trial in the district court. Both the Sheriff of Madison County and a deputy sheriff testified as to the efforts they made to locate Dean Henderson and serve the subpoena. The deputy sheriff testified that he was unable to locate Dean Henderson and was informed that he was out of the county. The defendant himself testified that:

> " . . . It has been over a month or more since I talked to Dean Henderson. There's no use trying to get him here. . . . He said that he didn't want to come to Court. . . . "
>
> " . . . I believe that he might be in Buncombe County with his sister. He spends a week with her now and then. It has been over a month since I have seen him.—It's not been that long. He was down on the river fishing one night

with his sister, the one that lives in Buncombe County. I really don't know anything about Buncombe, or him. He might spend a week up there with his sister, or a day, I don't know."

Under these circumstances, no abuse of discretion is shown, and defendant's first assignment of error is overruled.

[2] Defendant next assigns as error the failure of the trial judge to grant defendant's motion for a mistrial where a witness for the State gave a nonresponsive answer on cross-examination. As a general rule, a motion for a mistrial is addressed to the discretion of the trial judge, and the ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion. *State v. Williams,* 7 N.C. App. 51, 171 S.E. 2d 39 (1969); *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966). Here, the testimony complained of was elicited by counsel for defendant on cross examination; the record does not disclose what the question was that brought about the answer of the witness; and apparently no motion to strike the testimony was made. From these facts, no abuse of discretion can be seen.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

For the reasons stated, in the trial below there was

No error.

Judge BRITT concurs.

Judge GRAHAM dissents.

Judge GRAHAM dissenting.

Defendant testified that after he was arrested and placed in the patrol car, the arresting officer pursued a Mercury automobile at high speed for three or four minutes. In instructing the jury the court stated: "He contends, that is, the defendant, that he had ridden around with the officers and chased other automobiles *or other offenders* and that he had ample opportunity to possibly consume alcohol in the interim." (Emphasis added.) In my opinion, the court's inadvertent reference to "other offenders" constitutes an expression of opinion on the facts in violation of G.S. 1-180 and is grounds for a new trial.

Defendant denied strenuously that he had committed any offense. To characterize the driver of the automobile subsequently pursued by the officer as an "other offender" was to necessarily characterize defendant as an "offender."

I further find prejudicial error in the court's failure to sustain defendant's objection to testimony of a State's witness which was prejudicial and unresponsive to a question relating to the height of some bushes which defendant apparently contended obstructed the witness' view of the driver of the truck. This colloquy is set forth under defendant's Assignment of Error No. 13 as follows:

"Q. They're up high enough to where you have difficulty seeing through them—

A. No, that was not, now, Mr. Swain. Them bushes wasn't there at this time. I ain't got a thing against that boy. If I had had, next morning after he had his trial, here he come down there drunk, cussing and abusing me; and right there sets my youngest boy—I had him take him home.

MR. SWAIN: Objecting and move for a mistrial.

THE COURT: Overruled.

MR. SWAIN: Your Honor, that was not a responsive answer.

THE COURT: That's a response to your question.

MR. SWAIN: I did not ask—

THE COURT: All right, I overruled the objection, Mr. Swain."

I agree with the majority opinion that whether defendant's motion for a mistrial should have been granted was within the discretion of the trial court. However, even though the motion for a mistrial was denied, it was nevertheless the duty of the court to sustain defendant's objection and instruct the jury not to consider the obviously unresponsive and prejudicial portion of the witness' statement.

For the reasons set forth I vote to award defendant a new trial.

Robinson v. McAdams

BLONDELL ROBINSON, ADMINISTRATRIX OF THE ESTATE OF RICHARD CARL ROBINSON v. CHARLIE McADAMS, JIMMY McADAMS, AND BARBARA GOODE BLUE, ADMINISTRATRIX OF THE ESTATE OF RICHARD BLUE, JR.

No. 7128SC264

(Filed 28 April 1971)

1. **Appeal and Error § 18— improper filing of briefs — taxing of costs to appellants**

As to defendants who had previously been dismissed from the lawsuit, it was improper for appellants to have caused the defendants to file a brief on the appeal; accordingly, the cost of printing the defendants' brief will be taxed to the appellants.

2. **Judgments § 21— setting aside consent judgment — lack of court's authority**

Trial court erred in setting aside, during a two-week session of court, a consent judgment that was entered into by the plaintiff and the defendant during the session, the court having no authority to set it aside (1) on plaintiff's motion, (2) on the court's motion *ex mero motu,* or (3) in the court's discretion in the interest of justice.

3. **Judgments § 21— attack on consent judgment — motion in the cause**

The proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause.

4. **Judgments § 21— attack on consent judgment — fraud — mutual mistake**

The procedure to set aside a consent judgment for fraud or mutual mistake is by independent action.

5. **Judgments § 21— setting aside consent judgment — grounds of fraud**

The setting aside of a consent judgment for fraud committed *suppressio veri* or *suggestio falsi* must be accomplished in an independent action instituted for that purpose.

6. **Judgments §§ 6, 21 — setting aside judgment in fieri — consent judgment**

A consent judgment is an exception to the rule that the trial judge may set aside a judgment *in fieri* on his own motion or at the suggestion of counsel.

APPEAL by defendants from *Martin (Harry C.), Judge of Superior Court,* 16 November 1970 Session, BUNCOMBE Superior Court.

This action was instituted to recover damages for the alleged wrongful death of Richard Carl Robinson (Robinson).

It is alleged by plaintiff that Robinson was a passenger in an automobile being operated by Richard Blue, Jr. (Blue) on Southside Avenue in the City of Asheville, on 24 December 1967. It is alleged that the automobile being operated by Blue collided with an automobile being operated by Jimmy McAdams, and owned by Charlie McAdams. Plaintiff alleged negligence on the part of the operators of both automobiles.

Because of a prior action pending, this action was dismissed as to Jimmy McAdams and Charlie McAdams on 25 July 1969.

Following considerable negotiations looking toward a settlement of the controversy, a consent judgment was entered into between the Administratrix of Robinson and the Administratrix of Blue. This judgment was signed on 23 November 1970 by Honorable Harry C. Martin, Judge Presiding over the 16 November 1970 two-week Civil Session. The consent to the judgment was signed by counsel for both parties.

On 25 November 1970 counsel for plaintiff filed a motion to set aside the consent judgment entered on 23 November 1970. The motion reads as follows:

> "Now comes the plaintiff, Blondell Robinson, Administratrix of the Estate of Richard Carl Robinson, by and through her attorneys, Landon Roberts and Hendon & Carson, and respectfully moves the Court that the consent judgment heretofore entered in this cause on Monday, November 23, 1970, be set aside in the discretion of the Court, and as grounds therefor the plaintiff respectfully shows to the Court:
>
> "1. That all negotiations for settlement of this case were predicated upon the belief of the plaintiff's attorneys that there was a primary policy of 5-10-5 limits of the St. Paul and a 5-10-5 policy of State Farm being in excess.
>
> "2. That upon the offer of Harry DuMont of $3,500.00 on behalf of St. Paul, which with the other offers heretofore accepted totaled the sum of $10,000.00, and the contention by Mr. DuMont that State Farm had coverage defenses and the suggestion of the Trial Judge that judgment in the amount of $8,500.00 be entered, settlement was agreed upon and reduced to writing.

"3. Prior to the signing of the judgment the representation of coverage defenses by State Farm was repudiated by Mr. DuMont and he stated that no representation of St. Paul's limits of liability of the St. Paul had been positively made, and that they were in excess of $10,000.00.

"4. Notwithstanding such disclosures, plaintiff's attorneys having theretofore released their witnesses and another case having been called, and having committed their client, consented to the judgment as drawn, which upon reflection while the Court is still in session they feel is improper to their client, the defendant, to the insurance industry, to the attorneys involved and to the proper administration of justice.

"5. That for the judgment as signed to stand would be conducive of further litigation rather than the termination of litigation.

"WHEREFORE, the plaintiff prays that the consent judgment heretofore entered be set aside and this case set for trial at this Session or the next ensuing Session."

Hearing upon the motion was conducted by Judge Martin on 27 November 1970. No evidence was offered on the hearing; the only thing heard by Judge Martin was considerable statement of counsel. At the conclusion of the statements and arguments of counsel, Judge Martin entered the following Order:

"THIS CAUSE coming on before the undersigned Judge assigned to the Superior Court of the 28th Judicial District on the motion of the plaintiff to set aside the consent judgment entered in this case on November 23, 1970, and after considering the record proper and hearing the arguments of counsel for the plaintiff, Landon Roberts and Philip Carson, and hearing the argument of counsel for the defendant, Harry DuMont, and hearing the statement of O. E. Starnes, counsel for State Farm Insurance Company, the alleged excess carrier on the automobile belonging to Redfern, being the automobile in which it is alleged that plaintiff's intestate was riding as a passenger at the time of the alleged incident;

"And the Court also considering on its own motion the question of setting aside the judgment, said judgment

having been entered by this Court during this session of Court;

"IT IS, THEREFORE, HEREBY ORDERED, in the discretion of the Court and in the interest of justice, that the judgment heretofore entered in this case on November 23, 1970, be, and the same is hereby vacated, set aside, and declared null and void.

"Upon the examination of the record proper, the court finds that there has heretofore been filed in this case a motion to dismiss pursuant to Rule 12 and a motion to amend, both motions being filed by the defendant. The Court does not at this time pass on the motion to dismiss. The motion to amend is, in the discretion of the Court, allowed.

"This order setting aside said judgment is entered both by allowing plaintiff's motion and also as based upon the Court's actions ex mero motu in its discretion and in the interests of justice to set aside said judgment during term time.

"This, the 27th day of November, 1970."

From the entry of the order setting aside the consent judgment the defendant, Administratrix of Blue, appealed.

Landon Roberts, George Ward Hendon, and Philip G. Carson, by Landon Roberts, for plaintiff.

Uzzell & DuMont, by Harry DuMont, for defendant, Administratrix of Blue.

Williams, Morris & Golding, by James N. Golding, for defendants Charlie McAdams and Jimmy McAdams.

BROCK, Judge.

[1] Defendants Charlie McAdams and Jimmy McAdams have filed a motion in this Court to dismiss this appeal as to them. They have been out of this case since it was dismissed as to them on 25 July 1969. This appeal should never have indicated that they are still parties defendant. The appellant was wrong in causing the McAdams defendants to have to file a brief in this appeal, and the cost of printing the brief of Charlie and Jimmy McAdams will be taxed against the appellant, Admin-

istratrix of Blue. The motion of Charlie McAdams and Jimmy McAdams to dismiss this appeal as to them is allowed.

[2] It seems quite clear from reading Judge Martin's Order setting aside the consent judgment that he did so upon three grounds: (1) by allowing plaintiff's motion to set it aside; (2) by acting *ex mero motu* in his discretion during the two-week session when a judgment would ordinarily be *in fieri;* and (3) in his discretion in the interest of justice. It is also quite clear that Judge Martin made no findings of fact to support setting aside the judgment upon any of the three grounds stated. There was absolutely no evidence offered from which the judge could make findings of fact, and if there was evidence within his personal knowledge he failed to state what that evidence was.

It is interesting to note that in plaintiff's motion it is stated that prior to signing the consent judgment a full disclosure of the insurance coverage was made, but plaintiff's attorneys nevertheless executed the judgment as drawn, but "which upon reflection while the Court is still in session they feel is improper . . ." Clearly the motion does not allege fraud, mutual mistake, or that consent was not in fact given. Obviously plaintiff's counsel, and the able judge, felt that something had gone awry, but the appellate courts can only make determinations on what appears in the record on appeal.

[3, 4] "A judgment entered upon solemn consent of the parties cannot be changed or altered without the consent of the parties to it, or set aside except upon proper allegation and proof, and a finding of the court that it was obtained by fraud or mutual mistake, or that consent was not in fact given, the burden being on the party attacking the judgment." 5 Strong, N. C. Index 2d, Judgments, § 21, p. 41. The proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause. The procedure to set aside a consent judgment for fraud or mutual mistake is by independent action. 5 Strong, N. C. Index 2d, Judgments, § 21, p. 42.

[5] There is no evidence or finding by Judge Martin that consent was not in fact given by plaintiff, and such theory is not urged upon us on this appeal. Plaintiff argues on appeal that the consent judgment was obtained by fraud committed *sup-*

pressio veri. If plaintiff is entitled to have the consent judgment set aside on the grounds of fraud committed *suppressio veri* or committed *suggestio falsi,* it will have to be accomplished in an independent action instituted for that purpose. *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507.

[6] Plaintiff also argues that the consent judgment was *in fieri* during the two-week session and that Judge Martin had the authority, for that reason, to set it aside in his discretion. A consent judgment is an exception to the rule that all judgments are *in fieri* during the session and that it is in the breast of the judge to abrogate on his own motion or at the suggestion of counsel. *Deaver v. Jones,* 114 N.C. 649, 19 S.E. 637.

So much of the Order entered by Judge Martin on 27 November 1970 as sets aside the consent judgment entered on 23 November 1970 is

Reversed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. BILLY HUGH MICHAELS

No. 7127SC208

(Filed 28 April 1971)

1. **Automobiles § 126; Evidence § 31— drunken driving — second offense — court record as best evidence of first offense**

In a prosecution for a second offense of drunken driving, the court record was the best evidence to establish defendant's first conviction of the offense, and the trial court erred in allowing a former municipal court clerk to testify from memory as to what the record indicated where there was no showing that the court record had been lost or destroyed.

2. **Automobiles § 126— drunken driving — incompetent evidence to show second offense — prejudice — maximum and minimum sentences for first and second offenses**

In a prosecution for a second offense of drunken driving, error in the admission of evidence to establish defendant's prior conviction was not rendered harmless by the 1969 amendment to G.S. 20-179 which set a maximum sentence of six months imprisonment for either a first or second offense, since the minimum sentence permitted for a second

offense remains greater than the minimum permitted for a first offense.

APPEAL by defendant from *Falls, Superior Court Judge,* 5 November 1970 Session of GASTON County Superior Court.

Defendant was tried in the District Court of Gaston County under a warrant charging that on or about 26 April 1970, defendant unlawfully drove a motor vehicle on the public highways of this State while under the influence of intoxicating liquor. The warrant further charged: "The defendant had previously been convicted of this same offense on December 15, 1955, in the Municipal Court, Gastonia, North Carolina." The District Court entered a verdict of guilty and found the conviction to be defendant's second offense "he having been convicted in the Municipal Court of Gastonia, N. C., on the 15 day Dec. 1955 (case no. 2613)." Judgment was entered imposing a sentence which was suspended for five years upon condition defendant pay a fine of $300 and comply with certain other conditions. Defendant appealed to the Superior Court.

Upon trial in Superior Court the jury returned a verdict of guilty as charged and specifically found defendant to have been previously convicted of driving an automobile while under the influence of an intoxicant in December of 1955. Judgment was entered imposing an active term of six months imprisonment. Defendant appealed.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Costen for the State.

Childers and Fowler by Max L. Childers and H. L. Fowler, Jr., for defendant appellant.

GRAHAM, Judge.

G.S. 15-147 provides: "In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, . . . a transcript of the record of the first conviction, *duly certified,* shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction." (Emphasis added.)

[1] The State did not offer into evidence any record, certified or uncertified, to show defendant's previous conviction. Rather,

it undertook to establish the previous conviction by the testimony of a magistrate who had formerly served as clerk of the City Court of Gastonia. He testified that he had reviewed the files of that court for 15 December 1955. Then, in response to questions by the solicitor, the witness proceeded to testify, presumably from his own recollection, as to what the court record indicated. Defendant objected to each question propounded and moved to strike the witness' testimony. Defendant's objections were overruled and his motion to strike the testimony was denied. Defendant excepted to each ruling and assigns as error the admission of the witness' testimony on the ground that the court record itself constituted the best evidence.

This assignment of error must be sustained. In *Jones v. Jones,* 241 N.C. 291, 85 S.E. 2d 156, Higgins, Justice, speaking for the court, set forth the following rule:

> "In order to admit secondary evidence of the contents of a court record, it is necessary that the foundation be laid by showing the original record has been destroyed, or lost. 'The record itself in the former action, being in existence, is the only evidence admissible to prove its contents.' *Gibson v. Gordon,* 213 N.C. 666, 197 S.E. 135; *Gauldin v. Madison,* 179 N.C. 461, 102 S.E. 851; *Little v. Bost,* 208 N.C. 762, 182 S.E. 448."

Quoting from *State v. Norris,* 206 N.C. 191, 173 S.E. 14, Justice Higgins' opinion continues as follows:

> " 'The proceedings of courts of record can be proved by their records only; that is by reason of the vagueness and uncertainty of parol proof as to such matters, and of the facility which the record affords of proving them with certainty. Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth.' "

Here, no foundation was laid for the introduction of the magistrate's testimony in that there was no showing that the court record had been lost or destroyed. Indeed, the contrary is indicated by testimony that "[t]he record is in City Hall."

[2] With respect to this assignment of error the State argues in its brief that while error may appear, it is harmless since under the 1969 amendment to G.S. 20-179 the maximum punish-

ment permissible for either offense is six months imprisonment. Before the amendment, only the minimum penalties for the two offenses were set forth in the statute. Since no maximum punishment was fixed by the statute, two years imprisonment could be imposed for either offense. *State v. Lee,* 247 N.C. 230, 100 S.E. 2d 372. Under the 1969 amendment, the minimum sentence permitted upon conviction for a second offense remains greater than the minimum permitted upon conviction for a first offense. Consequently, we see no significance in the 1969 amendment with respect to whether the error complained of here was prejudicial.

The case of *State v. Stone,* 245 N.C. 42, 95 S.E. 2d 77, appears controlling. There, defendant was charged with operating an automobile while under the influence of an intoxicant; "same being his third offense. . . . " Proper evidence was introduced as to one of the previous convictions; but as to the second, the trial court erroneously permitted the introduction of a court record showing that defendant had pleaded *nolo contendere* to the charge. Defendant was convicted and sentenced to six months imprisonment, a sentence which would have been permissible even if the conviction had been for a first offense. The Supreme Court ordered a new trial, holding that a plea of *nolo contendere* in a prior case is not equivalent to a plea of guilty as a basis for pronouncement of judgment under G.S. 20-179. The following language in the opinion is pertinent:

> "Since the evidence was sufficient to establish defendant's guilt in respect of a violation of G.S. 20-138 on 13 July, 1956, the judgment pronounced was authorized by G.S. 20-179, whether this was defendant's first, second or third violation thereof; for the difference in the punishment prescribed by G.S. 20-179 for a second or subsequent violation of G.S. 20-138 concerns only the *minimum* punishment to be imposed. Even so, these facts confront us: first, the court below may have been influenced in pronouncing judgment by the jury's verdict purporting to establish defendant's present conviction as his third conviction; and second, the admission in evidence of the record of the plea of *nolo contendere* entered 10 January, 1950, was prejudicial error. Since it did not support the allegation as to a prior *conviction* on 10 January, 1950, evidence offered initially by the State tending to show that defendant had been previ-

ously charged with an unrelated prior criminal offense and of the disposition thereof under plea of *nolo contendere* was incompetent. *S. v. McClain,* 240 N.C. 171, 81 S.E. 2d 364, and cases cited."

In *State v. White,* 246 N.C. 587, 99 S.E. 2d 772, defendant was charged in an original warrant with one previous offense of driving while under the influence of an intoxicant. Upon transfer of the case to the Superior Court defendant was indicted and convicted for a third offense. Upon appeal, the Supreme Court held:

"[T]he jurisdiction of the Superior Court was derivative and it had no power to impose a penalty greater than that provided for a second offense, since the violation charged in the original warrant alleged such violation as being a second offense. *S. v. Miller, supra.* It is true that under the provisions of G.S. 20-179 a penalty as great as that inflicted in the court below might be imposed for a first or second offense. *S. v. Stone, supra.* However, it appears from the judgment entered in the court below that his Honor took into consideration this conviction as being a third offense in determining what sentence should be imposed. Consequently, the judgment on the second count is hereby set aside and the cause is remanded for sentence as for a second offense as provided in G.S. 20-179."

The opinion noted that unlike *State v. Stone, supra,* no contention was made that any incompetent evidence was introduced to establish either of the previous convictions. Therefore, a new trial was unnecessary in the case, though it was necessary that it be remanded for proper sentencing.

Here, as in *State v. Stone, supra,* incompetent and prejudicial evidence was introduced to establish the previous conviction. Therefore a new trial must be ordered.

Since a new trial is necessary, we do not discuss other assignments of error.

New trial.

Judges CAMPBELL and BRITT concur.

DONNA HICKS DAVIS v. ROBERT JOSEPH DAVIS

No. 7126DC108

(Filed 28 April 1971)

1. **Appeal and Error § 57— failure to include evidence in record — review of findings of fact**

Where the evidence has not been brought forward in the record on appeal, the court's findings of fact properly made must be deemed supported by competent and sufficient evidence.

2. **Rules of Civil Procedure § 52; Trial § 58— nonjury trial — findings by court**

When it becomes incumbent on the trial court to make findings of fact, the court should make its own determination as to what pertinent facts are actually established by the evidence rather than merely reciting what the evidence may tend to show.

3. **Divorce and Alimony § 18— alimony pendente lite — wife's earnings substantially higher than husband's**

The trial court erred in awarding alimony and counsel fees *pendente lite* to the wife where the court found the husband earns a net monthly income of $318.92 while the wife earns a net monthly income of $349.70 even after a deduction therefrom of $52.00 per month for a "thrift fund." G.S. 50-16.3(a)(2)

4. **Divorce and Alimony § 18— life insurance with child as beneficiary — payment of premiums pendente lite**

The trial court erred in ordering defendant husband to pay *pendente lite* the monthly premiums on two life insurance policies in which the child of the parties is named as primary beneficiary, since such payments provide nothing to meet the immediate needs of the child pending the hearing of the case on the merits.

APPEAL by defendant from *Gatling, District Judge,* 28 September 1970 Session of MECKLENBURG District Court.

This is an appeal by defendant husband from an order entered in his wife's action for alimony without divorce awarding his wife alimony and other relief *pendente lite.* The order, which was entered after an evidentiary hearing before the District Judge, contained findings of fact, including the following:

"14. That the plaintiff presented evidence tending to show that the monthly living expenses necessary to support and maintain the plaintiff and said minor child total the sum of $602.46.

"15. That the defendant presented evidence tending to show that he presently resides in the home of his father, and that the defendant presently incurs the following monthly expenses: [There then follows an itemization of defendant's expenses, not including any item for rent, showing total monthly expenses of $314.21.]

"16. That the defendant is presently employed at Faul & Crymes, Inc. of Charlotte, North Carolina, and from said employment the defendant earns a net monthly income in the sum of $318.92.

"17. That the plaintiff is presently employed at Humble Oil & Refining Company and from said employment the plaintiff earns a net monthly income in the sum of $349.70, after all deductions, including a deduction in the sum of $52.00 per month for a thrift fund."

Based on its findings of fact, the District Court concluded that plaintiff was entitled to an award of alimony and other relief *pendente lite,* and thereupon ordered that plaintiff have custody of the minor child of the marriage, with certain visitation rights granted to defendant, that defendant pay the sum of $20.00 per week as alimony *pendente lite* for the maintenance and support of plaintiff, that defendant pay the sum of $25.00 per week for the support of the minor child of the parties, that the defendant continue to pay the monthly premium of $32.35 required to maintain in force a certain policy of life insurance insuring the life of the defendant in the face amount of $35,000.00 with the minor child named as principal beneficiary, that the defendant continue to pay the monthly premium of $2.78 required to maintain in force a certain policy of life insurance insuring the life of the plaintiff in the face amount of $2,083.00 with the minor child named as principal beneficiary, that plaintiff be awarded the exclusive use of the residence of the parties together with all household and kitchen furnishings therein, and that defendant pay to plaintiff's attorney the sum of $100.00 as an attorney's fee for services rendered to the plaintiff in the preparation and prosecution of this action through the date of said order.

From the foregoing order defendant appealed.

Bailey & Davis, by Gary A. Davis, for plaintiff appellee.

Robertson & Brumley, by Richard H. Robertson, for defendant appellant.

PARKER, Judge.

[1, 2] The evidence before the District Court not being brought forward in the record on appeal, the court's findings of fact properly made must be deemed supported by competent and sufficient evidence. *Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 171 S.E. 2d 406. At the outset, however, we observe that findings of fact Nos. 14 and 15 are not properly findings of fact at all but are merely recitations by the court as to what certain evidence tended to show. Where, as in this case, it becomes incumbent on the trial court to make findings of fact, the court should make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show.

By appropriate exceptions and assignments of error, this appeal questions whether the findings of fact properly made support certain of the court's conclusions of law and the provisions of the judgment based thereon. Appellant raises no objections to those portions of the order awarding custody of the minor child to his wife, awarding her exclusive possession of their homeplace and its contents, and directing that he pay $25.00 per week for support of the child. In this connection, the court found as a fact that prior to entry of the order defendant had been paying to plaintiff the sum of $125.00 per month for support of the child, an amount larger than the court ordered him to pay for that purpose. Appellant does contend that the court's findings of fact do not support its conclusion that the plaintiff wife is entitled to an award of alimony *pendente lite*, and he contends there was error in those portions of the order which directed him to pay $20.00 per week to his wife for that purpose and to pay the monthly premiums on the two life insurance policies in which the child is named as principal beneficiary.

The statute providing for an award of alimony *pendente lite* is as follows:

"§ 50-16.3. *Grounds for alimony pendente lite.*—(a) A dependent spouse who is a party to an action for absolute

divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

"(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.

"(b) The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made."

It should be noted that subparagraphs 1 and 2 of section (a) of the statute are in the conjunctive. Therefore, a dependent spouse is entitled to an award of alimony *pendente lite* only when the conditions described in both subparagraphs are made to appear.

[3] In the present case the trial court has found as a fact that defendant husband earns a net monthly income of $318.92, while his wife earns a net monthly income of $349.70 even after a deduction therefrom of $52.00 per month for a "thrift fund." No reason appears why the "thrift fund" deduction is not fully available to the wife. In any event, it is apparent from the court's factual findings properly made that the wife in this case has a monthly income substantially larger than her husband's. Under these findings it does not appear that she "has not sufficient means whereon to subsist during the prosecution . . . of the suit and to defray the necessary expenses thereof." Since this requirement of G.S. 50-16.3(a) (2) was not made to appear, it was error to award alimony *pendente lite* and counsel fees *pendente lite* in this case.

[4] The trial court also erred in ordering the defendant to pay the monthly premiums on the two life insurance policies in which the child is named as primary beneficiary. While maintenance of these policies may be desirable in order to provide future financial security for the child, and while the father, who

has shown a concern for his child, may himself decide to continue paying the monthly premiums, such payments provide nothing to meet the immediate needs of the child pending the hearing of this case on its merits. It was, therefore, error for the court to order the father to continue to make these payments. Moreover, the record does not indicate that plaintiff requested, either in her complaint or by motion, that such an order concerning insurance be made.

For errors in the court's order as noted, the cause is remanded for rehearing.

Error and remanded.

Chief Judge MALLARD and Judge VAUGHN concur.

JOHN DEWAYNE HOOVER v. GASTON MEMORIAL HOSPITAL, INC. AND DR. GEORGE R. MILLER

No. 7127SC47

(Filed 28 April 1971)

Physicians and Surgeons § 16— malpractice — injury while patient anesthetized — unknown cause — summary judgment

In an action against a hospital and a surgeon to recover for an injury allegedly sustained to a nerve in plaintiff's left arm while he was unconscious from anesthesia during surgery on his right arm, defendants' motion for summary judgment was properly allowed where the complaint alleged that plaintiff did not know who caused the injury or how it occurred, and defendants introduced a deposition of plaintiff showing only that he experienced pain in his left arm when he awoke in the recovery room, and depositions of the surgeon and hospital employees showing that they knew of no occurrence which could have caused the condition complained of. G.S. 1A-1, Rule 56(c).

APPEAL by plaintiff from *Falls, Superior Court Judge,* in Chambers, in Shelby, North Carolina, 11 September 1970.

Plaintiff instituted this action seeking to recover for personal injuries allegedly caused by defendants. In his complaint, plaintiff alleged that Dr. Miller had been treating him for a broken bone in his right arm; that an operation became

necessary and was performed in July 1968 by Dr. Miller in Gaston Memorial Hospital, Inc., (Hospital); that plaintiff was under a general anesthetic and totally unconscious while the operation was performed; and that when he became conscious again, he had a severe pain in his left arm which eventually caused a portion of his left hand to atrophy. An operation was later performed in December 1968 on the left arm in which the ulnar nerve was removed from its natural groove at the elbow and transplanted to a new location. Plaintiff alleged that he was unable to discover what happened to cause the injury but that Dr. Miller, his assistant, the nurses under his control, and the Hospital were negligent in that they permitted an injury to the ulnar nerve in the left arm of plaintiff.

Both defendants denied negligence in the performance of their duties and denied that anything had happened while plaintiff was anesthetized that could cause an injury to the ulnar nerve of plaintiff's left arm. Defendants then moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure and submitted in support of their motion eleven depositions taken by plaintiff and a deposition of plaintiff taken by defendants.

The depositions, taken by plaintiff, of Dr. Miller, his assistant, and the nurses who assisted in the treatment and care of plaintiff disclosed that none of the deponents had any knowledge of anything that happened while plaintiff was anesthetized that could cause injury to the ulnar nerve of plaintiff's left arm. None of the deponents had any knowledge or recollection of plaintiff complaining of pain in his left arm following the operation on his right arm in July 1968.

The deposition of the plaintiff, taken by defendants, revealed that plaintiff was not aware of anything that took place during the operation. After coming out from under the anesthetic plaintiff experienced pain in his left arm and so informed the nurses and doctors.

The trial judge granted defendants' motions for summary judgment and entered an order dismissing the action. From the order allowing defendants' motions for summary judgment and dismissing the action, plaintiff appeals to this Court.

Smathers & Ferrell by James C. Smathers for plaintiff appellant.

Hollowell, Stott & Hollowell by Grady B. Stott for defendant Dr. George R. Miller; and Jonas & Jonas by Harvey A. Jonas, Jr., for defendant Gaston Memorial Hospital, Inc., defendant appellees.

CAMPBELL, Judge.

Plaintiff assigns as error the granting of defendants' motions for 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." G.S. 1A-1, Rule 56(c).

Plaintiff alleges that he was injured due to the negligence of defendants or their agents, yet he states in his complaint that he does not know who caused the injury, how it happened, or when it happened, except that he alleges that it occurred while unconscious due to the anesthetic administered him. The depositions of Dr. Miller and those who assisted him in the operation failed to further clarify plaintiff's allegations of negligence. The depositions disclosed that none of the deponents had any knowledge of any occurrence that could have caused the injury complained of; nor did any of the deponents even know that an injury had occurred until sometime after the operation.

In the deposition of Dr. Miller, he stated:

> " . . . It is correct to say that I know of nothing that occurred at the July 14th admission or during the operation or during the recovery room after the operation which produced or could have produced any injury to the ulna nerve in the left arm."

In December 1968 the plaintiff was again admitted and Dr. Miller testified:

> " . . . I diagnosed his condition in my history and physical examination of December 8th admission as neuropathy of the ulna nerve on the left. The word neuropathy is a general term denoting functional disturbances and

changes, and, or pathological changes in the peripherical [*sic*] nervous system. The etiology is not necessarily from a traumatic injury. It could be an etiological factor. Ischemic neuropathy and arsenical neuropathy could be a cause. Diabetes could also be a cause.

When I operated on the ulna nerve on his admission of December 8, 1968, I found that the nerve was irritable and that it was imbedded in scar tissue. I removed it from the tissue in which it was imbedded. We are talking about the funny bone nerve. There is a sheath around the nerve. We transferred the sheath with the nerve, but took it out of the tight tissue in which it was lying. We did find that it was imbedded in scar tissue. The words adhesions and scar tissue are used pretty much synonomously but there are certain differences, I suppose, technically. I describe this as scar tissue. I did this, so to speak, advisedly, because that's what it looked like, as contra-distinguished from adhesions. When I think of an adhesion, I think more of a narrower band rather than a more extensive covering.

I suppose many things can cause scar tissue. One of the causes could be that the blood vessels in the area are broken and hemorrhage occurs. Scar tissue is a form of healing. You can have a blood vessel break and have healing without any scar tissue; you can also have one break and have scar tissue. That is correct but whether it comes from just the breaking of that or whether it comes from—it has got to be some type of tissue reaction, which is hard to explain, why one time you get trauma and another time, you don't. This could be described as a partial ulna nerve paralysis."

Dr. Miller concluded his deposition with the statement that he knew of nothing which could have caused the condition he found during the operation of December 1968. The record also discloses that the plaintiff was a diabetic.

The deposition of the plaintiff shows only that plaintiff had pain in his left arm when he awoke in the recovery room. It does not reveal any further information as to how the injury occurred.

"To warrant the submission of a malpractice case to the jury, there must be proof of facts or circumstances which permit a legitimate inference of actionable negligence on the part of the physician . . . . A showing of an injurious result is not enough. . . . " *Boyd v. Kistler,* 270 N.C. 744, 155 S.E. 2d 208 (1967).

In *Boyd v. Kistler, supra,* Justice Higgins, in affirming a judgment of nonsuit, went on to state:

" . . . By investigation, the plaintiff surely could have obtained evidence as to when and how the injury occurred and who caused it. No doubt the plaintiff's able counsel knew of their right to make inquiry by adverse examination of witnesses and the examination of documents."

Here, the plaintiff has taken advantage of the discovery procedures available and has still been unable to obtain evidence as to when and how the injury occurred and who or what caused it.

In fact, the record does not reveal that any injury in the nature of an inflicted harm occurred, and the condition of the plaintiff could just as well have been from a pathological cause.

In the absence of a showing that there was a genuine issue as to any material fact, summary judgment was appropriate. The order of the trial judge granting defendants' motions for summary judgment and dismissing the action is

Affirmed.

Judges BRITT and GRAHAM concur.

IN RE: ZONING VIOLATION OF R. L. COLEMAN AND WIFE, BETTY B. COLEMAN, PROPERTY ON U. S. HIGHWAY 19 & 23 W

No. 7128SC143

(Filed 28 April 1971)

1. **Appeal and Error § 7; Municipal Corporations § 31— municipal board of adjustment — review of orders — parties aggrieved**

The rule that an appeal to the appellate division may be prosecuted only at the instance of a party aggrieved is applicable to an appeal from a superior court judgment which vacated an order of a municipal board of adjustment.

2. **Appeal and Error § 7— dismissal of appeal — anonymous appellants**

The Court of Appeals dismisses an appeal from a superior court judgment which vacated an order of a municipal board of adjustment, where the persons who attempted to bring the appeal were merely designated, without being named, as "property owners on Druid Drive and adjacent streets," "neighboring property owners," and "some of the residents of Druid Drive." G.S. 1-271; G.S. 143-316; G.S. 160-178.

3. **Rules of Civil Procedure § 17— parties to a legal proceeding — legal person**

In this State, a legal proceeding must be prosecuted by a legal person and not by an aggregation of anonymous individuals who are known only to their counsel.

4. **Rules of Civil Procedure § 23— class action — naming of members**

A class action must be prosecuted or defended by one or more named members of the class. G.S. 1A-1, Rule 23.

APPEAL from *Hasty, Judge of Superior Court,* 14 October 1970 Session, BUNCOMBE Superior Court.

The facts in this case may be summarized as follows. Mr. and Mrs. Coleman are the owners of a certain tract of land located in Buncombe County, North Carolina, which, prior to 13 September 1962, was zoned for residential use; on that date, the City Council of Asheville rezoned a portion of the Colemans' tract to "Neighborhood Trading Area"; in 1964, R. L. Coleman erected upon the portion of his tract which had been rezoned, a post office building, which was thereafter leased to the United States Government and used for post office purposes; on 10 June 1965, R. L. Coleman applied to the Asheville City Building Inspector for a building permit to erect an addition to the existing building, submitting therewith a site plan which indicated the location of the proposed addition; on 11 June 1965 the building

permit was issued by the Building Inspector; the Post Office addition was subsequently constructed at a cost of approximately $125,000.00; on 1 December 1965, the United States Government entered into possession thereof and began utilizing it as a Sectional Mail Distribution Center; on 31 March 1966, the Colemans entered into a lease agreement with the United States Government, by which the original facility and the addition were leased to the Government for a maximum term of thirty years; on 14 March 1969, Mr. William R. White, purporting to represent "property owners on Druid Drive and adjacent streets" wrote to Mr. J. E. Johnson, Chief Building Inspector of the City of Asheville, complaining, *inter alia,* that the Post Office addition was partially situated in a residentially-zoned area and thereby constituted a violation of the zoning ordinance, and demanded enforcement thereof; on 18 March 1969, Mr. Johnson informed Mr. White that no violation existed; on 31 March 1969 Mr. White gave notice of appeal from the decision of the Building Inspector to the Board of Adjustment of the City of Asheville on behalf of "the property owners on Druid Drive whom we represent" contending that the Government's use of the facility, which involved heavy truck traffic, constituted a use not permitted in either a "Residential area" or a "Neighborhood Trading area"; on 21 April 1969, the Board of Adjustment held a hearing and postponed determination of the matter, until an accurate survey of the area could be made; on 17 November 1969, the Board held a hearing and decided to delay a decision, upon the agreement of counsel to try to effect a settlement; on 25 February 1970, the Board entered an order finding facts, among which was that the Post Office addition was situated partially within the residentially-zoned area and, as such, constituted a non-conforming use, in violation of the zoning ordinance; the Board ordered the Colemans and their tenant ". . . to immediately cease and desist from any commercial use of that portion of the Post Office Annex located upon that portion of Lot 130 located on the RA-6 Zone which is in violation of Ordinance No. 322 of the City of Asheville, and further, that any ingress and egress for commercial purposes whatsoever through the RA-6 residential area adjacent to Druid Drive be denied to R. L. Coleman and wife, Betty B. Coleman and their tenants," and that the United States Government be notified that any continued use is unlawful; on 20 March 1970, the Colemans, through their counsel, served notice of their intention to petition the Superior Court of Bun-

combe County for the issuance of a writ of *certiorari* to the Board of Adjustment; the Colemans' petition for writ of *certiorari* was filed on 23 March 1970; after hearing argument of counsel for the Colemans and argument of counsel for the "neighboring property owners," Judge Ervin allowed the Colemans to amend their petition, and issued the writ of *certiorari,* by order dated 21 September 1970; at the 5 October 1967 Session of Buncombe Superior Court Judge Hasty reviewed the record of the hearing before the Board of Adjustment and made findings of fact, which are undisputed, and thereupon made the following conclusions of law:

"1. That the building permit for the erection of said Post Office Addition Building was properly obtained by the Petitioners.

"2. That in reliance on said permit the Petitioners have incurred material expense in the erection of said building.

"3. That the Petitioners acted entirely in good faith in placing said improvements on the property in question pursuant to said building permit.

"4. That the issuance of the cease and desist order dated February 25, 1970 by the Asheville Board of Adjustment constituted an arbitrary revocation of the building permit theretofore issued to the Petitioners on June 11, 1965.

"5. That the Board of Adjustment and the City of Asheville are equitably estopped from revoking said building permit and were without authority to issue the cease and desist order dated February 25, 1970.

"UPON THE FOREGOING UNDISPUTED FACTS AND CONCLUSIONS OF LAW, IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DEGREED:

"1. That the cease and desist order issued by the Asheville Board of Adjustment on February 25, 1970 be, and the same is hereby, reversed and declared a nullity, and is hereby vacated in its entirety."

The "neighboring property owners" gave notice of appeal to this Court.

Ramsey & White, by William R. White, and Riddle & Shackelford, by Robert E. Riddle, for Respondents-Appellants.

Hendon & Carson, by George W. Hendon, for Petitioners-Appellees.

BROCK, Judge.

[1] G.S. 160-178 provides that the rulings of municipal boards of adjustment shall be subject to review by "proceedings in the nature of *certiorari.*" The scope of review must be equal to that provided by G.S. Chap. 143, Art. 33, §§ 143-306 *et seq. Jarrell v. Board of Adjustment,* 258 N.C. 476, 128 S.E. 2d 879. G.S. 143-316 provides that appeals to the appellate division in proceedings governed by Art. 33 shall be under rules of procedure applicable to other civil cases. Therefore, the rule that an appeal to the appellate division may be prosecuted only at the instance of a party or parties aggrieved by the judgment of the court or tribunal from which the appeal is taken, G.S. 1-271, applies with as much force to proceedings such as the present, as to ordinary civil cases.

[2] Throughout this record, the persons who attempt to bring this appeal are variously designated as "property owners on Druid Drive and adjacent streets," "the property owners on Druid Drive whom we represent," "neighboring property owners," and "some of the residents of Druid Drive." Nowhere are they named. Nowhere does it appear how many they number. Nowhere is the proximity of their residences to the post office addition indicated. Nowhere is it shown that any specific person or persons are "aggrieved" by the judgment of the Superior Court. Nor does it appear that any person or persons who might have been thereby aggrieved are among those prosecuting the appeal to this Court.

[3, 4] In this state, a legal proceeding must be prosecuted by a legal person, whether it be a natural person, *sui juris,* or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency. Even a class action must be prosecuted or defended by one or more named members of the class. G.S. 1A-1, Rule 23. A legal proceeding prosecuted by an aggregation of anonymous individuals, known only to their counsel, is a phenomenon unknown to the law of this jurisdiction.

This appeal must be dismissed for lack of a showing that the parties are properly before the Court.

Appeal dismissed.

Judges MORRIS and HEDRICK concur.

J. R. KIRBY v. ASHEVILLE CONTRACTING COMPANY, INC.

No. 7125SC136

(Filed 28 April 1971)

1. **Rules of Civil Procedure § 60— setting aside default judgment — imputing attorney's neglect to defendant**

The neglect of defendant's attorney in failing to answer an amended complaint in apt time will not be imputed to the defendant, where the defendant had delivered a copy of the complaint to the attorney's secretary, and the secretary had failed to bring the complaint to the attention of the attorney; consequently, the superior court properly set aside the judgment of default that had been entered against the defendant. G.S. 1A-1, Rules 55(d), 60(b)(1).

2. **Rules of Civil Procedure § 60— setting aside default judgment — prerequisites**

To set aside a default judgment, the trial court must find not only a meritorious defense but also excusable neglect.

3. **Rules of Civil Procedure § 60; Appeal and Error § 57— setting aside default judgment —findings of fact — appeal**

Findings of fact made by the trial court upon a motion to set aside a default judgment are binding on appeal if supported by any competent evidence.

APPEAL by plaintiff from *McLean, J.*, 24 September 1970 Session of CALDWELL Superior Court.

This is an appeal from an order of a judge of the superior court allowing defendant's motion to set aside a judgment by default entered by the clerk of the superior court. Facts sufficient for an understanding of the matters presented by this appeal are set forth in the order appealed from as follows:

"FINDINGS OF FACT

"1. That original summons and complaint were served upon the defendant on November 2, 1967, and that follow-

ing service upon the defendant, the defendant employed the Law Firm of Bennett, Kelly & Long, a partnership engaged in the practice of law in Asheville, North Carolina, to represent it in said action and to file answer and all other necessary pleadings and papers; that defendant had previously employed said Law Firm on a regular basis and relied upon said attorneys to do all matters and things in connection with defending said action.

"2. That said attorneys filed a demurrer to the complaint, for the reason that plaintiff had failed to separately state several causes of action; that thereafter plaintiff filed an amended complaint to which the defendant again demurred on the same grounds, and that same was argued before the Honorable Thad Bryson, Judge Presiding, who announced no ruling and entered no order thereon, but requested certain information of the defendant, which was furnished through its attorneys.

"3. That although no ruling had been made on said amended complaint, plaintiff presented an order to the Honorable Harry C. Martin, Judge Presiding, without any notice to the defendant or its attorneys, and obtained entry thereof, by the terms of which plaintiff was again allowed to file another amended complaint, said order being dated January 29, 1970; that no copy of this order was mailed to or served on the defendant's attorneys. EXCEPTION NO. 3.

"4. That the second amended complaint, order of said Judge Martin, were served upon the defendant through its vice-president, H. C. Browning, on February 3, 1970; that the said Browning immediately took the same to the offices of Bennett, Kelly & Long, placing the same in the hands of one of the office secretaries in the reception room of said law offices, and requested said secretary to bring the same to the attention of one of the attorneys in said law office;

EXCEPTION NO. 4

that through inadvertence and mistake said secretary failed to bring said second amended complaint to the attention of any of the attorneys in said office, and caused the same to be placed in the file and that none of the attorneys, members of said firm, or attorneys connected therewith was

ever advised or was ever told that said second amended complaint was served or brought to the office of said attorneys.

"5. That said second amended complaint went unnoticed by any member of said law firm until said law firm received from plaintiff's attorney a copy of motion for judgment upon the pleadings for failure of the defendant to file answer to said second amended complaint.

"6. That at all times the defendant and its officers and agents had previously conferred with said attorneys and had furnished said attorneys all the facts relied upon by the defendant for its defense of said action, had obtained a commitment that they would prepare pleadings and necessary papers for the defense of said action, and that the defendant itself was guilty of no neglect with reference thereto. EXCEPTION No. 5.

"7. That the attorney for the defendant filed an answer to plaintiff's motion for judgment by default prior to the time that judgment was entered, but said Clerk entered said judgment by default notwithstanding the answer filed by defendant; that the motion filed herein by the defendant shows that the defendant has a meritorious defense to each of the alleged causes of action set out in the second amended complaint. EXCEPTION No. 6.

"8. That the defendant has, in its motion, shown a meritorious defense to each of the alleged causes of action set out in the second amended complaint. EXCEPTION No. 7."

Based on its findings of fact, the court concluded as a matter of law that the defendant's failure to file answer or other pleadings to the second amended complaint was by mistake and excusable neglect, and that the neglect of its attorneys in failing to carry out the duty which they had assumed in regard to the filing of answer and other pleadings, defending said defendant, was not imputable to the defendant.

From entry of the order setting aside the judgment by default, the plaintiff appealed.

L. H. Wall for plaintiff appellant.

Bennett, Kelly & Long by Harold K. Bennett for defendant appellee.

HEDRICK, Judge.

[1] The plaintiff's ten assignments of error present the question of whether Judge McLean had authority to set aside the judgment of default entered by the clerk, and, if so, whether the evidence supports the findings of fact and the conclusion of law entered thereon.

G.S. 1A-1, Rule 55(d), provides:

"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)."

The judgment entered by the clerk was not a mere entry of default, but was a final judgment which may be set aside only for the reasons stated in Rule 60(b) which provides as follows:

"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:

"(1) Mistake, inadvertence, surprise, or excusable neglect."

Rule 60(b)(1) replaces former G.S. 1-220, and the cases interpreting it are still applicable. *Doxol Gas of Angier, Inc. v. Barefoot,* 10 N.C. App. 703, 179 S.E. 2d 890 (1971). Some of the principles laid down in these cases are necessary for a proper understanding of the instant case. In *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902 (1947), it is stated that ". . . the excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney." In *Jones v. Fuel Co.,* 259 N.C. 206, 130 S.E. 2d 324 (1963), Denny, C.J., stated:

"It is generally held under the above statute that '(p)arties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable.' Strong, North Carolina Index, Judgments, section 22; *Whitley v. Caddell,* 236 N.C. 516, 73 S.E. 2d 162; *Pate v. Hospital,* 234 N.C. 637, 68 S.E. 2d 288; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67.

"Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to

keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507; *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906."

[2] Even if there is evidence from which a finding of excusable neglect can be made, our case law requires a finding of a meritorious defense before the judgment may be set aside. *Doxol Gas of Angier, Inc. v. Barefoot, supra; Cayton v. Clark,* 212 N.C. 374, 193 S.E. 404 (1937). The neglect of the attorney will not be imputed to the litigant unless he is guilty of inexcusable neglect. *Hodge v. First Atlantic Corp.,* 6 N.C. App. 353, 169 S.E. 2d 917 (1969). In the instant case, the evidence reveals that the defendant had employed counsel to handle his defense; that he had given them all pertinent information necessary to defend the action; that counsel had satisfactorily defended the action since the filing of the original complaint on 2 November 1967; and that the defendant had every reason to believe that counsel would properly handle the second amended complaint.

[3] Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. *Hodge v. First Atlantic Corp., supra; Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507 (1954). Therefore, it is our opinion, and we so hold, that there is plenary competent evidence to support the findings of fact, including the finding that the defendant had a meritorious defense, and they in turn support the conclusion that the defendant's failure to answer or otherwise plead to the second amended complaint was due to mistake and excusable neglect. The order appealed from is affirmed.

Affirmed.

Judges BROCK and MORRIS concur.

JERRY S. LAUGHTER v. JAMES LEON LAMBERT AND QUALITY TRANSPORT COMPANY

No. 7129DC63

(Filed 28 April 1971)

1. **Rules of Civil Procedure § 52— trial by court without a jury**

When trial by jury is waived and issues of fact are tried by the court, the court is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. G.S. 1A-1, Rule 52.

2. **Automobiles § 58— automobile accident — negligence in turning across traffic lane — sufficiency of evidence**

Plaintiff's evidence was sufficient to support trial court's findings and conclusions that defendant truck driver was negligent in turning his tractor-trailer truck from the right-hand lane across the left-hand lane without seeing that such turn could be made in safety and without seeing that the plaintiff's vehicle was being operated in the left lane.

3. **Rules of Civil Procedure § 52— trial by court without a jury — discrepancies and contradictions in evidence**

Credibility, contradictions, and discrepancies are all matters to be resolved by the trier of the facts.

APPEAL by defendants from *Gash, District Judge,* 12 August 1970 Session of HENDERSON District Court.

This is a civil action in which plaintiff seeks to recover damages for personal injuries sustained by him on 17 June 1969 when his automobile collided with a tractor-trailer owned by the corporate defendant and being driven by its employee, the individual defendant. The collision occurred at approximately 10:30 a.m. on U. S. Highway 29 in Cabarrus County at a point approximately one and a half miles south of Concord. At that point the highway runs generally north and south and is a four-lane paved highway, with two lanes for northbound and two lanes for southbound traffic, with a median separating the northbound lanes from the southbound lanes. The northbound lanes together have a width of approximately twenty-four feet, each traffic lane being approximately twelve feet wide, and the median is approximately twenty-five feet wide. At or near the point of collision there is a crossover to permit traffic to move across the median. The collision occurred when defendants' tractor-trailer, traveling north on the highway, slowed and commenced to turn left into the median crossover. Plaintiff's auto-

mobile, also traveling north on the highway, collided with the tractor-trailer, the front end of the plaintiff's automobile striking the left side of the tractor.

The case was tried by the judge without a jury upon pleadings raising issues of negligence, contributory negligence, and damages. Evidence was introduced by plaintiff and defendants. On direct examination plaintiff testified:

> "It was cloudy; as I recall it was not raining; the roads were dry.
>
> * * * * *
>
> "When I first saw the defendant's vehicle I was operating my vehicle at approximately fifty-five miles per hour. Defendant's vehicle was traveling at 10 to 15 miles per hour. My vehicle approached his. I had been in the left lane. I had passed a couple of cars and I came over a little hill, a little knoll, and as I did so I saw the truck operated by the defendant in the right lane. I stayed in the left lane and started to pass. From the time I first saw the truck I saw no turn signal on it. I did not pass completely. As I drew up beside it and got close to the front of the cab, immediately he began to turn left directly in front of me. I applied my brakes. I didn't have a lot of time to swerve into the median. I turned just a little bit and my car made contact with the front right in the middle where the gas tank sits on the truck, somewhere in that vicinity, right in the middle of it, the tractor part. Right in the middle of the part that pulled the cab. I struck no part of the trailer.
>
> "This collision took place in the vicinity of the crossover and defendant's vehicle appeared to be turning into the crossover.
>
> "From the first time I saw defendant's vehicle until he turned it off, it was in the right-hand lane. . . ."

Defendants presented the testimony of the highway patrolman who investigated the collision, the individual defendant who was driver of the tractor-trailer, and of two independent eyewitnesses. One of the eyewitnesses was in a truck driving north on the highway following the two vehicles involved in the collision and the other eyewitness was driving south in one of the southbound lanes of the highway opposite the point of the

collision. The testimony of these witnesses indicated that defendants' tractor-trailer was proceeding in the left-hand or inner northbound lane as it approached the crossover, that the left turn signal lights on the tractor were operating, that plaintiff's following automobile was moving at a speed in excess of 55 miles per hour, that it had been raining and the asphalt surface of the highway was wet, that plaintiff's automobile was swaying and was skidding, that plaintiff's vehicle had traveled partially on the shoulder of the dirt median, and that the collision occurred right in the crossover.

The court entered judgment making detailed findings of fact, including the following:

> "7. That at this time, the Plaintiff proceeded to pass the Defendant company's truck, which truck was being operated in the right-hand lane by the Defendant, James Leon Lambert, and the Plaintiff's vehicle was being operated in the left-hand northbound lane; that when the Plaintiff's vehicle was approximately abreast with the fuel containers on the cab of the Defendant company's tractor-trailer, the Defendant, James Leon Lambert, proceeded to operate said truck so as to turn from the right-hand northbound lane in which he had been traveling across the path of the left-hand northbound lane and through a break in the median separating the northbound and southbound lanes of traffic on U. S. Highway No. 29; that in making said turn, the Defendant, James Leon Lambert, moved suddenly and without warning to the Plaintiff and placed the cab of his tractor-trailer across the left-hand northbound lane in which the Plaintiff was traveling.
>
> "8. That the Plaintiff, upon seeing the Defendant, James Leon Lambert, make this turn, applied his brakes and turned his vehicle slightly to the left; that the Plaintiff's vehicle collided with the Defendant company's truck with the front of the Plaintiff's vehicle striking the cab of the Defendant's tractor-trailer at the point on the left-hand side at the approximate location of the fuel tanks, on the cab, this collision taking place in the left-hand northbound lane."

Based on its findings of fact, the court made conclusions of law, including that the plaintiff was without fault in operating his motor vehicle and that the defendant driver was neg-

ligent in that he turned his tractor-trailer truck from the right-hand lane across the left-hand lane without seeing that such turn could be made in safety and without seeing that the plaintiff's vehicle was being operated in that lane, in that he did not keep a proper lookout, and in that he failed to yield the right-of-way to the plaintiff's vehicle. The court also made findings and conclusions as to the extent and proximate cause of plaintiff's injuries and awarded judgment for plaintiff in accordance with its findings and conclusions. Defendants appealed.

Boyd B. Massagee, Jr., for plaintiff appellee.

Clarence N. Gilbert for defendant appellants.

PARKER, Judge.

[1] By appropriate exceptions and assignments of error appellants challenge the sufficiency of the evidence to withstand their motions for dismissal and to support the trial court's findings of fact Nos. 7 and 8 and the conclusions of law and resulting judgment based thereon. When trial by jury is waived and issues of facts are tried by the court, the court is required to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Rule 52(a) (1) of the Rules of Civil Procedure. In such case the court's findings of fact "have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. . . . The trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. . . . 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.

[2, 3] In our opinion, plaintiff's evidence was sufficient to support the challenged findings of fact; hence, this Court is bound by them. Appellants' counsel strenuously contends that plaintiff's testimony should be discredited because of discrepancies developed on cross-examination and because it was directly contradicted by the testimony of defendants' inde-

pendent eyewitnesses. However, credibility, contradictions, and discrepancies are all matters to be resolved by the trier of the facts. Since there was competent evidence to support the trial court's findings of fact and these in turn support its conclusions of law and the judgment entered thereon, the judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

JAMES T. BLACKMON, SR., PLAINTIFF v. VALLEY DECORATING COMPANY, INC., ET AL, DEFENDANTS v. VAUGHN'S, INC., THIRD PARTY DEFENDANT

No. 7126SC189

(Filed 28 April 1971)

1. **Corporations § 27; Libel and Slander § 13; Master and Servant § 34— liability of corporation for slander — burden of proof**

In order to sustain its counterclaim against a corporation for slander by an alleged employee of the corporation, defendant would have the burden of showing that at the time and in respect to the utterance of the words complained of the alleged employee was acting within the course and scope of his employment by the corporation.

2. **Corporations § 27; Libel and Slander § 16— slander — remarks by salesman — summary judgment for salesman's employer**

The trial court properly allowed motion of corporate third party defendant for summary judgment on counterclaim by defendant based on alleged slanderous remarks of plaintiff salesman, where third party defendant introduced an affidavit of its president that plaintiff had no authority to make the remarks complained of as an agent for the company and was not acting within the scope of his employment when the remarks were made, and defendant offered no evidence to contradict the affidavit or to supplement the allegations of its counterclaim.

APPEAL by original defendants from *Fountain, J.*, 2 November 1970 Session, MECKLENBURG Superior Court.

On 15 December 1969 plaintiff instituted this action against the original defendants (Valley) to recover commissions allegedly earned by plaintiff on sales of Valley's decorative materials. Valley counterclaimed against plaintiff and Vaughn's,

Inc., a Minnesota corporation (Vaughn's), alleging that plaintiff while working for Vaughn's made slanderous remarks against Valley. An order was entered making Vaughn's an additional party defendant.

Thereafter, Vaughn's filed a motion asking the court: (1) to dismiss the action alleged in the counterclaim as to it because the counterclaim failed to state a claim against Vaughn's upon which relief could be granted; (2) to quash the return of service of summons because the court did not have jurisdiction; and (3) to treat the motion and supporting affidavit as a motion for summary judgment.

Following a hearing on the motion, the trial court found facts as contended by Vaughn's, and, among other things, sustained its motion for summary judgment and dismissed the counterclaim as to Vaughn's with prejudice. Valley appealed.

Garland, Alala, Bradley & Gray by Charles D. Gray, III, attorneys for defendant-appellant, Valley Decorating Company, Inc., et al.

James & Williams by William K. Diehl, Jr., attorneys for Vaughn's, Inc., additional party defendant appellee.

BRITT, Judge.

Did the trial judge commit error in granting Vaughn's motion for summary judgment and dismissing the counterclaim as to Vaughn's with prejudice? We answer in the negative.

Pertinent allegations of the counterclaim are as follows:

> 2. During November, 1969, in Belk's Stores in the City of Concord, North Carolina, the Plaintiff, acting as the authorized agent of Vaughn's, Inc., in the presence and hearing of one Harold Knowles, maliciously spoke of and concerning the Defendants, the statement that the Defendants were no longer in business and were a defunct corporation and, further, in the presence and hearing of one David S. Beaman of Troy, North Carolina, maliciously uttered the false and defamatory words that the Defendants were now out of business and further that the Defendants were dishonest in their business dealings.
>
> 3. The words so spoken were false and defamatory.

On 13 April 1970 Vaughn's filed an affidavit of its President, LeRoy F. Vaughn, setting forth its contentions as to plaintiff's status with Vaughn's. Among other things, the affidavit alleged:

> Mr. Blackmon, as a sales representative or as an independent contractor, had no authority to act or speak for the Company. His only limited authority was to solicit orders for the sale of certain of the Company's products, and even this authority was subject to the approval of the Company.
>
> The Company has no knowledge of the statement attributed to Mr. Blackmon as set out in the Counterclaim of the original defendants. Mr. Blackmon had no actual authority, express or implied, to utter such statements, if he did, as an agent for the Company. Nor did Mr. Blackmon have any apparent authority to speak for the Company, if he did, in such a manner. The statements attributed to Mr. Blackmon were not spoken, if they were, within the scope of any employment of Mr. Blackmon by the Company. Nor did such statements, if spoken by Mr. Blackmon, serve to further the business of the Company. In addition, the Company has never ratified nor intended to ratify the alleged statements of Mr. Blackmon.

Valley introduced no evidence to contradict the portion of the Vaughn affidavit above quoted or to supplement the allegations of its counterclaim first above quoted.

[1] To sustain its counterclaim (or cross action) against Vaughn's at trial, the burden would be on Valley to show that at the time and in respect to the utterance of the words complained of plaintiff was acting within the course and scope of his employment by Vaughn's. *Gillis v. Tea Company,* 223 N.C. 470, 27 S.E. 2d (1943). In *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1 (1970), Parker, Judge, speaking for this court said:

> 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 pur-

pose 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). (Emphasis added.)

[2] In our opinion, at the hearing on its motion for summary judgment, Vaughn's by the affidavit of its president sufficiently met its burden of proof. Nothing else appearing, Vaughn's would be entitled to a directed verdict at trial. The counterclaim alleges that plaintiff was in Belk's Stores in Concord when he made the remarks complained of but there is nothing to show that plaintiff was "about his master's business" at the time. The unsupported allegations in the counterclaim are not sufficient to overcome the motion for summary judgment. *Pridgen v. Hughes, supra.*

In view of our holding that the trial judge properly sustained the motion of Vaughn's for summary judgment, thereby terminating with prejudice the counterclaim as to Vaughn's, we deem it unnecessary to discuss the other questions posed in the briefs.

For the reasons stated, the judgment sustaining Vaughn's motion for summary judgment and dismissing with prejudice the counterclaim as to Vaughn's is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES ABLE

No. 7126SC240

(Filed 28 April 1971)

1. **Criminal Law § 146— insufficiency of indictment — appellate review — arrest of judgment**

If the bill of indictment is insufficient on its face to sustain a criminal charge and support a conviction, the Court of Appeals *ex mero motu* should so declare and arrest the judgment.

2. **Forgery § 2— uttering forged check — sufficiency of indictment — copy of check**

Indictment which did not contain a copy of the forged check or an averment of the necessary facts relating thereto was insufficient to charge the offense of uttering a forged check.

APPEAL by defendant from *McLean, Superior Court Judge,* 4 January 1971, Schedule A Criminal Session of MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with uttering a forged check. Defendant entered a plea of not guilty. From a verdict of guilty as charged and a sentence of six years and ten months to nine years, the defendant appeals to this Court.

Attorney General Robert Morgan by Staff Attorney William Lewis Sauls for the State.

Whitfield, McNeely and Echols by Rodney L. Purser for defendant appellant.

CAMPBELL, Judge.

The appellant's brief recites:

"Counsel represented the defendant at the trial and has examined the record on appeal. Based upon his examination the undersigned is unable to find reversible error in the record."

The brief filed on behalf of the Attorney General asserts:

"The State contends that the defendant in the present case had a fair trial conducted in a fair and impartial manner free from prejudicial error."

[1] Despite the above assertions, the bill of indictment, upon which the prosecution is based, is before us as a part of the record proper, and we are charged with notice of its contents. If the bill of indictment is insufficient on its face to state a criminal charge and support a conviction, this Court, *ex mero motu,* should so declare, and arrest the judgment. *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318 (1965).

[2] In the instant case the bill of indictment as it appears in the record reads as follows:

"INDICTMENT—FORGERY, ETC. No. 69-Cr-90430
STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

In The General Court of
Justice, Superior Court Division
December 7 Session, 1970

The State of North Carolina
v.
James Able, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, that James Able late of the County of Mecklenburg on the 31 day of January 1969, at and in the county aforesaid, unlawfully and feloniously, of his own head and imagination, did wittingly and falsely make, forge and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain _____ which said forged _____ is as follows, that is to say:

with intent to defraud, against the form and statute in such case made and provided, and against the peace and dignity of the State.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT, That the said James Able afterward, to wit, on the day and year aforesaid, at and in the county aforesaid, wittingly and unlawfully and feloniously did utter and publish as true a certain false, forged and counterfeited check is as follows, that is to say: copy of check attached:

with intent to defraud—he, the said James Able at the time he so uttered and published the said false, forged and

counterfeited check then and there well knowing the same to be false, forged and counterfeited against the form of the statute in such case made and provided, and against the peace and dignity of the State.

Solicitor

WITNESSES:

F. S. White 1500 W. Blvd.
Clyde A. Thompson 531 E. 9th St.
B. J. Chastain, C. L. Ramsey CPD X

Those marked X sworn by the undersigned foreman and examined before the grand jury and this bill found (illegible) A True Bill.

ROBERT C. MARSHALL
Foreman Grand Jury"

There is no check appearing in the bill of indictment, and while the record refers to a check as having been introduced in evidence as Exhibit No. 1, there is no such exhibit in the record presented to us.

The record presented to us contains a stipulation reading as follows:

"IT IS AGREED that the foregoing shall constitute the record and case on appeal to the Court of Appeals of North Carolina in this action.

THIS the 11th day of February, 1971.

THOMAS F. MOORE, JR.
Solicitor for the 26th
Solicitorial District

RODNEY L. PURSER
Attorney for the Defendant"

We can only pass upon a record as submitted to us.

The essentials of a bill of indictment to sufficiently charge a criminal offense have been set forth numerous times:

" 'The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provision is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. . . . ' " *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770 (1968), and cases cited therein; see also, *State v. Banks, supra.*

In the instant case, if an exact copy of the check had appeared in the indictment, it may or may not have been sufficient to constitute a proper indictment. If the false and fraudulent nature of the instrument appears upon its face, then setting forth an exact copy of it in the indictment would be sufficient, otherwise, the necessary facts must be averred.

In *State v. Covington,* 94 N.C. 913, 55 A.R. 650 (1886), it is stated:

"The constituent elements of the crime of forgery at common law, are the false making or alteration of the writing or instrument forged, the fraudulent purpose, and the tendency and capacity of it to prejudice the right of another person.

If such tendency and sufficiency of the instrument appear upon its face, it will only be necessary to aver its false and fraudulent nature, setting forth an exact copy of it in the indictment. If, however, these do not appear, but there are extraneous facts that make the instrument have such tendency, and therefore, the subject of forgery, those facts must be averred in connection with it in such apt way, as will make the tendency appear. This is necessary, because the Court must see that the complete offense is charged."

To like affect, see *State v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742 (1961); *State v. Shepard,* 261 N.C. 402, 134 S.E. 2d 696 (1964).

For the reasons stated, the bill of indictment contained in the record before us is held insufficient to charge a criminal offense. The Court, *ex mero motu,* takes notice thereof and arrests the judgment without prejudice to further proceeding by the State on a proper bill of indictment if so advised.

Judgment arrested.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. KENNETH N. YOUNG

No. 7129SC100

(Filed 28 April 1971)

1. **Criminal Law § 161— form of assignments of error**

Purported assignment of error not referring to any exception presents no question for review by the Court of Appeals.

2. **Criminal Law § 154— statement of case on appeal — agreement by solicitor**

A so-called "Statement of Case on Appeal" which was not agreed to by the solicitor is not properly a part of the record on appeal.

3. **Criminal Law § 161— grouping of exceptions**

Appellant's exceptions must be grouped. Rules of Practice in the Court of Appeals Nos. 19(c) and 21.

4. **Criminal Law § 91— motion for continuance**

A motion for continuance is addressed to the sound discretion of the trial judge.

5. **Criminal Law § 163— exception to the charge**

An exception to the charge requires that the entire charge, not selected paragraphs, be included in the record on appeal. Rule of Practice in the Court of Appeals No. 19.

6. **Criminal Law § 166— the brief — abandonment of assignments of error**

Assignments of error for which no argument appears in the brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

7. **Criminal Law § 161— appeal as exception to the judgment**

An appeal to the Court of Appeals is itself an exception to the judgment or to any other matter of law appearing on the face of the record.

State v. Young

APPEAL by defendant from *Grist, Judge,* July 1970 Session Superior Court of TRANSYLVANIA County.

Defendant was tried under two bills of indictment: No. 68 CR 238-B alleging that as an officer of Diversified Insurance Service of North Carolina, Inc., he caused to be sold capital stock of that company to Floyd Buchanan of Transylvania County, North Carolina, without first properly registering said stock with the North Carolina Secretary of State, and No. 68 CR 238-C alleging that as an officer of the same company he caused to be offered for sale capital stock of the company without having first properly registered the stock with the Secretary of State. The jury returned a verdict of guilty as to each charge and from judgment entered on the verdicts, defendant appealed. Such facts as are necessary for a determination of the appeal are set out in the opinion.

Attorney General Morgan, by Staff Attorney Ricks, for the State.

Ramsey and White, by William R. White, for defendant appellant.

MORRIS, Judge.

[1-3] Defendant's first assignment of error is as follows: "1. The Court erred in that the Trial Judge allowed a motion to Quash and then later allowed the State to proceed on the quashed bill of indictment 68 CR 238-B, without it being resubmitted to the Grand Jury. (Page 14)" We are not referred to any exception. It is true that page 14 of the record contains a motion to quash indicating it was signed by counsel for defendant. No filing date is shown, nor does the record indicate the action taken thereon by the court, nor is any exception noted in the record. In the "Statement of Case on Appeal," pages 2-6 of the record on appeal, we find the following: "The defendant then made a Motion to Quash the indictment 238-B, the reason for it being that it, the State, had alleged in the bill of particulars in 238-C that Floyd Buchanan is one of the persons involved in the indictment 238-C and that the defendant contended that this would put the defendant on trial for the same offense twice and he thereupon moved to Quash 238-B. There was argument following. The Court stated 'I will rule that I will allow

the Motion to Quash the sale to Buchanan in favor of the offer to sale *(sic)* to him in 238-C.' The Court then allowed Mr. Lowe to withdraw Mr. Buchanan's name from the bill of particulars and the defendant objected and excepted. The Court then stated that it had overruled the Motion to Quash in 238-B and 238-C and treated the Motion as a motion for a bill of particulars." The question which defendant attempts to argue is not before us. The so-called "Statement of Case on Appeal" is not properly a part of the record on appeal. *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158 (1968). It has not been agreed to by the solicitor and merely serves as stating defendant's contentions with respect to the matters set out therein. The purported assignment of error refers to no exception taken, nor can we, on a voyage of discovery, find any exceptions taken. Where appellant's exceptions are not grouped as required by the Rules of Practice in the Court of Appeals of North Carolina, Rule 19(c) and Rule 21, they may not be considered. *Midgett v. Midgett,* 5 N.C. App. 74, 168 S.E. 2d 53 (1969); *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364 (1962).

[4] Defendant's purported assignment of error No. 2 is directed to the court's denial of his motion for continuance. This attempted assignment of error is handled by appellant in an identical manner as No. 1. He refers to "page 16." We assume he refers to page 16 of the record on appeal. At page 16 we find a written motion for continuance, signed by counsel, showing no filing date. At the lower left hand corner thereof the words "Denied by the court P.K.F." appear. The initials P.K.F. are meaningless to us. No exception appears. In the "Statement of Case on Appeal," defendant does contend that the court overruled his motion for continuance and he objected and excepted. Even if the question defendant argues under this purported assignment of error was properly before us, he has shown no abuse of discretion, *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1967), nor do we find anything in the case which takes it out of the general rule that a motion for continuance is addressed to the sound discretion of the trial judge. *State v. Murphy,* 4 N.C. App. 457, 167 S.E. 2d 8 (1969).

[5] Defendant's next six purported assignments of error attempt to point out alleged errors in the court's charge to the jury. Each again refers to a page number, but not to an exception. The charge of the court is not in the record on appeal.

On page 42 of the record on appeal we find the words "JUDGE'S CHARGE." Under these words we find the following "(For the case on appeal the Defense will only list such sections of the Judge's Charge as he takes exception to.)" The next two pages contain what apparently are selected paragraphs from the court's charge. After each paragraph there appears an exception; *i.e.*, after the first paragraph the words "This is EXCEPTION No. 3" appear. Rule 19, Rules of Practice in the Court of Appeals of North Carolina, require that where there is exception to the charge of the Court, the charge shall be included in the record on appeal. This, of course, means the entire charge. For reasons too obvious to mention, we will not attempt to consider alleged error in the selected portions of a charge where the entire charge is not before us.

[6] Although defendant attempted to assign as error other rulings of the court, no argument thereon appears in his brief, and they are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

We direct counsel to the opinion of Judge Brock in *State v. Robert Edward Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971), for a very clear and concise discussion of the proper content and arrangement thereof in a record on appeal.

[7] An appeal to the Court of Appeals or Supreme Court is itself an exception to the judgment or to any other matter of law appearing on the face of the record. *Balint v. Grayson, supra.* Despite the condition of the record on appeal before us, we have carefully examined it. The verdict supports the judgment, and we find

No error.

Judges BROCK and VAUGHN concur.

KATHLEEN BRYSON MOORE v. T. D. BRYSON, JR., AND E. C. BRYSON

No. 7130SC180

(Filed 28 April 1971)

Limitation of Actions § 9— action to recover share of estate

Action by remainderman against executors to recover an undistributed share of an estate accrued two years after defendants qualified as executors, and the action was barred by the ten-year statute of limitations, G.S. 1-56, where the executors qualified in 1955 and the action was commenced in 1970.

APPEAL by plaintiff from *Snepp, Superior Court Judge,* 11 November 1970 Session of SWAIN County Superior Court.

Plaintiff alleged three causes of action against the defendants. In her first cause of action, plaintiff alleged that the plaintiff and defendants are devisees and legatees under a residuary clause in the will of D. R. Bryson, deceased; that defendants were appointed executors of the Estate; that more than two years have elapsed since the appointment of defendants as executors; and that no final accounting had ever been filed. In her prayer for relief, plaintiff requested that the defendants be required to file a final accounting and pay over to her such amounts as may be shown owing.

In the second cause of action, plaintiff incorporated by reference the allegations of the first cause of action and further alleged that there has been available for distribution to the remaindermen the sum of $6,992.25, part of which was paid, without authorization, to the defendants as commissions; and that defendants are not entitled to said commissions due to their improper handling of the Estate. Plaintiff sought judgment in the amount of $1,165.35 with interest as her pro rata share of the funds in the Estate.

In her third cause of action, plaintiff alleged that defendants, as executors of the Estate, had received rents and profits from certain real property belonging to plaintiff and other remaindermen as tenants in common and have refused to account for the profits. Plaintiff prayed for an accounting and the distribution of her share of any profits.

Defendants, in their answer, admitted that they were the duly appointed executors of the Estate of D. R. Bryson and were appointed 27 December 1955; that they have never filed a final accounting; and that they each received $2,000.00 for their services to the Estate. They denied any improper handling of the Estate and denied the availability of $6,992.25 for distribution to the remaindermen. As an affirmative defense to both the first and second causes of action, defendants pleaded the ten-year statute of limitations. As to the third cause of action, defendants denied that they had received any rents and profits from the land in question.

Defendants then moved for summary judgment on the basis of the statute of limitations and requested that their motion be treated as an affidavit in support of the motion.

The trial judge found that the first and second causes of action were barred by the running of the statute of limitations and granted the motion for summary judgment and dismissed them with prejudice. The third cause of action was retained for trial at next session. From the granting of the motion for summary judgment, the plaintiff appeals to this Court.

Clark & Tanner by Eugene Tanner for plaintiff appellant.

Stedman Hines and E. C. Bryson (In Propria Persona) for defendant appellees.

CAMPBELL, Judge.

Plaintiff's only assignment of error is directed at the granting of the motion for summary judgment as to the second cause of action. 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." G.S. 1A-1, Rule 56(c). The pleadings show that the defendants were appointed executors of the Estate of D. R. Bryson on 27 December 1955. The complaint in the present action was filed 19 January 1970.

The sole question is whether or not the action is now barred by the running of the ten-year statute of limitations, G.S. 1-56. Plaintiff distinguishes this action for recovery of an undistributed share of an estate from an action for an accounting and contends that the statute of limitations in this action does not

begin to run until there has been a demand and a refusal, whereas in an action for an accounting the statute makes a demand two years after the personal representative qualifies.

Plaintiff relies on *Pearson v. Pearson,* 227 N.C. 31, 40 S.E. 2d 477 (1946). There the administrator *d. b. n., c. t. a.* was in possession of the land under a court order permitting him to continue farming operations. He permitted the land to be foreclosed and bought it himself at the foreclosure sale. An action was brought to declare a constructive trust on the land. The Court held that, in the absence of a demand and refusal, the statute of limitations in an action to impose a constructive trust upon the administrator did not begin to run until the administrator completed and closed the administration.

No constructive trust is sought to be imposed in the present action, rather this involves an express trust. The distinction between an action for recovery of an undistributed share of an estate from an action for an accounting, which the plaintiff seeks to make in this case, is not a valid one.

We think this case is controlled by *Edwards v. Lemmond,* 136 N.C. 329, 48 S.E. 737 (1904), and *Pierce v. Faison,* 183 N.C. 177, 110 S.E. 857 (1922). In the latter case it is stated:

> "The right of action for legacies and distributive shares, or to have an accounting with an executor and a settlement, accrues two years from his qualification. . . . The executor is required to distribute and pay over the assets to those entitled thereto at that time, and if he fails to do so, they may sue for the same. . . ."

Here the claim or cause of action accrued on 27 December 1957, two years after the qualification of the defendants as executors and the statute of limitations began running at that time. No disability having been alleged or shown, the action was barred by the statute of limitations at the time it was commenced, and hence the motion for summary judgment was properly granted.

Affirmed.

Judges BRITT and GRAHAM concur.

STEVE MORRIS v. A. E. PERKINS AND WIFE, GYPSY K. PERKINS

No. 7129SC174

(Filed 28 April 1971)

Appeal and Error § 57— judgment on pleadings for defendant — former appeal denying defendant's plea of res judicata

Determination by appellate court that the facts found or admitted support the trial court's judgment on the pleadings in favor of defendant, that the judgment is regular in form, and that error does not appear on the face of the record does not contradict the appellate court's disposition of a former appeal in which it reversed a judgment sustaining a plea of *res judicata* interposed by defendant.

APPEAL by plaintiff from *Thornburg, S.J.*, 16 November 1970 Session, TRANSYLVANIA Superior Court.

This action was previously before us on an appeal from a judgment of the superior court sustaining a plea of *res judicata* interposed by defendant. 6 N.C. App. 562, 170 S.E. 2d 642 (1969). We reversed the judgment and *certiorari* was denied by the Supreme Court. 276 N.C. 184 (1970). A summary of the pleadings is set forth in our opinion in the former appeal.

The case is now before us on an appeal by plaintiff from judgment on the pleadings in favor of defendant.

Cecil C. Jackson, Jr., for plaintiff appellant.

Redden, Redden & Redden by M. M. Redden for defendant appellee.

BRITT, Judge.

In the judgment appealed from, the court found and determined as follows:

> 1. On 14 November, 1968, a final judgment was entered in the General County Court of Henderson County, in the case entitled "Steve Morris, plaintiff vs. The Mountainaire Corporation, Defendant, as will appear by reference to Plaintiff's Exhibit B attached to the complaint, in which it is set forth in Paragraph numbered 2,
>
> "That the defendant is entitled to recover of the plaintiff the principal amount of the notes sued on and set forth in the Answer, as a counterclaim and cross action, less a credit of $1000.00 on the note set forth in the first cross

action and counterclaim of the defendant, which credit is made as of the 14th day of July, 1967, together with interest at six percent per annum on the original amount to the 14th day of July, 1967, and on the balance, to wit: $15,902.50 from said date until paid."

No appeal from this judgment was entered. Plaintiff herein recognized said judgment by accepting the credit of $1000.00, being the purchase price of the stock sold at public auction and sued for in the instant action. Further, plaintiff recognized the validity of said judgment by accepting a credit of $15,902.50 on a claim owing by him and involved in the action. And in Paragraph 13 of the complaint the plaintiff alleges and admits:

> "That the said promissory notes executed by the plaintiff to defendant A. E. Perkins and the said promissory notes executed by the corporation to this plaintiff have been satisfied in full by reason of judgment dated November 14, 1968 in the General County Court of Henderson County, North Carolina, a copy of said judgment is hereto attached as Exhibit "B" and incorporated herein by reference."

2. The 455 shares of stock sought to be recovered in this action was deposited with defendant A. E. Perkins simultaneously with the execution and delivery of the note, in the sum of $16,902.50, dated 1 January, 1965, and attached to the complaint as Plaintiff's Exhibit "A," as will appear by reference to the terms and provisions of said note; that the full amount of said note was recovered by foreclosure under its terms and by the entry of a judgment hereinbefore mentioned as an offset against the claim of plaintiff Morris; that the foreclosure under the terms of said Exhibit A was strictly in accordance with the terms of said note, as will appear by reference to "Notice" dated 3rd day of July, 1967, attached to plaintiff's complaint as Exhibit "C"; that at said sale defendant Gypsy Perkins became the purchaser of said stock for the consideration of $1000.00, and plaintiff recognizes this fact by tendering to the defendants, "one or both the sum of $1,000.00 for the return of the 455 shares of stock," as will appear by reference to Paragraph 6 of plaintiff's reply herein, and in open Court plaintiff again makes said tender which is refused.

3. While plaintiff alleges by way of conclusions that the transfer of the stock in the manner and way set forth in the pleadings was "void," he recognizes and confirms the validity, sale and transfer of said stock in his pleadings and by his acceptance of the benefits thereof in the Henderson County judgment and otherwise, to the end that he has paid certain of his obligations by reason of the offsets in said Henderson County judgment, from which no appeal was taken and no effort made to modify or change any portion of the judgment.

4. That because of the facts herein found and the other facts pleaded by plaintiff in his complaint and reply, the Court is of the opinion that plaintiff does not state a claim upon which relief can be granted and that the motion for judgment on the pleadings should be allowed;

Plaintiff's sole exception and assignment of error is to the signing of the judgment. In *Fishing Pier v. Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968), in an opinion by Parker, Chief Justice, our Supreme Court said:

"This sole assignment of error to the signing of the judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form."

In the case before us, we hold that the facts found by the trial court, or admitted, support the judgment, that the judgment is regular in form, and that error does not appear on the face of the record.

The question then arises, does our disposition of this appeal contradict our disposition of the former appeal? We think not, the primary difference being one of procedure.

On the former appeal, we were dealing with defendant's plea of the county court judgment as *res judicata* of the present action. Under *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132 (1959), and cases therein cited, the questions before us then were: Was the former adjudication on the merits of the action? Was there *identity of parties* and of subject matter in the two actions? And, were the merits of the two actions identical? This test impelled a negative answer.

The questions before us on this appeal are: Do the facts found or admitted support the judgment? Is the judgment regular in form? Is the face of the record free of error? *Fishing Pier v. Carolina Beach, supra.* An application of this test, impels an affirmative answer.

The judgment appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

IN THE MATTER OF: THE WILL OF THOMAS WESLEY KNOWLES, SR., DECEASED

No. 7127SC238

(Filed 28 April 1971)

1. **Wills § 22— caveat proceeding — competency of testator — admissibility of lay opinion**

   It is proper for the attesting witnesses to give their lay opinion concerning the competency of the testator to make a will.

2. **Wills § 3— testator's request for attestation**

   The testator's request for attestation may be implied from the conduct of the testator and from the surrounding circumstances.

3. **Wills § 20— testator's request for attestations — sufficiency of evidence to support instructions**

   The court in a caveat proceeding was warranted in instructing the jury that a request for attestation could be inferred from the testator's conduct, where there was evidence that the testator was mentally alert, although severely physically incapacitated; and that the testator could say "yea" and "nay," shake his head, and gesture with his left hand.

4. **Wills § 20— testator's request that minister sign will for him — jury issue**

   Evidence in a caveat proceeding could support a jury finding that a physically incapacitated testator requested a minister to sign the will for him. G.S. 31-3.3(b).

APPEAL by caveator from *Thornburg, S.J.,* 21 October 1970 Session of LINCOLN Superior Court.

This is a caveat proceeding filed by Thomas Wesley Knowles, Jr., alleging that the paper writing which purports

to be the Last Will and Testament of Thomas Wesley Knowles, Sr., dated 24 February 1969 was executed at a time when he lacked the mental and physical capacity to make a will, and that it was executed as a result of undue influence exerted by his sister, Vertie K. Wilson.

By order dated 5 February 1970, the case was transferred to the superior court for trial on the issue of *devisat vel non.*

The propounders offered evidence tending to establish the following pertinent facts: Claude G. Wilson, Jr., the executor under the purported will, and the son of Vertie K. Wilson, the sole beneficiary named in the purported will, arranged a trip to Oteen, N. C., where the deceased was hospitalized in the Veterans Administration Hospital. Mr. Knowles had had a stroke and was paralyzed to the extent that he was confined to a wheel chair, and was unable to speak except to say "yea" or "nay." Reverend G. R. McCulley signed Mr. Knowles' name on the paper writing, and also made a mark with Mr. Knowles touching the pen. The two attesting witnesses, Mrs. W. M. Hall and Faye Sloan Dixon, were both permitted, over objections of the caveator, to give their opinion as to the mental capacity of Mr. Knowles, although their opportunity for observing him was limited. Other witnesses, including Dr. E. D. Bennett, testified that in their opinion Mr. Knowles had sufficient mental capacity to make a will.

The caveators offered no evidence.

The following four issues were submitted to and answered by the jury as indicated:

"1. Was the paper writing propounded for probate in solemn form executed by Thomas Wesley Knowles, Sr., and with the formality required by the statute?

ANSWER: Yes.

"2. At the time of the execution of said paper writing on February 24, 1969, was Thomas Wesley Knowles, Sr., mentally incapable of making a valid will?

ANSWER: No.

"3. Was the execution of said paper writing procured through undue influence and duress?

ANSWER: No.

"4. Is said paper writing propounded for probate in solemn form and each and every part thereof the last will and testament of Thomas Wesley Knowles, Sr., deceased?

ANSWER: Yes."

From a judgment entered on the verdict, the caveator appealed.

Tim L. Harris by Don H. Bumgardner for caveator appellant.

Harvey A. Jonas, Jr., and Willis C. Smith, by Richard Jonas, for propounder appellee.

HEDRICK, Judge.

[1] By his first assignment of error the caveator contends that the court committed prejudicial error by allowing the two attesting witnesses to the will "to give their lay opinion concerning the competency of the deceased, Thomas W. Knowles, Sr., to make a will. . . ." This assignment of error is without merit. In North Carolina, a witness, expert or otherwise, may give his opinion as to whether a person has sufficient mental capacity to execute a will, if he has had reasonable opportunity to observe or converse with him. *In re Will of Cauble,* 272 N.C. 706, 158 S.E. 2d 796 (1968); *Clary v. Clary,* 24 N.C. 78. The value of the opinion is dependent upon the opportunity of the witness to form it. *State v. Khoury,* 149 N.C. 454, 62 S.E. 638 (1908). The weight to be given to the opinion testimony is for the jury.

The caveator by his next assignment of error contends that the court committed prejudicial error in instructing the jury that a request for a witness to attest the will could be inferred from the circumstances, and that a failure to object to the requested attestation by some third party could be considered a constructive request.

[2, 3] In North Carolina, the testator's request for attestation need not be specific; it may be implied from the conduct of the testator and the surrounding circumstances. 7 Strong, N.C. Index 2d, Wills, § 3, p. 559. "A constructive request is sometimes considered the equivalent of an actual request." *In re Will of Kelly,* 206 N.C. 551, 174 S.E. 453 (1934). The instructions complained of were appropriate and correct, for the evidence tended

to show that the testator at the time of the execution of the will, although severely physically incapacitated, was mentally alert, that he could say "yea" and "nay," that he could shake his head, and that he could gesture with his left hand. Clearly, there was sufficient evidence from which the jury could find that Mr. Knowles constructively requested the attestation of his will.

[4] The caveator's final assignment of error is as follows: "The court erred in failing to give a peremptory instruction in favor of the caveator on the issue of the execution of the will."

The caveator argues that the deceased never requested or directed anyone to sign the will for him as required by G.S. 31-3.3(b). We do not agree. The evidence with respect to the execution of the will tends to show: Mr. Knowles, Vertie K. Wilson, C. G. Wilson, Jr., Mrs. W. M. Hall, and Faye Sloan Dixon were all together in a small room at the Veterans Hospital just prior to the execution of the will. Mr. Knowles was in a wheel chair. C. G. Wilson, Jr., read the will to Mr. Knowles and asked if that was what he wanted. Mr. Knowles acknowledged by nodding his head in the affirmative. Mr. Wilson then went out into the hall to find someone to sign Mr. Knowles' name to the instrument. There he found the Reverend McCulley who agreed to help. After being introduced to Mr. Knowles, Reverend McCulley signed Mr. Knowles' name to the will, and then, while Mr. Knowles held the tip of the pen, made a mark thereon. Mrs. W. M. Hall and Faye Sloan Dixon then attested the will in the presence of each other and Mr. Knowles.

It is our opinion and we so hold that this evidence gives rise to an inference to be resolved by the jury as to whether the will was duly executed according to law. The testator signified by a nod of his head that the paper writing read to him was his will. As previously noted, although the testator was severely physically incapacitated, he was mentally alert, and able to make known any objection he might have had to Reverend McCulley's signing his name to the will. This he failed to do; indeed, he placed his hand upon the pen while Reverend McCulley made his mark.

In the trial in the superior court, we find no error.

No error.

Judges BROCK and MORRIS concur.

CAROLINA FREIGHT CARRIERS CORPORATION v. LOCAL UNION #61 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARHOUSEMEN AND HELPERS OF AMERICA

No. 7127SC33

(Filed 28 April 1971)

1. **Rules of Civil Procedure § 65; Injunctions § 12— issuance of injunction — conditions precedent**

The filing of a complaint or the issuance of a summons pursuant to G.S. 1A-1, Rule 3, is a condition precedent to the issuance of an injunction or restraining order. G.S. 1A-1, Rules 2, 3, 65(b).

2. **Master and Servant § 17; Rules of Civil Procedure § 65— restraining picketing activity by trucking union — invalid restraining order**

Affidavit of a trucking company executive which did not meet the requirements of a complaint could not support the issuance of a temporary injunction restraining the Teamsters Union from picketing the company's headquarters; therefore, the injunction was void and the disobedience of it was not punishable. G.S. 1A-1, Rules 8(a)(2), 10(a), 11(a), and 65(b).

ON *certiorari* to review orders of *Falls, Superior Court Judge,* entered in chambers on 30 June 1970.

The record before this court reveals, in pertinent part, the following proceedings:

(1) On Sunday, 12 April 1970, at 4:00 a.m., Judge Falls entered an order restraining each member of defendant union from participating in any activity designed to bring pressure upon plaintiff; from interfering with the free and unimpeded flow of traffic and shift changes at the home office of plaintiff; from displaying any placard, poster or similar object which might indicate a labor stoppage at plaintiff's home office; and from being within a distance of 60 feet of plaintiff's property except in connection with a specific job assignment. The order provided that "the terms and provisions of this order shall expire April 22, 1970, unless extended as by law provided." The order was filed on 13 April 1970.

(2) The aforesaid order recited that it was based upon an affidavit of John L. Fraley, Executive Vice-President of plaintiff. The affidavit is dated 12 April 1970 and was filed on 13 April 1970.

(3) On 12 April 1970, John L. Fraley executed another affidavit in which he stated that the aforesaid order of Judge

Falls was executed by the sheriff of Gaston County by reading the same to various members of defendant union who were engaged in the activities being restrained; that in spite of the issuance and execution of said order, various members of defendant union continued the activities forbidden in the order. Affiant asked the court to issue a show cause order to each individual who continued to participate in the activities complained of following execution of the order.

(4) On 12 April 1970, Judge Falls issued an order requiring certain named members of defendant union, including Bill Rhew, Dennis Wright, Robert Mills, Jerry McMurray, Sam Kerley, Thomas Parker, Charles Michaels, Hubert Jarvis, David Self, Jerry Rink, William Jordan and Sam Knight (hereinafter referred to as appellants), to appear before him on 15 April 1970 and show cause, if any there be, why they should not be punished as for contempt of court. This order was personally served on appellants on 12 April 1970.

(5) By successive consent orders dated 15 April 1970, 22 April 1970, 1 May 1970, and 11 May 1970, Judge Falls postponed the date of the hearing on the temporary restraining order and the order to show cause, and continued the restraining order in full force and effect during the interim.

(6) On 30 June 1970, following a hearing in which affidavits and oral testimony were offered, Judge Falls entered 12 separate orders finding each of the appellants in contempt of court and requiring them to pay fines ranging from $50.00 to $100.00.

Each appellant gave notice of appeal from the order pertaining to him but failed to perfect his appeal within the time allowed. By order entered on 29 September 1970, this court allowed petition for writ of *certiorari.*

Palmer E. Huffstetler for plaintiff appellee.

Bruce A. Elmore for defendant appellants.

BRITT, Judge.

[1, 2] In their first assignment of error, appellants contend that Judge Falls committed error in signing all orders in this case when no complaint had been filed by plaintiff and no summons issued in the superior court; appellants contend that the

superior court never acquired jurisdiction. The assignment of error is well taken.

We hold that the filing of a complaint or the issuance of summons pursuant to G.S. 1A-1, Rule 3, is a condition precedent to the issuance of an injunction or restraining order, and when a complaint is not filed or summons is not issued as provided in said rule, an action is not properly instituted and the court does not have jurisdiction.

G.S. 1A-1, Rule 2, provides: "There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action."

G.S. 1A-1, Rule 3, provides as follows:

Rule 3. Commencement of action.

A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be *prima facie* evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

Appellee strenuously contends that by virtue of G.S. 1A-1, Rule 65(b), a temporary restraining order may be issued upon an affidavit provided it clearly appears from specific facts shown by the affidavit that immediate and irreparable injury, loss, or damage will result to the applicant. Appellee contends that by virtue of Rule 65(b) a temporary restraining order is given a status different from a civil action as envisioned by Rule 3. We do not agree with these contentions. Rule 3 and Rule 65(b) must be construed *in pari materia*; procedure under Rule 65(b) is permissible only *after* an action is commenced as provided by Rule 3.

In this case, appellee only filed a document denominated an affidavit. This document did not purport to be a complaint and cannot be held to be one. Among other things, (1) it was not properly captioned as required by Rule 10(a); (2) it was not signed by an attorney of record as required by Rule 11(a); and (3) there was no demand for relief made in the document as required by Rule 8(a)(2). The record fails to disclose that a summons was ever issued.

We hold that Judge Falls did not have jurisdiction in this case, therefore, the temporary restraining order was void and disobedience of it was not punishable. 43 C.J.S., Injunctions, § 259, p. 1007. The restraining order is vacated and the orders finding appellants in contempt are

Reversed.

Judges CAMPBELL and GRAHAM concur.

AIRPORT KNITTING, INC. v. KING KOTTON YARN CO., INC.

No. 7125SC190

(Filed 28 April 1971)

1. **Rules of Civil Procedure § 41— trial without a jury—dismissal of action**

In ruling on a motion to dismiss in a trial without a jury, the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and if so, the court must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover. G.S. 1A-1, Rule 41(b).

2. **Sales § 10— seller's action for purchase price — sufficiency of evidence**

In plaintiff's action to recover the alleged contract price for certain items—including office equipment, a 1964 Chevrolet truck, and a quantity of yarn—that it had sold to defendant, plaintiff's evidence was sufficient to withstand defendant's motion for dismissal under G.S. 1A-1, Rule 41(b).

3. **Limitation of Actions § 17— plea of the statute — burden of proof**

Defendant has the burden of convincing the court by the greater weight of the evidence that plaintiff's claim was barred by the statute of limitations.

APPEAL by defendant from *Collier, Judge,* September 1970 Session, CATAWBA Superior Court.

Plaintiff instituted this action on 12 December 1969 seeking to recover of defendant the alleged contract price of $9279.35 for certain items of equipment, including office equipment, a 1964 Chevrolet truck, and a quantity of yarn. Defendant denied the existence of a contract, but admitted that plaintiff purported to convey certain items of yarn, equipment, and a 1964 truck to defendant in the summer of 1964 but did not have title to the equipment and the yarn had no value. Defendant also pleaded the bar of the three-year statute of limitations.

The matter was heard by the court without a jury. At the end of plaintiff's evidence and again at the close of all the evidence, defendant moved for dismissal of plaintiff's claim under Rule 41(b) on the ground that upon the facts and law in the case, plaintiff had shown no right to relief. The court denied the motions and defendant excepted to the rulings. The court entered judgment for plaintiff in the amount of $4720.98, based on its findings of fact. Defendant excepted to all of the findings of fact, to the failure of the court to find and conclude that plaintiff's claim was barred by the statute of limitations, and to the entry of the judgment.

Kenneth D. Thomas for plaintiff appellee.

Keener and Cagle, by Joe N. Cagle, for defendant appellant.

MORRIS, Judge.

[1] In ruling on a motion to dismiss under Rule 41(b), applicable only "in an action tried by the court without a jury," the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover. *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E. 2d 113 (1970).

[2] The evidence in this case tended to show: One Cecil Owenby (Owenby) was president and principal stockholder of Airport Knitting Company and terminated his employment with that company in 1966. During 1966 he and Mr. Ralph Johnson organized the King Kotton Yarn Company. Ralph Johnson (Johnson) became president of defendant and Owenby became secretary thereof. During that year the two discussed the sale by plaintiff to defendant of certain items of inventory and property owned by plaintiff. Owenby went with defendant in July or

August of 1966. About that time and later quite a few discussions were had on the price of the items. Johnson asked Owenby to discuss the matter with Mr. Capps, a C.P.A. employed by defendant in 1967 to audit its books for the fiscal year ended 31 July 1967. Owenby did so, and as a result of that conference, the items were shown on the books of defendant as an account payable to plaintiff. Owenby identified plaintiff's Exhibit No. 1 as a ledger sheet of defendant showing a total of $9279.35 for the items transferred. Mr. Capps testified that plaintiff's Exhibit No. 1 was not a ledger sheet but his worksheet and that the assets transferred included the truck and the yarn inventory at $3300. He was of the opinion the assets were transferred at 30 September 1966. He testified that defendant's fiscal year ended 31 July 1967 and "that was when the engagement was made for us to perform the audit at that time." He was instructed to get with Owenby and make a list of the assets transferred. After he sat down with Owenby and came up with those figures, Johnson approved the figures. They were carried in the book as an account payable and reflected in the balance sheet for 1967 prepared by Mr. Capps' firm. Johnson testified that he and Owenby did agree as to the value of the truck. "The company got the truck at a good buy for $685.02" and "I believe that Mr. Owenby and I reached an agreement about the value of the office equipment—$735.00." As the result of a fire in some machinery, some yarn was damaged, and defendant was paid by the insurance carrier in May of 1967 approximately $1800 for the damage as a result of the fire. Owenby testified that part of the yarn in question was damaged. Johnson testified that none of the yarn in question was damaged by the fire. Some of the yarn in question was sold, defendant getting the proceeds of sale. Neither Owenby nor Johnson was able to testify as to the amount sold. The transfer of the assets of plaintiff to defendant was a separate transaction from the acquisition by Owenby of his stock in defendant and the assets were not transferred for stock.

The court found facts as follows:

"1. That prior to and subsequent to December 1966, Plaintiff, Airport Knitting, Inc., a North Carolina corporation, and Defendant, King Kotton Yarn Company, Inc., a North Carolina corporation, entered into agreements for Plaintiff to transfer to Defendant certain assets and that pur-

suant to said agreements, Plaintiff transferred to defendant a truck, office equipment, and certain yarn inventory.

2. That Plaintiff transferred said truck, office equipment, and certain yarn inventory to Defendant in reliance upon Defendant's promise to pay Plaintiff for same and that Defendant has not paid Plaintiff for the purchase price of said items.

3. That Defendant is indebted to Plaintiff for the truck in the sum of Six Hundred Eighty-five and 02/100 ($685.02); for the office equipment in the sum of Seven Hundred Thirty-five and 96/100 ($735.96); and for certain yarn inventory in the amount of Three Thousand Three Hundred ($3,300.00) and that Defendant has not paid any of said amounts to Plaintiff.

4. That Defendant is therefore indebted to Plaintiff in the sum of Four Thousand Seven Hundred Twenty and 98/100 ($4,720.98), and that Plaintiff is entitled to recover judgment against the Defendant in said sum of Four Thousand Seven Hundred Twenty and 98/100 ($4,720.98) with interest from the 14 day of Oct. 1970."

We are of the opinion, and so hold, that the court correctly overruled defendant's motion for dismissal and further that the facts found are supported by competent evidence and are sufficient to support the judgment.

[3] In passing upon the weight and credibility of the evidence, the court must resolve all inconsistencies and conflicts in the evidence. As to its affirmative defense, defendant had the burden of convincing the court by the greater weight of the evidence that plaintiff's claim was barred by the statute of limitations. The entry of the judgment in favor of plaintiff, of course, evidences the fact that the court was not so convinced. Our study of the evidence discloses nothing requiring that result to be disturbed.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. BENNETT PRITCHARD
— AND —
STATE OF NORTH CAROLINA v. LONNIE CARSWELL

No. 7125SC297

(Filed 28 April 1971)

Assault and Battery § 15— issue of self-defense

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the court was not required to submit the issue of self-defense when there was no evidence to support such an issue.

ON *certiorari* to review trial before *Martin (Harry C.), Judge of Superior Court,* 1 June 1970 Session, BURKE Superior Court.

Defendants, along with one Yates Baker, were tried upon bills of indictment charging that they assaulted Ellis Smith on 8 August 1969 with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

The State offered evidence that tended to show that on the 8th day of August, 1969, Ellis Smith, accompanied by Winford Mace, drove up to the trailer occupied by one of the defendants, Lonnie Carswell. Bennett Pritchard was with Carswell at the trailer. Both were drinking beer, and they invited Smith and Mace to come into the trailer and have a beer with them. The defendant Pritchard then asked Smith and Mace to drive into town and purchase more beer. After going into town, Smith returned and placed the beer in the icebox while Winford Mace left the scene in his automobile.

After placing the beer in the icebox, Smith stated that he needed to shave and was invited by Pritchard to shave in his house which was adjacent to the trailer. After shaving, Smith saw his wife drive up and was preparing to leave with her and go to the show; however, before leaving Smith went into the trailer where he removed a beer from the icebox and told the defendants that they could have the rest. At this point Smith testified that the defendant, Bennett Pritchard, hit him and knocked him backwards on the couch and "he came on me and hit me again and I kicked him off." Smith further testified that when he got up the defendant, Lonnie Carswell, grabbed his arm with both hands and that after pulling loose from Cars-

well and while going out the trailer door, Yates Baker opened his knife and cut him. Smith further testified that before he could reach his car Pritchard and Carswell held him while Yates Baker cut him a second time. After Smith got away from the defendants and jumped into his car, he was cut a third time by Yates Baker. Smith testified that Yates Baker cut him three times with a hawk bill knife and that 44 stitches were required to close the wounds.

Smith's wife testified that she entered the trailer and saw Pritchard beating her husband in the face with his fists. She further testified that she was trying to take her husband home when Yates Baker cut him for the first time while he was leaving the trailer. Mrs. Smith testified that her husband was cut a second time by Yates Baker while being held by Pritchard and Carswell and that her husband was cut a third time while attempting to get away in his automobile.

The defendants offered evidence that tended to show that Smith came into the trailer and jerked the door off of the refrigerator, and that when Pritchard told Smith to get out and leave if he couldn't do anything right, Smith hit him with his fist. Pritchard further testified that he hit back at Smith and knocked him down, and that they both began fighting each other. He further testified that Mrs. Smith entered the trailer and was successful in getting her husband to leave the trailer. After Mr. and Mrs. Smith left the trailer, Pritchard testified that he followed Smith outside, that Smith hit him in the head with a stick four or five times and knocked him to his knees, that when Yates Baker tried to separate them Smith started to hit Yates Baker on the head, and that after seeing this attack on Baker, he passed out. He further testified that neither Lonnie Carswell nor Yates Baker were involved in any fighting inside of the trailer.

The defendant Lonnie Carswell's testimony was substantially similar to that of Pritchard in that they both agree that Smith started the fight in the trailer, that Smith hit Pritchard in the head with a stick outside of the trailer, and that Smith then turned on Yates Baker and began hitting him in the head with a stick and knocked him to his knees. Further testimony was offered by Carswell to show that after Smith had knocked the defendant to his knees, he turned and ran to his car and

drove off with his wife. Carswell testified that "I never saw a knife," and that he never saw Yates Baker cut Ellis Smith.

The testimony of Yates Baker was similar to that of Pritchard and Carswell with one exception. Yates Baker testified that after Smith hit him on the head he did not know whether he took his knife out of his pocket because after he was knocked down he felt like he was going to pass out and that the next time he remembered anything it was 11:00 p.m. that night.

From verdicts of guilty as charged, and judgments of confinement, defendants Pritchard and Carswell appeal. The Record does not disclose an appeal by Baker. The time for docketing appeal expired before a transcript of the trial proceedings was available, and, upon proper petition, we issued writ of *certiorari* to perfect the appeal.

Attorney General Morgan, by Assistant Attorney General Harris and Trial Attorney Magner, for the State.

James A. Simpson for the defendants.

BROCK, Judge.

Defendants assign as error that the trial judge refused to submit to the jury the issue of self-defense.

There is no evidence in this record upon which to base a reasonable inference that defendants cut, or assaulted, the victim in self-defense. The State's evidence discloses a senseless and unprovoked cutting of the victim. The defendants' evidence discloses a senseless and unprovoked assault upon them by the victim. Nowhere did their evidence indicate that they cut or assisted in cutting the victim in self-defense; all of their evidence tends to show that the victim was not cut.

The trial judge was correct in refusing to submit the issue of self-defense.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. BOYD LINVILLE WADE

— AND —

STATE OF NORTH CAROLINA v. CLARENCE R. BENNETT

No. 7125SC121

(Filed 28 April 1971)

1. **Larceny § 7— sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of larceny of copper bars where it tended to show that defendant was seen cutting one of the copper bars while on the owner's property, and a short time thereafter defendant was found with the stolen bars in a car driven by him.

2. **Larceny § 7— sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of larceny of copper bars where it tended to show that defendant was in a car driven by a codefendant when it was stopped and the stolen bars were discovered therein a short time after the theft occurred and a short distance from where the bars had been loaded into the car, and that the copper had a carbon dust about it and defendant had carbon dust on his clothing.

3. **Criminal Law § 9— principal in second degree — instruction**

In this prosecution for larceny of copper bars, the evidence supported the court's instruction that defendant could be found guilty as a principal in the second degree.

4. **Criminal Law § 9— principals in first and second degrees — equal guilt**

Principals in the first and second degrees are equally guilty.

APPEAL by defendants from *McLean, Superior Court Judge,* 10 August 1970 Session of BURKE County Superior Court.

Defendants were tried upon separate bills of indictment charging them with felonious breaking and entering, felonious larceny and receiving. At the conclusion of the State's evidence the court entered directed verdicts of not guilty on the counts of breaking and entering.

The State presented evidence tending to show the following: On a day prior to the alleged theft, copper bars belonging to Great Lakes Carbon Corporation in Burke County were dragged from the corporation's main compound under a chain link fence and to another portion of the corporation's property which was enclosed by a barbed wire fence. A deputy sheriff testified that he "staked out" the property on 12 July 1970. About 1:00 or 1:15 a.m. on that date, the deputy observed defendant Wade

and a Mr. Wright pulling a copper bar out and cutting on it. He heard other voices (male and female) in the close vicinity but he did not see anyone else. For about two and a half to three hours after 1:00 a.m. on that date, deputies kept under observation a Falcon automobile which was parked on Golf Course Road one mile or less from the carbon plant. During this period a Pontiac automobile drove up to the Falcon and stopped. Two people got out of the Pontiac, walked around the Falcon, opened and closed the trunk and got in the Falcon. The Pontiac then drove away. About two minutes later the Falcon started to drive away and was stopped by officers. A Mrs. Walters (sister of defendant Bennett) and Wright (who was seen cutting the copper) were in it.

The Pontiac automobile was stopped by an officer a short distance from where the Falcon had been located. Defendant Wade was driving the Pontiac and defendant Bennett was riding as a passenger. The rear seat had been pushed out of place and a copper bar was observed by the officer. Other copper bars were found in the car. The bars had carbon dust on them and Wade and Bennett both had carbon dust about their clothing.

An official of the Great Lakes Carbon Corporation placed the value of the recovered copper at about $400.

Defendant Bennett testified that on the night of 11 July 1970, Wade, who is Bennett's brother-in-law, agreed to take Bennett to his home in Lenoir in his Pontiac automobile. They were accompanied by Bennett's brother, Max Junior Bennett, who is now deceased. When the three men got to Morganton, Max Junior said "something about some stuff that he wanted to pick up while we were over here." They then went to the area where the Falcon was parked. Bennett's sister and Leon Wright were in the Falcon. Bennett and his companions joined them in drinking some beer. While Bennett was over to an embankment relieving himself, his brother, Wade, and Wright left in the Pontiac. They returned about twenty minutes later. Wright returned to the Falcon and Bennett returned to the Pontiac. As Bennett, his brother, and Wade drove off in the Pontiac, they noticed a parked deputy sheriff's car; whereupon, they pulled into a driveway and Max Junior Bennett got out and left through the woods. Bennett denied knowing that there was any copper in the car or having heard anyone say anything about copper. He also denied having had carbon dust on his clothing.

Wade testified that he helped Max Junior Bennett load the copper into the Pontiac. The copper had been hidden in some woods. Wade denied, however, that he knew the copper was not the property of Max Junior Bennett.

The jury returned verdicts of guilty of larceny of goods of the value of more than $200, and from judgments imposing prison sentences defendants appealed.

Attorney General Morgan by Assistant Attorney General Briley and Assistant Attorney General Harris for the State.

Simpson & Martin by Dan R. Simpson for defendant appellants.

GRAHAM, Judge.

Both defendants assign as error the denial of their motions for directed verdicts of not guilty made at the close of the State's evidence and renewed at the close of all the evidence.

It is elementary that upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580. Furthermore, all of the evidence actually admitted, whether competent or incompetent, including that offered by the defendants, if any, which is favorable to the State, must be taken into account and considered by the court in ruling upon the motion. *State v. Cutler, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777.

[1] Defendant Wade was identified as one of two men pulling on one of the copper bars and cutting it. In order to get to the copper it was necessary that they enter onto the owner's property which was enclosed by a barbed wire fence. Wade admitted that he assisted in loading the copper bars which were hidden in some woods. Within a relatively short time thereafter he was found with the stolen property in a car being driven by him. This constituted plenary evidence to be passed upon by the jury on the question of his guilt of larceny.

[2] The evidence with respect to Bennett is not as compelling. Nevertheless, when considered in the light most favorable to the State, we are of the opinion that it was also sufficient to be passed upon by the jury. Bennett admitted being in the company of Wade during the early morning hours of 12 July 1970 when the theft occurred. He was in the Pontiac automobile with Wade when it was stopped and the stolen property discovered therein. This was a short time after the theft had occurred and a short distance from where the property had been loaded into the Pontiac. Compare *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; *State v. Stroud* and *State v. Mason* and *State v. Willis,* 10 N.C. App. 30, 177 S.E. 2d 912. Furthermore, witnesses testified that the copper had carbon dust about it and Bennett had carbon dust on his clothing. Bennett offered testimony tending to explain his presence near the scene of the theft and exculpate him from responsibility. However, the credibility of this testimony was for the jury.

[3, 4] Defendant Bennett also assigns as error the court's instruction that he could be guilty as a principal in the second degree. A person who is actually or constructively present at the place of a crime either aiding, abetting, assisting or advising in its commission, or is present for that purpose is a principal in the second degree. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793. The evidence would support a finding that the defendant was either a principal in the first degree, or that he rendered aid to the actual perpetrator of the offense, though he never directly assisted in removing the copper bars from the property of the owner. If Bennett were a principal in the first or second degree he would be equally guilty. *State v. Benton, supra; State v. Allison,* 200 N.C. 190, 156 S.E. 547. This assignment of error is overruled.

No error.

Judges CAMPBELL and BRITT concur.

WITTEN SUPPLY COMPANY, INC. v. THOMAS REDMOND AND WIFE, ELIZABETH LOVE REDMOND, AND REGGIE THOMAS

No. 7127SC42

(Filed 28 April 1971)

1. **Accord and Satisfaction § 1— what constitutes an accord — agreement between creditor and debtor**

An agreement between a creditor and a debtor constituted an "accord," where, during the creditor's action to perfect a lien for materials supplied in the construction of the debtor's home, the creditor agreed to take a nonsuit and release the lien upon the debtor's promise to pay the debt in monthly installments, the promise to be secured by a second mortgage and deed of trust on defendant's other home.

2. **Accord and Satisfaction § 1— two categories of agreement**

Agreements governed by the doctrine of accord and satisfaction fall into two categories: (1) the parties agree that the agreement itself shall operate as the satisfaction of the old right; (2) the parties agree that only the performance of the agreement shall have such effect.

3. **Mortgages and Deeds of Trust § 33— distribution of proceeds from foreclosure sale**

A debtor whose obligation was secured by a note and a deed of trust was entitled, upon the foreclosure of the deed of trust, to have the foreclosure proceeds applied to the note. G.S. 45-21.31(a)(4).

4. **Accord and Satisfaction § 2; Mortgages and Deeds of Trust § 17— payment of debt secured by note and deed of trust — creditor's high bid at foreclosure sale**

A debt secured by a note and deed of trust on the debtor's home was paid in full when, upon the foreclosure of the deed of trust, the creditor successfully bid an amount to cover the note and accepted the trustee's deed in exchange for the note.

5. **Rules of Civil Procedure § 60— relief from execution sale — motion in the cause**

A motion in the cause was not an improper procedure for seeking relief from an execution sale under a judgment. G.S. 1A-1, Rule 60(b)(5)(6).

APPEAL by plaintiff from *Falls, Superior Court Judge*, 2 October 1970 Session of CLEVELAND County Superior Court.

Appeal from an order permanently restraining the confirmation of an execution sale.

The following facts are not in dispute:

Plaintiff filed complaint in October of 1968 seeking to perfect a lien in the amount of $2,825.72 for materials supplied by plaintiff and used by defendants in constructing a home in Cleveland County. While the case was pending, defendants agreed to pay plaintiff the obligation sued upon, plus certain collection expenses and interest, in monthly installments of $100. The undertaking was to be secured by a second mortgage note and deed of trust on a home owned by defendants in Stanly County. Plaintiff's attorney, acting on behalf of plaintiff, agreed: "Upon recording the deed of trust, I will take a nonsuit in the above captioned action and release the lien."

The note and deed of trust were executed and delivered in accordance with the agreement, and on 1 October 1969, the deed of trust was recorded in the office of the Stanly County Register of Deeds. Two days later, plaintiff's attorney wrote defendants: "[I]t was represented that this [deed of trust] would be a second lien on that property and upon examination of the record, we find that the 1967, 1968 and 1969 County Taxes have not been paid and that there are Judgments in favor of the Stanly County Hospital and T. A. Smith's Supermarket which are also liens on this property ahead of our deed of trust. It was our understanding that these liens would be paid before we would take a non suit [*sic*] in Cleveland County Action."

Defendants defaulted under the terms of the note and in December, 1969, plaintiff caused the deed of trust to be foreclosed. At the foreclosure sale plaintiff's bid, which was in an amount sufficient to cover the amount due under the note plus interest and other expenses, was the high bid. A trustee's deed for the equity of redemption was thereafter accepted by plaintiff. The deed recited consideration in the amount of the bid.

A nonsuit in the Cleveland County action was never entered and in March of 1970 the matter came on for trial. Neither defendant was present at the trial and plaintiff obtained judgment for the full amount of the original debt plus interest. Execution on the judgment was thereafter issued and defendants' Cleveland County home was sold under the execution. Before the sale was confirmed the male defendant filed a motion in the cause seeking to have the confirmation enjoined. The motion alleged the essential facts heretofore set forth, and in addition, alleged that the moving party was in the State of Oklahoma when judgment was entered.

A temporary restraining order issued and was continued until final hearing. The matter came on for final hearing before Judge Falls. The parties waived a jury trial and submitted the controversy to the court upon an agreed statement of facts. Judge Falls found that there had been an accord and satisfaction of plaintiff's claim by the execution, delivery and foreclosure of the note and deed of trust on defendants' Stanly County property and permanently enjoined confirmation of the sale. Plaintiff appealed.

Horace M. DuBose III for plaintiff appellant.

Jack H. White for defendants Thomas Redmond and wife, Elizabeth Love Redmond.

GRAHAM, Judge.

"Accord and satisfaction is a method of discharging a contract or cause of action, whereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the 'accord' being the agreement, and the 'satisfaction' its execution or performance." 1 C.J.S., Accord and Satisfaction, § 1, p. 462.

[1, 2] Plaintiff argues strenuously that its agreement to accept monthly installments was not an "accord" within the legal meaning of that term, contending that the agreement and the note and deed of trust were intended simply as additional security for the original debt. Even so, payment of the note would necessarily constitute payment of the original debt, for the note was in an amount sufficient to cover the amount of the debt and certain collection expenses as well. Agreements governed by the doctrine of accord and satisfaction fall into two categories. "In the one case the parties agree that the agreement itself shall operate as the satisfaction of the old right; and in the other the parties agree that it is only the performance of the agreement that shall have that effect." *Dobias v. White,* 239 N.C. 409, 80 S.E. 2d 23.

[3] Plaintiff responds by saying that the note has not been paid and therefore there has been no performance by defendants. We disagree. Defendants were entitled to have applied to the note the net proceeds from the foreclosure sale. G.S. 45-21.31(a)(4). The net proceeds equaled the exact amount of the note. The note was surrendered to the trustee in part pay-

ment of the price bid, and plaintiff accepted the trustee's deed in full payment of the note.

[4] The real complaint of plaintiff seems to be that the equity of redemption was not worth the amount of the bid. However, the question of whether plaintiff received a poor bargain when it bid in the property is of no consequence at this point. The fact remains that the defendants' debt was paid in full when plaintiff accepted the trustee's deed in exchange for the note evidencing the debt. Plaintiff may not receive payment again through an execution sale under a judgment for the identical debt.

[5] Plaintiff has raised several procedural points which have been considered and are overruled. A motion in the cause was not an improper procedure for seeking relief from an execution sale under the judgment. G.S. 1A-1, Rule 60(b)(5)(6). Plaintiff's motion to dismiss was properly denied, and no prejudicial error appears with respect to any of the interlocutory orders appearing in the record.

The agreed statement of facts fully support the findings and conclusions of the trial court and entitle defendants to the permanent injunction granted.

Affirmed.

Judges CAMPBELL and BRITT concur.

BARBARA S. FINLEY v. ARTHUR LEE RIPPEY, JR., ORIGINAL DEFENDANT; AND HAROLD LLOYD FINLEY, ADDITIONAL DEFENDANT

No. 7014SC528

(Filed 28 April 1971)

1. Evidence § 50— testimony by medical expert — admissibility

Testimony by an orthopedic specialist, when asked to explain what he meant by a possible disc injury, was testimony as to probabilities based upon his examination of plaintiff and diagnosis of her condition, and its admission was not prejudicial error.

2. Evidence § 50— medical testimony as to permanent disability

A medical expert may give his opinion as to the percentage of permanent disability to a portion of the body on the basis of an objective or detached standard without reference to the patient's occupation or daily activities.

Finley v. Rippey

APPEAL by Original Defendant Arthur Lee Rippey, Jr., from *Godwin, Special Superior Court Judge,* February 1970 Session, DURHAM Superior Court.

Plaintiff instituted this action to recover damages for personal injuries arising out of a collision which occurred on 26 November 1965. The action was originally brought against Arthur Lee Rippey, Jr., and Tony Wayne Rippey, his son. Pending trial, Tony Wayne Rippey was killed and the action proceeded only as to the defendant, Arthur Lee Rippey, Jr. It was stipulated that Tony Wayne Rippey was driving the automobile of Arthur Lee Rippey, Jr. as agent of Arthur Lee Rippey, Jr. The original defendant filed a cross action against Harold Lloyd Finley, husband of the plaintiff, alleging negligence on the part of Harold Lloyd Finley as a proximate cause of the collision and claiming contribution. Evidence as to the collision was conflicting. Plaintiff's evidence tended to show that the additional defendant Finley approached an intersection and gave a left turn signal indicating his intention to turn to the left; that as he approached the intersection, the automobile of the defendant Rippey was following him and collided with the Finley automobile while it was in the process of making a left turn. Defendant Rippey's evidence tended to show that the Rippey automobile had pulled out to pass the Finley automobile and that Finley began a left turn into the path of the overtaking Rippey automobile. Defendant Rippey's evidence also tended to show that instead of giving a left turn signal the additional defendant Finley, gave a right turn signal. Issues of negligence and damages were answered in favor of plaintiff. The third issue as to the joint and concurring negligence of the additional defendant Finley was answered in the negative. The defendant Rippey appealed.

Spears, Spears, Barnes and Baker by Marshall T. Spears, Jr., for plainiff appellee.

Bryant, Lipton, Bryant and Battle by Victor S. Bryant for original defendant appellant Rippey.

Teague, Johnson, Patterson, Dilthey and Clay by Ronald C. Dilthey for additional defendant appellee Finley.

VAUGHN, Judge.

[1] Plaintiff's doctor, an orthopedic specialist, testified as to his examination, diagnosis and treatment of the plaintiff and gave his opinion as to her disability. His testimony includes the following:

> "Our diagnosis was that she had sustained a ligamentous injury of her low back which is not really or necessarily an exact diagnosis in that we know that in addition to ligaments the other movable structures in the spine that are frequently injured in an injury of this type and which do not show up on x-rays, where only fractures or dislocations are visible, is an injury to the intervertebral disc. There was no evidence we could point to that she had had a disc injury. On the other hand, although her findings were suggestive of ligamentous injury, we felt that she could certainly have sustained an injury to an intervertebral disc at this level."

Subsequently the witness was asked:

> "Explain to us just a little bit more what you mean by a possible disc injury. What could this reasonably involve in your mind?"

Defendant's objections to the question were overruled and the doctor answered as follows:

> "A disc injury, as with all other injuries, can be minimal or they can be extensive. Even with an extensive injury of a disc it does not necessarily mean that a rupture may occur, but the disc may be severely damaged and may undergo changes thereafter with narrowing of the space between the vertebra, and we know that people can have an injury and perhaps years later have a disc rupture occur that may well have been due to a previous injury, and yet we also know that the normal process of aging and wear and tear involving discs is such that there is no way we can be sure how much may have been attributed to an injury and how much may have been attributed to wear and tear.
>
> "In this case her findings and history over this brief period of time subsequent to an injury and without any prior history of back pain, and with a history of radiating

pain, were suggestive that she may well have had a disc injury even though there was no proof of this; and actually the only means of proving for instance, a ruptured disc, is actually by seeing it at the time of surgery."

Defendant contends that the foregoing constituted error in that it allowed the witness to "go off into the realm of speculation." We hold that the witness, a medical expert, was testifying as to probabilities based upon his examination and diagnosis and that the admission of the evidence was not prejudicial error.

[2] Defendant's assignments of error Nos. 4 and 9 are directed to the testimony of this doctor when he testified, in substance, that in his opinion plaintiff had "5 per cent partial permanent residual disability of the spine as a whole." The thrust of defendant's assignments of error with reference to the admission of this testimony is that the disability rating was given on a basis which did not include any relationship to the patient's occupation or to her daily activities. Where a medical expert is of the opinion that his patient has suffered some permanent loss or disability to a part of his body, we think it is entirely proper for him to express his opinion as to the percentage of disability to that portion of the body on the basis of an objective or detached standard. The jury will then consider this along with all the other evidence in determining what damages the plaintiff as an individual has sustained. These assignments of error are overruled.

The defendant brings forward 13 assignments of error based on alleged errors in the charge, all of which have been carefully reviewed by this Court. When the charge in this case is considered as a whole, in the same connected way in which it was given, it presents the law fairly and clearly to the jury and no prejudicial error appears therein which would afford grounds for reversing the judgment. The case was well and fairly tried in the superior court and has been ably argued on appeal to this Court. We hold that the defendant has had a fair and impartial trial, free of prejudicial error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. EDDIE LEE MELTON

No. 7127SC278

(Filed 28 April 1971)

1. **Criminal Law § 114— instruction that court found witnesses to be fingerprint expert**

In a prosecution for breaking and entering and larceny wherein the State's case was based entirely upon fingerprint evidence, the trial judge erred in instructing the jury in two portions of the charge that he himself had found a State's witness to be a fingerprint expert.

2. **Criminal Law § 114— instruction on circumstantial evidence — expression of opinion on fingerprint evidence**

In a prosecution in which the State relied on fingerprint evidence, the court's instruction that circumstantial evidence is a recognized instrumentality of the law and when properly understood is highly satisfactory in matters of gravest moment, while a correct statement, tended in this case to create with the jury the impression that in the opinion of the court the fingerprint evidence of the State was highly acceptable and entitled to great weight.

3. **Criminal Law § 114— instructions on fingerprints — expression of opinion**

In a prosecution in which the State relied on fingerprint evidence, the trial court erred in instructing the jury that fingerprints found at the crime scene are "receivable in evidence" to identify the accused as the perpetrator of the crime if they could only have been placed there at the time the crime was committed, since the instruction was susceptible to the interpretation that the court was satisfied that a fingerprint found at the crime scene could only have been impressed there when the crime was committed before the court admitted the fingerprint in evidence.

APPEAL by defendant from *Falls, Judge,* 25 November 1970 Session of GASTON Superior Court.

Defendant was charged with breaking and entering with intent to commit larceny in the first count of the bill of indictment and with larceny after breaking and entering in the second count. The jury found him guilty as charged on both counts. From judgment entered on the verdict, defendant appealed. Upon a finding of defendant's indigency, counsel was appointed to perfect his appeal. Defendant failed to docket his appeal on time and moved, in writing, that the record on appeal be treated as a petition for writ of *certiorari.* The motion was allowed.

Attorney General Morgan, by Staff Attorney Price, for the State.

Max L. Childers for defendant appellant.

MORRIS, Judge.

[1] Among errors assigned by defendant are portions of the court's charge to the jury. The State's entire case was based upon fingerprint evidence. Five witnesses testified for the State. Four of them gave testimony with respect to a fingerprint taken from the windowsill inside the living room of the house entered. The other witness was the owner of the premises entered and the property taken therefrom. In its charge, the court instructed the jury:

> "Another police officer named Ferguson testified about his training in the field of fingerprint comparisons, etc., and *the Court qualified him as an expert to testify as an expert in this field of fingerprint comparison and analysis.*" (Emphasis supplied).

and

> "In circumstantial evidence, it is a recognized instrumentality of the law in the ascertainment of truth and when properly understood and applied, it is highly satisfactory in matters of greatest *(sic)* moment."

and

> "Now, in passing upon the testimony in this case, members of the jury, you will recall that *the Court found as a fact that Officer Ferguson was an expert in the field of fingerprint comparison and analysis.* In that respect, I instruct you that the proof of fingerprints corresponding to those of an accused in a place where a crime has been committed, under such circumstances *that they could only have been impressed at the time when such crime was perpetrated, is receivable in evidence to identify the accused as the person who committed such crime.*" (Emphasis supplied).

We must agree with defendant that these portions of the charge, particularly under the circumstances of this case, constitute prejudicial error, inadvertent though it may be. We do not approve, under any circumstances, an instruction to the jury that a witness is an expert in the field about which he testified. The evidence given was admitted by the court and presumably

remembered by the jury. Here the court emphasized in two separate portions of the charge that he himself had found the witness to be an expert.

[2] The statement that circumstantial evidence is a recognized instrumentality of the law in the ascertainment of truth and when properly understood and applied, is highly satisfactory in matters of gravest moment is certainly a correct statement. See *State v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97 (1966). Nevertheless, in our opinion, its inclusion in the instructions to the jury tended to create with the jury the impression that in the opinion of the court the fingerprint evidence of the State was highly acceptable and entitled to great weight.

[3] It is true that *in order to warrant a conviction,* the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed. *State v. Smith,* 274 N.C. 159, 161 S.E. 2d 449 (1968), and cases there cited. Here, the court, after again reminding the jury that he had found the officer testifying as to the fingerprint to be an expert, instructed them that proof of prints corresponding to those of the accused in a place where a crime has been committed under such circumstances, that they could only have been placed there at the time of the commission of the crime, is *receivable into evidence* to identify the accused as the perpetrator of the crime. Here, of course, the fingerprint was received in evidence and the testimony with respect thereto admitted. The jury could have, from this instruction, particularly in light of previous instructions, understood that the court was satisfied that the fingerprint could only have been impressed at the scene at the time of the commission of the crime before he allowed the evidence in.

The evidence was that the prosecuting witness had been away from her home and there had been no one there for some three or four days at the time it was discovered that her house had been entered. When she returned home, having been notified that her home had been entered, the window on the front porch was raised "a couple of inches." The officer, who arrived before the prosecuting witness, testified he had gone there as the result of a telephone call and found the front door standing open about twelve or fifteen inches and the window "up two or three

inches." The officer dusted for fingerprints in other areas of the rooms which had been ransacked but found only those under the windowsill.

We come to the conclusion that the portions of the charge set out herein, to which defendant excepts, are sufficiently prejudicial to defendant to warrant a new trial. We do not discuss exceptions to the admission or exclusion of evidence as they will probably not occur upon retrial.

New trial.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT CHARLES PFEIFER

No. 7128SC268

(Filed 28 April 1971)

Criminal Law §§ 8, 91— Interstate Agreement on Detainers — request for trial before warrant issued

The trial court did not err in the denial of defendant's motion to quash an indictment charging him with escape interposed on the ground that the State had failed to comply with the Interstate Agreement on Detainers, G.S. 148-89, where the State in November 1967 filed fugitive warrants with prison authorities in Pennsylvania to secure defendant's return to this State to complete service of sentences from which defendant escaped, defendant in December 1967 filed a petition with the State of North Carolina requesting that he be tried on the escape "charge," and the warrant charging defendant with escape was not issued until April 1970 and was served on defendant in September 1970 after his return to this State, since at the time defendant filed his petition with the State requesting trial, there was no "untried indictment, information or complaint" pending against him for the escape.

APPEAL by defendant from *Martin (Harry C.), J.*, 2 December 1970 Session of BUNCOMBE Superior Court.

This is a criminal prosecution upon a bill of indictment, proper in form, dated 21 October 1970, charging the defendant with felonious escape on 22 March 1966. Before pleading, the defendant moved to quash the bill of indictment for the reason that he had been deprived of a speedy trial. After hearing

evidence on the defendant's motion, the court made findings of fact which are summarized as follows:

In September 1963, the defendant was convicted in Lincoln County of assault with a deadly weapon. He was given a two-year sentence which was suspended. The defendant violated the conditions of the suspension, and the prison sentence was activated in September 1964. The defendant shortly thereafter escaped. He was captured, tried and convicted of escape, and sentenced to three months imprisonment to be served in addition to his original two-year sentence. On 22 March 1966, the defendant escaped for a second time and fled to Pennsylvania where he was subsequently convicted and imprisoned for violating the criminal laws of that state. Upon learning of the defendant's whereabouts, the State of North Carolina in November 1967 filed a fugitive warrant with the Pennsylvania authorities. On 11 December 1967, the defendant filed a petition with the State of North Carolina requesting that he be tried on the escape "charge." At this time the defendant had not been charged in North Carolina for the escape which occurred on 22 March 1966. On 13 August 1970, the defendant, after waiving extradition, was returned to North Carolina to finish serving the sentence imposed upon his conviction of assault with a deadly weapon. On 4 September 1970, the defendant was served with a warrant dated 28 April 1970 for the escape which occurred on 22 March 1966. The defendant's motion to quash the bill of indictment was denied, and the defendant pleaded not guilty. The jury found the defendant guilty as charged, and from judgment entered on the verdict the defendant appealed.

Attorney General Robert Morgan and Staff Attorney Walter E. Ricks III for the State.

Robert L. Harrell for defendant appellant.

HEDRICK, Judge.

The defendant contends that it was error for the court to deny his motion to quash the indictment in that North Carolina failed to comply with the provisions of the Interstate Agreement on Detainers, to which both North Carolina and Pennsylvania are parties. This agreement, codified as G.S. 148-89, provides in pertinent part:

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. . . . "

The fugitive warrant filed by North Carolina with the State of Pennsylvania in November 1967 was not based upon a warrant charging the offense of escape, but was to secure the return of the defendant to serve the unexpired portion of sentences already imposed. The defendant had no "untried indictment, information or complaint" pending against him until the issuance of the warrant for escape on 28 April 1970. The court properly denied defendant's motion to quash the indictment.

The defendant further contends that the court erred in denying his motion in arrest of judgment. "A motion in arrest of judgment is one made after the verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). We have carefully examined the record and find no fatal defect appearing thereon. The defendant had a fair trial in the superior court free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

RUTH SIGMON McMURRY, MOTHER; ROBERT F. McMURRY, SR., FATHER; ROBERT F. McMURRY, JR., DEC'D. EMPLOYEE v. MOHICAN MILLS, INC., EMPLOYER; EMPIRE MUTUAL INSURANCE CO., CARRIER

No. 7127IC98

(Filed 28 April 1971)

Master and Servant § 79— workmen's compensation — dependency of parent — payments in lieu of board

There was competent evidence to support the Industrial Commission's findings that any payments made by the insured employee to his mother were made in lieu of board and lodging and should not be considered in determining whether the mother was partially dependent upon the employee, and that no one was partially or wholly dependent upon the insured employee, and the Commission properly concluded that compensation benefits for death of the employee should be divided equally between the employee's divorced parents. G.S. 97-39.

APPEAL by femme plaintiff from opinion and award of the North Carolina Industrial Commissioner filed 21 September 1970.

This appeal arose out of a determination by Deputy Commissioner Thomas and then by the full Industrial Commission that both parents of the deceased son, who was covered by the Workmen's Compensation Act, were entitled to an equal share of the compensation award. Liability was stipulated by the compensation carrier and the sole question was whether the femme plaintiff (Mrs. McMurry) was "partially dependent" upon the insured employee and therefore entitled to the full award pursuant to G.S. 97-38(3).

Testimony was presented by both the mother and father (Mr. McMurry) which testimony was in conflict as to whether deceased partially supported his mother. Mr. and Mrs. McMurry had been legally separated and divorced for several years and deceased had been living with his mother prior to his death. Both she and her son worked and it was found as fact that deceased occasionally bought groceries and gave his mother money which constituted payments in lieu of board and lodging. The deputy commissioner found that no one was wholly or partially dependent upon the deceased for support, and concluded that the father and mother should share the compensation equally. Mrs. McMurry appealed to the full commission and

from its affirmation of the opinion and award of the deputy commissioner, she appealed to this court.

Corne, Warlick & Pitts by Larry W. Pitts for plaintiff appellant, Ruth Sigmon McMurry.

Moose & Moose by Raymond R. Moose for plaintiff appellee, Robert F. McMurry, Sr.

BRITT, Judge.

It is well settled that on appeal to the courts the findings of fact of the Industrial Commission are binding on the courts if competent evidence supports such findings. *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957); *Blalock v. Durham*, 244 N.C. 208, 92 S.E. 2d 758 (1956); and, *Carlton v. Bernhardt-Seagle Co.*, 210 N.C. 655, 188 S.E. 77 (1936).

G.S. 97-39, one of the applicable statutes, states in pertinent part that:

> A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident, *but no allowance shall be made for any payment made in lieu of board and lodging* or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. * * * (Emphasis added.)

There was sufficient competent evidence for the commission to find that any payments made to Mrs. McMurry were "made in lieu of board and lodging," which payments are not to be considered in determining whether Mrs. McMurry was dependent upon the insured. There was sufficient competent evidence for the commission to find that the amounts given to Mrs. McMurry were for the benefit of the deceased rather than her. Therefore, it was proper for the commission to find that no one was wholly or partially dependent upon the deceased, and to conclude that the compensation should be equally divided between Mr. and Mrs. McMurry. G.S. 97-40.

The order and award appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

IN THE MATTER OF THE ESTATE OF BOBBY GENE SNYDER, ALIAS BOBBY GENE TAYLOR

No. 7125SC126

(Filed 28 April 1971)

Appeal and Error § 6— appeal from order not signed by court

Purported appeal from an order which was never signed by the court and never officially filed or approved by the court must be dismissed.

PURPORTED appeal by petitioner from *McLean, Judge,* 6 October 1970 Session, Superior Court of CALDWELL County.

Service of the record on appeal in this matter was accepted by counsel for Mae Blankenship, designated as "Respondent" by petitioner. However, counsel for Mae Blankenship did not sign the stipulation appearing in the record that the "foregoing ____ pages shall constitute the record on appeal in the above captioned cause." Neither did counsel for Mae Blankenship file a brief, nor do we perceive any necessity for his doing so. Nevertheless, for purposes of this opinion, we assume that the facts stated by petitioner are correct. They are as follows: Bobby Gene Snyder, alias Taylor, died intestate on 11 April 1969, survived by one child, Dawn Taylor, 22 months of age, and his mother, Mrs. John Taylor. On 15 April 1970, Walter Lentz, filed application for letters of administration, alleging that "the applicant is a resident of North Carolina, is entitled to administer the estate by statutory preference or renunciation, as the record may show, is over twenty-one years of age, has never been convicted of a felony, is not in any way disqualified to act as administrator under the laws of this State, and has not renounced the right to qualify." On the same date Maybelle Taylor, in writing, renounced her right to administer the estate and requested the appointment of Mr. *(sic)* Bob Blankenship.

On 27 April 1970, Mae Blankenship filed application for letters of administration.

On 28 April 1970, the clerk of superior court entered an order denying the application of Walter Lentz.

On 29 April 1970, the clerk entered an order granting the application of Mae Blankenship.

On 7 May 1970, Walter Lentz filed notice of appeal to the superior court from the entry of the order denying his application, and on the same date filed a petition alleging that he is the father of LaRae Taylor Lentz, 19 years of age; that LaRae Taylor and Bobby Gene Snyder (alias Taylor) were married on 17 January 1967; that one child, Dawn Taylor, was born of the marriage; that on 26 February 1969, LaRae Taylor secured a divorce from Bobby Gene Taylor and was awarded custody of the child; that LaRae Taylor and the minor child reside with petitioner; that Bobby Gene Snyder (alias Taylor) died intestate on 11 April 1970 *(sic)* survived by his mother, Mrs. John Taylor, a resident of Virginia; that on 27 *(sic)* April 1970 petitioner filed application for letters of administration and the clerk denied the petitioner the right to administer the estate; that Dawn Taylor is the only child of the deceased and is his next of kin; that a good cause of action exists on behalf of the intestate's estate for wrongful death. Petitioner prayed that the court reverse the order denying petitioner the right to administer the estate and enter an order appointing him the administrator of the deceased's estate.

There next appears in the record on appeal an order entitled "Order Affirming Denial." The purported order is not signed and bears no filing date. Petitioner states in his facts that the cause came on for hearing before Honorable W. K. McLean on 28 September 1970; that Judge McLean affirmed the order of the clerk denying petitioner the letters of administration; that the order was not prepared by the attorney for respondent, and "counsel for petitioner filed an unsigned order dated October 6th, 1970, for the purpose of acquainting the Court of Appeals with the history of the proceedings." On 2 October 1970, petitioner filed notice of appeal, apparently from the unsigned order later filed by petitioner's counsel. Petitioner failed to docket his purported appeal on time, and petition for writ of *certiorari* was allowed on 28 December 1970.

Ted S. Douglas for petitioner.

MORRIS, Judge.

Apparently, petitioner does not consider his petition either as an attempted collateral attack on the appointment of Mrs. Blankenship nor a motion before the clerk to vacate and set

aside the letters of administration theretofore issued by the clerk. Regardless of the appellation given his proceedings by petitioner, he brings us nothing to consider. With commendable candor he states that he attempts to appeal from a purported order which was never signed by the court and never officially filed nor officially approved by the court but prepared by counsel for petitioner, dated 6 October 1970 (4 days after the entry of notice of appeal) and filed by counsel for petitioner (apparently with the court papers). Under these circumstances it is obvious that petitioner's purported appeal must be dismissed. There has been nothing presented for this Court to consider.

Purported appeal dismissed.

Judges BROCK and HEDRICK concur.

JAHALA S. WRIGHT v. A. J. WRIGHT

No. 7120DC64

(Filed 28 April 1971)

Divorce and Alimony § 22; Evidence § 51; Parent and Child § 1— blood-grouping test — child born before parties separated

In the wife's action for alimony without divorce and custody and support of a minor child, the trial court erred in allowing the husband's motion under G.S. 8-50.1 for a blood-grouping test on the question of paternity of a child born almost three years before the parties separated, since the blood-grouping test results cannot be used to establish nonpaternity if there was access, and the results would be superfluous if nonaccess is established.

Judge BROCK dissenting.

APPEAL by plaintiff from *Webb, District Court Judge,* 9 June 1970 Session, UNION County District Court.

Plaintiff instituted this action for alimony without divorce, maintenance for herself, and for custody and support for the minor child of the parties.

Numerous motions have been filed by both parties, but the crux of the plaintiff's appeal to this Court is the District Court Judge's order allowing defendant's motion under G.S.

8-50.1 for a blood-grouping test. The parties were married in 1948 and lived together as man and wife until their separation which occurred on 13 November 1969. The child whose paternity defendant denies was born on 5 December 1966 and was almost three years of age at the time of the separation.

Clark, Huffman and Griffin, by Robert L. Huffman for plaintiff appellant.

Thomas and Harrington by Larry E. Harrington for defendant appellee.

MORRIS, Judge.

G.S. 8-50.1 has been in its present form since 1965 and the second paragraph thereof reads as follows:

> "In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person."

Upon its face this statute seems broad in its application, and is undoubtedly the purported authority under which Judge Webb entered his order requiring plaintiff to present herself and the minor child at the Diagnostic Laboratories and submit to a blood-grouping test. However, in 1968 our Supreme Court held:

> "When a child is born in wedlock, the law presumes it to legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife. [citations]. To render the child of a married woman illegitimate, unless impotency be established, proof of the nonaccess of her husband is required, and neither the wife nor the husband is a competent witness to prove such nonaccess. [citations]. 'The evidence of nonaccess, if there be such, must come from third persons.' [citation]. If there was access, *there is a*

conclusive presumption that the child was lawfully begotten in wedlock. [citations]." (Emphasis added). *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562, (1968).

Under the clear holding of *Eubanks* the results of a blood-grouping test cannot be used to establish nonpaternity if there was access; and if nonaccess is established the results of the blood-grouping test would be superfluous. Therefore, since the results of the blood-grouping test are incompetent or immaterial evidence, the order requiring the test was error.

Reversed.

Judge VAUGHN concurs.

Judge BROCK dissents.

Judge BROCK *dissenting.*

It seems to me that the decision in *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562, relied on by the majority, has no direct application to the question raised on this appeal. In *Eubanks* the Supreme Court was considering only the failure of the evidence to show nonaccess. Clearly no question was raised with respect to a motion or an order for a blood-grouping test under G.S. 8-50.1. In my opinion the statute will authorize the ordering of a blood-grouping test in a divorce action, and a showing thereby that the husband is excluded as the father is competent evidence to show nonpaternity. It is my opinion that a showing of the exclusion of the husband as the father by a blood-grouping test constitutes a proper method of showing nonpaternity in addition to impotency and nonaccess discussed in *Eubanks.* See: Annot: Blood Grouping Tests, 46 A.L.R. 2d 1000; Uniform Act on Blood Tests to Determine Paternity, 9 U.L.A. 110-114. For discussion of use and reliability of blood-grouping tests, see *State v. Fowler,* 277 N.C. 305, 177 S.E. 2d 385.

The question of laches on the part of the husband in raising the question of paternity has also been argued in this appeal and it seems to me that it is a question that needs to be explored further. However, since the majority opinion does not allow the blood-grouping test, there is no value in my pursuing the question of laches in this dissent.

AMMIE ROSS McCONNELL v. CARY JONES McCONNELL

No. 7126DC253

(Filed 28 April 1971)

Appeal and Error § 41— narration of evidence on appeal

Appeal is dismissed for failure of appellant to state the evidence in narrative form. Rule of Practice in the Court of Appeals No. 19(d).

APPEAL by plaintiff from *Gatling, District Judge,* 14 January 1971 Session, MECKLENBURG District Court.

This is an action for temporary and permanent alimony and counsel fees pursuant to G.S. 50-16.1 et seq. Following a hearing on plaintiff's motion for alimony *pendente lite* and counsel fees, the court entered an order in which it found facts in favor of defendant and denied plaintiff's motion. Plaintiff appealed.

Gene H. Kendall for plaintiff appellant.

J. C. Sedberry for defendant appellee.

BRITT, Judge.

The purported record on appeal filed in this case does not comply with the Rules of the Court of Appeals. Among other things, the evidence introduced at the hearing is not set forth in narrative form. Plaintiff filed what purports to be a stenographic transcript of the testimony supposedly in compliance with our original Rule 19(d) (2), but Rule 19(d) was amended by the Supreme Court on 11 February 1969, the amendment becoming effective on 1 July 1969. 2 N.C. App. 690. The amendment provides that the "evidence in case on appeal shall be in narrative form" and that the stenographic transcript of the evidence may not be used as an alternative to narration of the evidence. For failure to comply with the Rules, plaintiff's appeal is, *ex mero motu,* dismissed. *Crosby v. Crosby,* 1 N.C. App. 398, 161 S.E. 2d 654 (1968).

Nevertheless, we have carefully reviewed the record on appeal as filed and conclude that the trial court's order is fully supported by the findings of fact, which findings are amply supported by competent evidence.

Appeal dismissed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHN QUINTON POWELL

No. 7125SC248

(Filed 28 April 1971)

1. **Criminal Law § 23— validity of guilty plea — effect of defendant's intoxication**

The fact that defendant was intoxicated at the time he entered a guilty plea was not prejudicial error under the facts of this case, the trial judge having examined defendant painstakingly and found him competent to plead.

2. **Criminal Law § 134— commitment for pre-sentence diagnostic study — subsequent judgment of imprisonment**

The commitment of defendant to the Department of Correction for pre-sentence diagnostic study is authorized by statute and does not preclude the court from thereafter entering a judgment of imprisonment. G.S. 148-12.

3. **Criminal Law § 138— sentence of imprisonment — credit for time spent in diagnostic center**

Court of Appeals vacates a judgment of imprisonment which did not give defendant credit for time spent in a pre-sentence diagnostic center. G.S. 148-12(b).

APPEAL by defendant from *Beal, Special Judge,* 7 December 1970 Session, CALDWELL Superior Court.

Defendant was charged in an indictment, proper in form, with felonious breaking or entering and felonious larceny of property of a value in excess of $200 from the Central Lumber Yard Building of Bernhardt Furniture Company in Lenoir, North Carolina.

Defendant appeared in open court on 25 August 1970 before Judge McLean, in company with his brother, charged as an accomplice in the alleged offenses. After being fully informed by the Court of the nature of the proceeding and the charges, the maximum punishment, his right to plead not guilty and have a trial by jury, his right to the appointment of counsel by the court, his right to have witnesses subpoenaed, and the conse-

quences of a plea of guilty, the defendant executed, in writing, a waiver of counsel and a plea of guilty as charged in both counts of the bill of indictment.

During the examination of the defendant by the court, it developed that the defendant was then under the influence of alcohol, and was of "low mentality." Nevertheless, he indicated to the court that he fully understood the matters which had been explained to him, as set forth hereinabove. After hearing the State's evidence, the court continued prayer for judgment and ordered that the defendant be committed to the custody of the Department of Correction for pre-sentence diagnostic study. The defendant appeared before Judge Beal on 11 December 1970, at which time judgment of imprisonment in the State Prison for a term of not less than one nor more than three years was entered. Defendant gave notice of appeal in open court, and is represented on appeal by counsel appointed by the court.

Attorney General Morgan by Assistant Attorney General Weathers for the State.

Townsend & Todd by Neil D. Beach for defendant-appellant.

BROCK, Judge.

[1] Defendant assigns as error the court's acceptance of his plea of guilty, the defendant having informed the court that he was under the influence of alcohol. The record shows that the trial judge, who had the opportunity to observe the defendant closely, examined him painstakingly and found him competent to plead to the indictment. In a proper case, it might be more appropriate to postpone the arraignment of an intoxicated defendant, and possibly to adjudge him in contempt of court. However, upon the facts of this case, we cannot hold that to accept a plea of guilty from such a defendant is error as a matter of law, or abuse of discretion.

Defendant assigns as error that the court failed to find as a fact that the plea of guilty was knowingly and voluntarily made. If the facts of this case require such an express finding, but cf. *State v. Johnson,* 7 N.C. App. 53, 171 S.E. 2d 106, the record plainly shows that such a finding was in fact made. This assignment of error is overruled.

[2] Defendant assigns as error that the court entered judgment of imprisonment on 11 December 1970 ". . . when in fact judg-

ment was entered on August 26, 1970 when the defendant was ordered 'committed to the custody of the Commissioner of the Department of Corrections for a diagnostic study of the defendant for a period of sixty days with the right and privilege of the department to hold the defendant for an additional thirty days should the need arise and that the court be advised of the recommendations of the diagnostic center prior to the judgment of the case.'" The prior order, defendant contends, ". . . would seem to preclude the State from entering a second judgment against the defendant." G.S. 148-12 provides for the procedure followed in this case. This assignment of error is without merit and is overruled.

[3] The judgment fails to provide that defendant shall receive credit against his sentence for time spent in the diagnostic center, as required by G.S. 148-12(b). Therefore the judgment must be vacated and the case remanded for entry of judgment so providing.

Judgment vacated and case remanded.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD LEE CRAIG

No. 7125SC79

(Filed 28 April 1971)

Criminal Law § 113— failure to recapitulate testimony of one defense witness

Where, in a prosecution for manslaughter arising out of an automobile collision, the trial judge stated defendant's evidence to the extent necessary to explain the application of the law thereto, particularly with regard to the defense that defendant was not intoxicated and that his conduct in driving his car and his loss of memory concerning the collision had been caused by being struck on the head in a fight shortly before the collision, defendant was not prejudiced by failure of the court to recapitulate the testimony of one of his witnesses which was pertinent to such defense.

APPEAL by defendant from *McLean, J.*, 17 August 1970 Session of CALDWELL Superior Court.

State v. Craig

By bill of indictment, proper in form, defendant was charged with the crime of manslaughter in connection with the death of Robert Lee Ingram, who died as result of an automobile collision which occurred on 25 July 1970 in Caldwell County, N. C. Defendant pleaded not guilty. The State's evidence in substance tended to show: Defendant was driver of the car which collided with the car driven by Ingram; Ingram died as a result of the collision; the collision occurred when defendant drove through a red light at a high rate of speed on the wrong side of the road while in a highly intoxicated condition; a chemical analysis of defendant's breath made approximately an hour and a half after the collision showed a blood alcohol concentration of 0.24 percent. The defendant's evidence tended to show: He was not intoxicated; shortly before the accident he had been in a fight with a boy named Whittington; any abnormal conduct on his part was caused by his being struck on the head by Whittington in the fight; he did not recall anything that happened from the time when he was struck on the head in the fight until the following morning, and he remembered nothing about the accident.

The jury found defendant guilty as charged. From judgment imposing prison sentence, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Russell G. Walker, Jr., for the State.

Townsend & Todd by Neil D. Beach for defendant appellant.

PARKER, Judge.

Defendant brings forward on this appeal only one assignment of error, that the trial court erred in its charge in failing to recapitulate the testimony of one of his witnesses. This testimony, taken by deposition, was to the effect that in the opinion of the witness defendant was not drinking at the time she saw him shortly before the accident, that he was not then under the influence of any intoxicating beverage, that she saw defendant and the Whittington boy fight, and that defendant acted in a strange manner after he was struck on the head in the fight.

"In instructing the jury the court is not required to recapitulate all of the evidence. The requirement of G.S. 1-180 that the judge state the evidence is met by presentation of the

principal features of the evidence relied on respectively by the prosecution and defense. A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions." *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14. Examination of the court's charge to the jury in the present case reveals that the trial judge stated defendant's evidence to the extent necessary to explain the application of the law thereto, particularly with regard to the defense that he was not intoxicated and that his conduct in driving his car and his loss of memory concerning the collision had been caused by being struck on the head in the fight. Defendant did not request any additional instructions. Considering the charge as a whole, we find no prejudicial error.

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

CARL F. WALKER v. RELDA BARNETTE PLESS

No. 7125SC284

(Filed 28 April 1971)

1. **Rules of Civil Procedure § 50— ruling on motion for directed verdict — findings of fact**

   In ruling on defendant's motion for a directed verdict, it was not essential or appropriate that the trial court make "Findings of Fact and Conclusions of Law."

2. **Automobiles § 62— pedestrian struck while walking on shoulder of road — sufficiency of evidence for jury**

   Plaintiff's evidence was sufficient for the jury in an action to recover for personal injuries sustained when plaintiff was struck from the rear by defendant's automobile while walking on the shoulder of the road.

APPEAL by plaintiff from *Beal, Special Superior Court Judge,* December 1970 Session of Superior Court held in BURKE County.

Simpson & Martin by Dan R. Simpson for plaintiff appellant.

Patton, Starnes & Thompson by Thomas M. Starnes and Robert L. Thompson for defendant appellee.

MALLARD, Chief Judge.

Plaintiff seeks to recover damages for personal injuries resulting from the alleged actionable negligence of defendant in the operation of her automobile.

When considered in the light most favorable to him, plaintiff's evidence tended to show that on the night of 11 December 1968 he was walking northward towards Morganton on the shoulder of Highway #64 when he was struck from the rear by an automobile operated by the defendant. When he was struck he was 46 feet south of the center of Fletcher Street and three feet east of the paved portion of Highway #64. Plaintiff testified:

> "I did not see or hear the car when it struck me. I saw one car going south which passed me before I was hit. The next thing I recall after being hit was coming to in the middle of Fletcher Street and Miss Pless was and Mr. S. L. Poole was there right after that."

His leg was broken, his head injured, and he remained in the hospital for five weeks.

At the conclusion of plaintiff's evidence, the court allowed defendant's motion for a directed verdict under G.S. 1A-1, Rule 50(a) on the grounds that plaintiff's evidence of negligence was insufficient to require or justify submission of the issues to the jury.

The plaintiff's only assignment of error is to the action of the court in allowing the motion of the defendant for a directed verdict.

[1] Upon the request of plaintiff, the trial judge, purportedly acting in accordance with G.S. 1A-1, Rule 52(a)(2), made separate "Findings of Fact and Conclusions of Law" and in another instrument entered a "Judgment on Directed Verdict." In ruling on defendant's motion for a directed verdict in this case, it was not essential or appropriate that the judge make "Findings of Fact and Conclusions of Law." *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The rule on considering a defendant's motion for a directed verdict made at the conclusion of a plaintiff's evidence is set forth by Chief Justice Bobbitt in *Kelly v. Harvester Co., supra.* See *Sawyer v. Shackleford,* 8 N.C. App. 631, 175 S.E. 2d 305 (1970), *cert. denied,* 277 N.C.

112, and also *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 392, 174 S.E. 2d 820 (1970).

[2] When all of the evidence in this case is considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn, resolving contradictions, conflicts and inconsistencies in his favor, we are of the opinion and so hold that the evidence was sufficient to require submission to the jury. See *Rowe v. Fuquay*, 252 N.C. 769, 114 S.E. 2d 631 (1960). The case of *Rogers v. Green*, 252 N.C. 214, 113 S.E. 2d 364 (1960), cited by appellee, is factually distinguishable.

The trial judge committed error in allowing defendant's motion for directed verdict.

Reversed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JERRY DALE MARSHALL

No. 7125SC106

(Filed 28 April 1971)

1. **Criminal Law § 18— jurisdiction of superior court to try defendant on warrant of district court**

The superior court has no jurisdiction to try an accused for a misdemeanor on the warrant of the district court unless he is first tried and convicted for such misdemeanor in the district court and appeals to the superior court from sentence pronounced against him by the district court.

2. **Criminal Law § 157— failure of record to show jurisdiction**

The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from.

3. **Criminal Law § 154— record on appeal — duty of appellant**

It is the duty of defendant appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals.

4. **Criminal Law §§ 146, 157— dismissal of appeal — failure to show jurisdiction of superior court**

Appeal is dismissed for failure of the record to show the jurisdiction of the superior court.

State v. Marshall

APPEAL by defendant from *McLean, J.*, 21 September 1970 Session of CALDWELL Superior Court.

The record before us discloses the following: A warrant was issued from the District Court of Caldwell County charging defendant with driving a vehicle on the highways of Caldwell County while under the influence of intoxicating liquor, in violation of G.S. 20-138. Defendant was tried in superior court on said warrant, was found guilty by a jury, and from judgment imposed on the verdict, he appealed to this court.

Attorney General Robert Morgan by Assistant Attorney General Henry T. Rosser for the State.

Ted S. Douglas for defendant appellant.

BRITT, Judge.

[1-4] The record filed in this court fails to disclose how the superior court obtained jurisdiction of this case. The superior court has no jurisdiction to try an accused for a misdemeanor on the warrant of the district court unless he is first tried and convicted for such misdemeanor in the district court and appeals to the superior court from sentence pronounced against him by the district court. *State v. Byrd,* 4 N.C. App. 672, 167 S.E. 2d 522 (1969). The Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from. It is the duty of defendant appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *State v. Byrd, supra.* For failure of the record to show jurisdiction, the appeal must be dismissed. *State v. Banks,* 241 N.C. 572, 86 S.E. 2d 76 (1955).

Nevertheless, we have carefully reviewed the record that is before us, with particular reference to the questions argued in defendant's brief, but conclude that no error sufficiently prejudicial to warrant a new trial appears.

Appeal dismissed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. TALMADGE H. INNMAN

No. 7125SC176

(Filed 28 April 1971)

Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence

In a prosecution charging defendant with housebreaking and felonious larceny, the State's evidence was sufficient to withstand defendant's motion for a directed verdict of not guilty.

APPEAL by defendant from *McLean, J.*, 19 October 1970 Session, CALDWELL Superior Court.

By indictment proper in form, defendant was charged with house breaking and felonious larceny. He pleaded not guilty but was found guilty as charged. Defendant testified in his own behalf and on cross-examination admitted that he had theretofore been convicted of numerous felonies for which he had served prison terms. These offenses included store breaking, larceny of automobiles, armed robbery, violation of the National Fire Arms Act, and two or three convictions for escape. From judgment imposing two consecutive prison sentences of from nine to ten years, defendant appealed.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

L. H. Wall for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to grant his timely made motion for a directed verdict of not guilty. The evidence presented at trial, considered in the light most favorable to the state, tended to show:

While the owners were away, the rural home of Joe and Lewis Wilker was broken into and entered and considerable personal property, including a television set and a radio, was stolen. Due to heavy rains prior to the burglary, police found clear mud-grip tire tracks, as well as men's shoe tracks, around the house; they also found a heel from a man's shoe. The day following the burglary, defendant was seen driving a truck belonging to his brother, and the truck was equipped with mud-grip tires which made tracks similar to those found at the

Wilker home. At defendant's residence, police found a pair of shoes with a heel missing; the shoes made tracks similar to those found at the Wilker home. All of the stolen property except the television set was found at the home of defendant's brother, and the brother stated that defendant had brought it there. The television set was found at the home of a third party who testified that he received it from defendant in trade for a radio. The Wilkers did not give defendant permission to enter their home. After having been advised of his rights, defendant admitted to police officers that he "stole the stuff from the Wilker house."

Suffice to say, the evidence was more than sufficient to survive defendant's motion for a directed verdict and the assignment of error relating thereto is overruled.

Defendant's remaining assignments of error relate to the admission of certain testimony and the court's charge to the jury. We have carefully considered each of these assignments, but finding them without merit, they are overruled.

The defendant received a fair trial, free from prejudicial error, and the judgment imposed was within the limits prescribed by statute.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. ARTHUR SILAS CASE

No. 7128SC270

(Filed 28 April 1971)

Criminal Law § 99— questioning of State's witness by trial court — harmless error

It was not prejudicial error that the trial court questioned the State's witness 34 times during a trial that lasted less than a day.

ON *certiorari* to review trial before *Hasty, Judge of Superior Court,* 24 September 1970 Session, BUNCOMBE Superior Court.

Defendant was charged in a two-count bill of indictment, proper in form, with felonious breaking or entering and with felonious larceny. Defendant was represented at his trial and on this appeal by the same counsel. Defendant entered pleas of not guilty to each of the charges.

State's evidence tended to show that during the night of 15 June 1970 or the early morning hours of 16 June 1970, defendant broke and entered the B & V Grocery store operated by one Jack Warren; and that he stole therefrom a quantity of money.

From verdicts of guilty as charged in both counts, and judgment of confinement entered thereon, defendant appealed.

Attorney General Morgan by Trial Attorney Cole for the State.

Riddle & Shackelford by John E. Shackelford for the defendant.

BROCK, Judge.

Defendant's sole contention upon this appeal is that the trial judge committed prejudicial error in interrupting the State's witnesses to have them repeat what they had said. Defendant concedes that the trial judge may properly question a witness to clarify the testimony or to obtain a proper understanding of what the witness said. However, defendant contends that in this trial, which lasted less than a day, it was error for the trial judge to interrupt and question the State's witnesses thirty-four times. During oral argument counsel conceded that no one of the interruptions and questions by the trial judge constitutes error, but that the prejudice to defendant arises from the number of occasions, within a short period of time, that the judge interrupted and questioned the witness.

We might concede that it is desirable that no occasion arise which would prompt the trial judge to ask questions of a witness for clarification and understanding of the testimony. However, so long as we are dealing with human beings as witnesses, solicitors and defense counsel, and so long as we undertake to communicate by a spoken language, we are going to have need for clarification and understanding of what has been said. The frequency for the need to question for clarifica-

tion and understanding will decrease or increase with the capability of counsel in propounding clear questions, the capability of the witness to understand and to respond to the question which was asked, and the capability of the witness to express himself in such a way that his answer is clear. We cannot say, as a matter of law, that thirty-four interruptions by the trial judge to ask proper questions of witnesses constitutes prejudicial error. Of course, at no time may the trial judge ask questions of a witness which tend to impeach him or cast doubt upon his credibility.

No error.

Judges MORRIS and HEDRICK concur.

FLOYD HOLLIFIELD v. RACHEL S. DANNER AND HUSBAND, FRED RICHARD DANNER

No. 7125SC178

(Filed 28 April 1971)

Automobiles § 62— accident case — negligence in striking pedestrian — sufficiency of evidence

Evidence by plaintiff pedestrian that during a heavy rainstorm the defendant's automobile struck an accumulation of water which flew onto defendant's windshield and that the automobile swerved and struck the plaintiff, who was one foot away from the paved portion of the road, *held* sufficient to withstand defendant's motion for a directed verdict.

APPEAL by plaintiff from *May, Judge of Superior Court,* 31 August 1970 Session, BURKE Superior Court.

Plaintiff instituted this action to recover for personal injuries allegedly suffered by him as a result of the negligence of defendant in the operation of her husband's car.

Plaintiff's evidence tends to show that at about 6:30 a.m. on 20 January 1969 plaintiff was walking north along the left shoulder of Bethel Road in Morganton on his way to work. It was dark and it was raining heavily. Defendant Rachel Danner approached from the opposite direction driving her husband's

automobile south along Bethel Road. Water was "slipper-top" deep in the road and was accumulating on a bridge which was about 60 feet north of plaintiff. As defendants' automobile crossed the bridge it struck the water which flew up over defendants' windshield; and defendant swerved toward plaintiff, striking him with the right front edge of her bumper and throwing him against her windshield, and causing the injuries and damages complained of. At the time defendant struck plaintiff, plaintiff was one foot from the paved portion of the road, and the wheels of defendants' vehicle were on the paved portion.

At the close of plaintiff's evidence defendants' motions for a directed verdict were allowed. Plaintiff appealed.

Hatcher, Sitton & Powell by Claude S. Sitton for plaintiff.

Byrd, Byrd & Ervin by Thomas R. Blanton III for defendants.

BROCK, Judge.

Plaintiff alleged, *inter alia,* that defendant failed to keep her vehicle under proper control, that she failed to maintain a proper lookout, and that she drove at an unreasonable speed under the circumstances then existing. Under the evidence in this case we hold that whether defendant was negligent in one of the respects alleged, and whether that negligence was one of the proximate causes of plaintiff's damages, are questions to be resolved by the jury, unless plaintiff's evidence has shown him to be guilty of contributory negligence as a matter of law.

Although there are inferences of negligence on the part of plaintiff which might legitimately be drawn from the evidence, in our opinion the evidence does not disclose as a matter of law that plaintiff was contributorily negligent.

Admittedly the evidence in this case presents close factual questions, but a decision by a jury is necessary to settle the factual dispute.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROOSEVELT MORNES

No. 7126SC138

(Filed 28 April 1971)

Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence

In a prosecution charging defendant with the felonious breaking or entering of a hardware store and with the larceny of a lawn mower therefrom, the State's evidence was sufficient to withstand defendant's motion for a directed verdict of not guilty.

APPEAL by defendant from *Beal, Special Superior Court Judge,* 9 November 1970 Special Criminal Session, MECKLENBURG Superior Court.

Defendant was tried on a bill of indictment containing two counts: one of felonious breaking or entering and a second count charging felonious larceny pursuant to a felonious breaking or entering. From a verdict of guilty and judgment thereon, the defendant, represented by his court-appointed attorney, appealed.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

W. Herbert Brown, Jr., for defendant appellant.

VAUGHN, Judge.

The sole assignment of error is that the court erred in denying defendant's motion for a directed verdict of not guilty. Evidence for the State tended to show the following. At 2:50 a.m. on 29 August 1970 the defendant was observed pushing an orange-red electric lawn mower down a sidewalk on South Mint Street in Charlotte, North Carolina, about two blocks from the building in which the Little Hardware Company, Inc. was located. The price tag was still on the mower. Shortly thereafter, inspection of the hardware store disclosed that a plate glass window had been broken in the front of the store. An officer of the hardware company was called to the scene. He identified the mower as being one that he had placed in the show window on "the afternoon before it was stolen." He identified the mower by model number and by the letter "A" which he had personally marked on the bottom of the mower before placing

it in the window. The mower found in the possession of the defendant along with another mower was in the show window when he locked and left the store about 6 p.m. on 28 August 1970. The other mower was found two days later under some bushes behind the store. The evidence was sufficient to withstand defendant's motion and his assignment of error is overruled. In the entire trial we find no error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. SALLY P. BRYANT

No. 7126SC241

(Filed 28 April 1971)

Criminal Law § 143— revocation of probation — sufficiency of grounds

Revocation of defendant's probation on the grounds that she had failed to report to her probation officer and that she had been convicted of shoplifting during the probation, *held* lawful.

APPEAL by defendant from *Copeland, S.J.*, 16 November 1970 Regular Schedule "C" Session, MECKLENBURG Superior Court.

The record reveals that in March 1968 defendant pleaded guilty to the crime of possession of narcotics and was sentenced to prison for a period of not less than three years nor more than five years; the prison sentence was suspended and defendant placed on probation, two of the conditions of probation being (1) that defendant report to her probation officer as directed, and (2) that she violate no penal law of any state or of the Federal Government.

Following a hearing on a motion by the Probation Department that defendant's probation be revoked and her prison sentence activated, Judge Copeland found as a fact (1) that defendant failed to report to her probation officer as directed on 20 and 24 September 1968, and on 2 October 1968; and (2) that on or about 13 September 1968 in the City of Norfolk, Virginia, defendant was convicted of the crime of shoplifting.

From an order and judgment revoking her probation and activating the prison sentence, defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General Ralph Moody for the State.

Charles V. Bell for defendant appellant.

BRITT, Judge.

The findings of Judge Copeland that defendant had violated the conditions of her probation are fully supported by the evidence. In fact, at the hearing defendant testified and admitted that she failed to report to her probation officer as instructed and that she was convicted of shoplifting after being placed on probation. The findings of fact fully support the order and judgment and no abuse of the court's discretion is shown. Judge Copeland acted in conformity with established procedure. *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53 (1967) ; *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967).

The judgment appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. ORA ALEXANDER MOTLEY

No. 7127SC56

(Filed 28 April 1971)

Criminal Law § 155.5— failure to docket record in apt time

Appeal is subject to dismissal for failure of defendant to docket the record on appeal within the time permitted under Court of Appeals rules.

APPEAL by defendant from *Falls, Superior Court Judge,* 29 July 1970 Session of Superior Court held in GASTON County.

Defendant was tried on a bill of indictment, proper in form, charging her with the felonies of forgery and uttering a forged instrument.

The jury returned a verdict of guilty of the felony of forgery and also guilty of the felony of uttering a forged instrument. From judgments of imprisonment on each count, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Sauls for the State.

J. Ralph Phillips for defendant appellant.

MALLARD, Chief Judge.

The record on appeal was not docketed in the Court of Appeals within the time allowed by the rules and no extension of time was granted. For failure to docket the record on appeal within the time permitted under the rules, the case is subject to dismissal.

However, we have carefully considered each of the defendant's assignments of error and find no prejudicial error in the trial.

No error.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF THE CUSTODY OF CHARLES RAY JONES

No. 7130DC45

(Filed 28 April 1971)

Infants § 9— child custody proceeding — conclusiveness of findings of fact

Findings of fact in a child custody proceeding are conclusive on appeal when supported by competent evidence.

APPEAL by respondent Betty Ann Green Jones from *Leatherwood, District Judge,* 31 August 1970 Session, SWAIN County District Court.

This is a proceeding by writ of *habeas corpus* to determine custody of an infant child brought by the father against the mother. After applying findings of fact and conclusions of law,

the trial judge entered an order placing the child in the custody of the father pending further order of the court. The respondent mother appealed to this Court.

Monteith, Coward and Coward by Kent Coward for petitioner appellee.

Joseph Schenck for respondent appellant.

VAUGHN, Judge.

Findings of fact made in proceedings to determine custody, when supported by competent evidence, are conclusive on appeal. *In re Orr,* 254 N.C. 723, 119 S.E. 2d 880. There is ample competent evidence to support the findings of fact of the trial judge and such findings of fact support the order entered. Such of appellant's assignments of error as were properly presented on the appeal have been carefully considered and are found to be without merit.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

JOHN HENRY LARK v. LEROY McMANUS, JR.

No. 7126SC24

(Filed 28 April 1971)

APPEAL by plaintiff from *Hasty, Superior Court Judge,* 22 June 1970 Special Mixed Session of Superior Court held in MECKLENBURG County.

In his complaint plaintiff sought to recover damages for personal injuries alleged to have been sustained as a result of the actionable negligence of the defendant when an automobile operated by the plaintiff and one operated by the defendant collided at an intersection in Charlotte. Defendant answered and denied that he was negligent, pleaded contributory negligence of the plaintiff, and filed a counterclaim in which it was alleged that defendant's automobile was damaged by the actionable negligence of the plaintiff.

From an adverse judgment, the plaintiff appealed.

Marvin Lee Ritch for plaintiff appellant.

Carpenter, Golding, Crews & Meekins for defendant appellee.

MALLARD, Chief Judge.

Plaintiff's appeal was not docketed within the time permitted by the rules of this court, and no extension of time was granted. However, we deny defendant's motion to dismiss, treat the appeal as a petition for a writ of *certiorari,* allow it, and consider the case on its merits.

The evidence was conflicting. Plaintiff's evidence tended to show that he was injured by the actionable negligence of the defendant, and defendant's evidence tended to show that his property was damaged by the actionable negligence of the plaintiff.

The jury, by the verdict, held that the plaintiff was not injured by the actionable negligence of the defendant and that the defendant's automobile was damaged in the amount of $600 by the actionable negligence of the plaintiff.

We have carefully considered plaintiff's assignments of error and find no prejudicial error in the trial.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES WILLIAM WOODRING

— AND —

STATE OF NORTH CAROLINA v. THURMAN WOODRING

No. 7130SC144

(Filed 28 April 1971)

APPEAL by defendants from *Snepp, Superior Court Judge,* October 1970 Session of Superior Court held in JACKSON County.

The defendants were tried upon a bill of indictment, proper

in form, charging them with the felonies of breaking and entering and larceny.

From the judgment of imprisonment as youthful offenders after a plea of guilty, the defendants appealed.

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

Thomas W. Jones for defendant appellants.

MALLARD, Chief Judge.

Upon competent evidence the trial judge found that the plea of guilty of each defendant was freely, understandingly and voluntarily made.

Court-appointed counsel, with commendable frankness, states that he is unable to find error in the trial. The Attorney General states that he finds no error entitling the defendants to a new trial. We have examined and considered the record, and we find no prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. HAROLD RAY GREENE, ALIAS JIMMY LEE GRAY

No. 7124SC134

(Filed 28 April 1971)

APPEAL by defendant from *Froneberger, Superior Court Judge,* September 1970 Session of WATAUGA County Superior Court.

Defendant was charged in a proper bill of indictment with breaking and entering and larceny, and entered a plea of not guilty.

Evidence for the State tended to show that the defendant broke into a store in Stony Fork Township, Watauga County, owned by John D. Wellborn, and removed therefrom the items

described in the bill of indictment. Defendant was accompanied in the commission of the crime by his brother-in-law, who testified for the State. Another witness testified that she saw the defendant outside the store at the approximate time the break-in occurred.

Defendant presented no evidence in his own behalf.

From a verdict of guilty on both counts and consecutive sentences of five years on the larceny count and six years on the breaking and entering count, defendant appeals to this Court.

Attorney General Robert Morgan by Assistant Attorney General Sidney S. Eagles, Jr., and Staff Attorney Russell G. Walker for the State.

T. Michael Lassiter for defendant appellant.

CAMPBELL, Judge.

No brief was filed in this Court on behalf of defendant. However, the court-appointed attorney for defendant, in his statement of the case on appeal contained in the record, states with candor and frankness that he is unable to find any error to assert on appeal.

We have reviewed the record in this case and find no prejudicial error.

No error.

Judges BRITT and GRAHAM concur.

PORTER BROTHERS, INC. v. CHARLES ADRIAN JONES AND WIFE, REBA SAULS JONES

— AND —

PORTER BROTHERS, INC. v. CHARLES ADRIAN JONES D/B/A JONES SMALL ENGINE

No. 7127SC266

(Filed 26 May 1971)

1. **Appeal and Error § 24— assignment of error — requisites**

An assignment of error must be supported by an exception previously noted.

2. **Venue § 8— change of venue for convenience of the witnesses**

The denial of a motion for change of venue for convenience of witnesses is within the discretion of the trial judge, and absent an abuse of discretion, the ruling will not be disturbed on appeal.

3. **Rules of Civil Procedure § 53— reference — examination of complicated account**

Where the trial of an issue requires the examination of a complicated account, the trial court may, upon its own motion, order a reference. G.S. 1A-1, Rule 53(a)(2).

4. **Rules of Civil Procedure § 53; Sales § 14— order of reference — action to recover on note and open account — counterclaim on warranties**

Trial court properly ordered a reference in a plaintiff's action to recover on a promissory note and upon an open account for goods sold and delivered, where defendants' pleadings raised questions as to warranty transactions between plaintiff and defendants and between defendants and defendants' customers.

5. **Rules of Civil Procedure § 53— reference — waiver of jury trial**

A reference does not deprive a party of a jury trial, but the party is deemed to have waived his right to a jury trial unless he submits appropriate issues based upon the exceptions taken. G.S. 1A-1, Rules 53(b)(2) and 53(b)(2)c.

6. **Rules of Civil Procedure § 50— motion for directed verdict — adoption of referee's report**

Although trial court sitting without a jury improperly granted plaintiff's motion for a directed verdict in a hearing to adopt a referee's report, the finding of fact and the conclusion of law relating to such motion will be stricken as surplusage, the adoption of the referee's report being sufficient to support judgment in favor of plaintiff. G.S. 1A-1, Rule 50.

APPEAL by defendants from *Falls, Judge,* 21 September 1970 Session, CLEVELAND Superior Court.

Plaintiff instituted the action against Charles Adrian Jones and wife to recover on a promissory note executed by them as makers. Plaintiff instituted the action against Charles Adrian Jones in his business capacity upon an open account and upon trust receipt notes for merchandise sold and delivered.

Defendants answered admitting execution of the note sued upon, and defendants admitted delivery of a quantity of merchandise, but alleged a total failure of consideration for the note and accounts, and alleged damages for breach of warranty.

Defendants moved that the cases be transferred to Onslow County for trial for the convenience of witnesses. The motion was denied. No exception to the order appears of record. At a subsequent session of court a reference was ordered in both cases. All parties excepted to the order of reference. Without objection the two cases were consolidated for the reference and a full hearing was conducted by the Referee who made findings of fact, conclusions of law, and recommendations as follows:

"THIS CAUSE coming on to be heard and being heard before Robert W. Yelton, Referee, on the 25th day of November, 1969, and again being heard and concluded on the 2nd and 3rd days of February, 1970, and the said Referee hearing the evidence and testimony of the witnesses for the defendant, together with the argument of counsel, finds as follows:

FINDINGS OF FACT

"1. That the parties hereto have stipulated that as a result of contractual relations between the plaintiff and the defendant as a result of the plaintiff selling saws and parts to the defendant from August, 1966, to February, 1967, the defendant, in 68 CvS 11, is indebted to the plaintiff in the sum of Seven Thousand, Seven Hundred, Forty-Six and 74/100 Dollars ($7,746.74).

"2. That the parties hereto have stipulated that, in 68 CvS 9, there is due from the defendant to the plaintiff the sum of Two Thousand, One Hundred Dollars ($2,100.00) on a promissory note, together with interest thereon from the 10th day of February, 1967.

"3. That the defendant, Charles A. Jones, was a retail dealer in chain saws and small engines and did repair work on all types of small engines.

"4. That the said defendant opened his business in July, 1966, and that this was the first time he had ever been in a retail business for himself.

"5. That, pursuant to negotiations between the defendant and the plaintiff, the defendant became the authorized retail dealer for McCulloch Chain Saws in August, 1966, through the plaintiff, Porter Brothers, Inc., who was and is the distributor for McCulloch Corporation products.

"6. That the defendant purchased some fifty-seven (57) McCulloch Chain Saws from the plaintiff during the period from August, 1966, to February, 1967. That the defendant in turn sold all of these saws to his retail customers. That, with the exception of four (4) or five (5), all saws sold by the defendant were sold to commercial loggers.

"7. That each of the saws sold to the defendant by the plaintiff were sold under an express 30-day written warranty. That the warranty as set forth in the pleadings of both the plaintiff and the defendant is the warranty which accompanied each and every saw sold to the defendant by the plaintiff.

"8. That the express written warranty is limited to supplying without charge a genuine replacement part in exchange for any part which is defective if the part is returned through an authorized McCulloch Dealer or Distributor. The warranty further provides that it is expressly in lieu of all other warranties, express or implied.

"9. That many of the saws, especially the 210G models and the 510G models, purchased by the defendant and subsequently sold to commercial loggers, broke down and needed repairs within thirty (30) days after they were put in use.

"10. That many of the saws which broke down and needed repairs were returned to the defendant to make the needed repairs, said repairs including the replacement of

pistons, operation handles, carburetors, cylinders and other parts.

"11. That in all cases the defendant made the needed repairs on the saws which he had sold without making any charge therefor to his customers, whether the particular saw was still under warranty or not.

"12. That there was an established procedure for the defendant to use in filing warranty claims. That the defendant understood how to file the necessary written warranty claim form with the plaintiff, and did in fact file, in approximately nine instances, the first being in September, 1966, and the last in June, 1967, with the plaintiff the warranty claim form. That the instructions for preparing and filing the warranty claim form are contained on the form itself, said claim form being introduced herein as Plaintiff's Exhibit #9.

"13. That in each instance when the defendant filed the required warranty claim form with the plaintiff he received from the plaintiff a credit to his account in the form of a Credit Memo for each and every part he claimed was defective and in addition the defendant in each such instance received credit to his account for the labor required to replace said part in accordance with an established schedule of labor required to perform the particular repair or replacement.

"14. That the defendant did not fill out and file with the plaintiff any more of the warranty claim forms for saws or parts which he believed to be defective because he did not have time because of the large number of repairs. He did not use the procedure established to receive credit by way of the warranty except when he happened to have time to do so.

"15. That the defendant and his wife, Reba Sauls Jones, signed a promissory note to the plaintiff in the amount of Two Thousand, One Hundred Dollars ($2,100.00) on or about the 11th day of November, 1966, which was after the defendant, according to his evidence, had notice that there were claimed defects in the saws purchased by the defendant from the plaintiff; and the defendant gave an assignment of his accounts receivable (See Plaintiff's

Exhibit #3) to the plaintiff on or about the 30th day of March, 1967, to secure an amount he acknowledged as due to the plaintiff in excess of Six Thousand Dollars ($6,000.00), which assignment was made after the defendant, according to his evidence, knew that the chain saws in question were defective.

"16. That the defendant does not contend nor does the evidence show that all of the chain saws he purchased from the plaintiff were defective. The evidence for the defendant shows that his complaints concern the model 210G and the model 510G saws, and that he purchased other saws from the plaintiff for which he has no complaints.

"17. That the defendant does not contend nor does the evidence show that all the parts and accessories and related items which he purchased from the plaintiff were used to replace parts and accessories which were defective. He bought some expendable parts such as chains, as well as other parts which were not defective.

"18. That there is no evidence as to what amount the defendant was charged for the 210G and 510G saws he purchased from the plaintiff. The only evidence in this regard is that the defendant purchased approximately Twelve Thousand Dollars ($12,000.00) worth of chain saws, and of the total number of saws purchased eighty (80%) per cent were 210G's and 510G's. However, there is no evidence as to the price charged the defendant for the 210G's or the 510G's, or the price charged for saws which were of some other model.

"19. That there is no evidence as to what amount the defendant was charged by the plaintiff for the parts and accessories used to repair or replace parts or accessories the defendant claims were defective.

"20. That there is no evidence as to the value of the saws and parts the defendant claims were defective; either value as they should have been as warranted, or value as they actually were according to the defendant when received or put into operation.

"21. That there is no competent evidence as to any loss or profit by the defendant. The only evidence cencerning any amount of monetary income or loss by the defendant which can be arrived at from the evidence is by calculating the difference between what the defendant testified was his total gross business income, cash and accounts receivable, during the period of August, 1966, to April, 1967, or nine (9) months, which the defendant's evidence shows was $33,938.20, and the total cost of doing business during this period of time, which according to the evidence for the defendant was approximately $29,000.00, or a gross profit, before taxes of approximately $5,000.00, without any ordinary business write-off for uncollectable accounts receivable.

"22. That the defendant had available to him at all times an opportunity to secure without cost to him any replacement part he claimed was necessary to replace any claimed defective part on the chain saws sold to him by the plaintiff, plus he had the opportunity to receive a credit allowance for labor necessary to make such replacement, all by way of the express written warranty. However, he chose not to take advantage of such warranty, but instead elected to suffer any claimed loss himself, by providing and installing parts on his customers' saws without charge.

"23. That the defendant failed to comply with the terms of the express written warranty in that he failed to return the claimed defective parts to the plaintiff as required by the warranty or to file the necessary warranty claim forms which was the established procedure, known to the defendant, to secure credit for any claim under the warranty, except in the nine instances mentioned above in paragraph 12.

"24. That the evidence shows that a McCulloch Owner's Manual came packaged in each saw sold by the plaintiff to the defendant. However, there is no evidence to show that the chain saws sold and repaired by the defendant were used and maintained in accordance with the McCulloch Owner's Manual as is required by paragraph 1 of the Warranty. Nor is there any evidence to show that the chain saws sold and repaired by the defendant were not excluded from coverage under the Warranty, in paragraph

3 thereof, which sets forth specifically those instances wherein the said Warranty does not apply, for instance, a saw that has been tampered with, subjected to misuse, neglect or accident, etc.

"25. That, in case Number 68 CvS 9, there is now due from the defendants, Charles A. Jones and wife, Reba Sauls Jones, to the plaintiff the sum of Two Thousand, One Hundred Dollars ($2,100.00) plus interest thereon at the rate of six (6%) per cent from February 10, 1966; that, in case Number 68 CvS 11, there is due from the defendant, Charles A. Jones, doing business as Jones Small Engine, to the plaintiff the sum of Seven Thousand, Seven Hundred, Forty-Six and 74/100 Dollars ($7,746.74); and that the plaintiff is entitled to judgment therefor in each case without offset for any amount as claimed by said defendants in the defendants' defense or defense and counterclaim in the respective cases.

CONCLUSIONS OF LAW

"1. That all of the evidence offered by the defendant must be, and has been, considered in the light most favorable to the defendant due to the fact that no evidence on defendant's counterclaim was offered by the plaintiff.

"2. That the express written warranty under which the merchandise in question was sold by the plaintiff to the defendant, Charles A. Jones, is in lieu of and excludes any other warranty, express or implied.

"3. That the plaintiff complied with the terms of said warranty in each instance when the defendant, Charles A. Jones, returned any part to the plaintiff for a claim under such warranty.

"4. That the defendant, Charles A. Jones, failed to comply with the terms of the said warranty, through no fault of the plaintiff, and is therefore barred and estopped to assert any defense or counterclaim based upon a breach of said warranty.

"5. That the defendants, Charles A. Jones and wife, Reba Sauls Jones, waived any right to assert a breach of warranty, either as a defense to or a counterclaim

against the action brought by the plaintiff on the promissory note in case Number 68 CvS 9.

"6. That even if the defendant, Charles A. Jones, were not barred and estopped to assert a breach of warranty as a defense or counterclaim, he has failed to introduce any competent evidence of damages. That the measure of damages in the case of a breach of warranty is the difference between the value of the article as it should have been if it were as warranted, and the actual value as delivered, together with any special damages as were within the contemplation of the parties. The defendant, Charles A. Jones, has not introduced any evidence to show the value in either instance of the alleged defective chain saws or parts, and has not introduced any competent evidence of any special damages upon which a reasonable man, or a jury, could assess any damages in the case of the counterclaim of the defendant.

"7. That the defendants are barred and estopped to assert, as a defense or as a counterclaim, a complete failure of consideration in either of these cases.

"8. That even if the defendants were not barred and estopped to assert, as a defense or as a counterclaim, a complete failure of consideration, they have failed to introdue any competent evidence which would tend to show a complete failure of consideration.

"9. That the defendants have the burden of proof of a breach of warranty, or of a complete failure of consideration, either as a defense to the action by the plaintiff for recovery of the balance due on the sale price or as a counterclaim. Upon the facts and the law, the defendants, nor either of them, have shown any right to relief either as a defense to the claims of the plaintiff or upon the counterclaim against the plaintiff.

"10. That, in case Number 68 CvS 9, there is now due from the defendants, Charles A. Jones and wife, Reba Sauls Jones, to the plaintiff the sum of Two Thousand, One Hundred Dollars ($2,100.00) plus interest thereon at the rate of six (6%) per cent from February 10, 1966, until paid; that, in case Number 68 CvS 11, there is due from the defendant, Charles A. Jones, doing business as Jones Small

Engine, to the plaintiff the sum of Seven Thousand, Seven Hundred, Forty-Six and 74/100 Dollars ($7,746.74).

"11. That the motion for Directed Verdict for the plaintiff made by the plaintiff at the close of the evidence for the defendant and renewed at the close of all the evidence on the counterclaim should be allowed, and that such counterclaim should be dismissed with prejudice.

PROPOSED JUDGMENT

"1. That, in case Number 68 CvS 9, the plaintiff have and recover of the defendants, Charles A. Jones and wife, Reba Sauls Jones, the sum of Two Thousand, One Hundred Dollars ($2,100.00), together with interest thereon at the rate of six (6%) per cent from February 10, 1967.

"2. That, in case Number 68 CvS 11, the plaintiff have and recover of the defendant, Charles A. Jones, doing business as Jones Small Engine, the sum of Seven Thousand, Seven Hundred, Forty-Six and 74/100 Dollars ($7,746.74).

"3. That, in case Number 68 CvS 11, the counterclaim of the defendant, Charles A. Jones, doing business as Jones Small Engine, be and the same is hereby dismissed with prejudice.

"4. That the costs and expenses, including a reasonable fee for the Referee to be set by the Court, in both of these cases are hereby taxed against the defendants in each respective case.

"This the 30th day of July, 1970.

/s/ Robert W. Yelton
Referee"

Judge Falls reviewed the Report of the Referee, approved and adopted the findings of fact, approved and adopted the conclusions of law, and entered judgment for plaintiff in accordance with the recommendations of the Referee. Defendants appealed.

Whisnant and Lackey, by N. Dixon Lackey, Jr., for plaintiff appellee.

Hubert E. Phillips and E. C. Thompson III for defendant appellants.

BROCK, Judge.

[1, 2] Defendants undertake to assign as error the denial of their motion for change of venue to Onslow County for convenience of witnesses. No exception to the order appears in the Record on Appeal. An assignment of error must be supported by an exception previously noted. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). In any event, the ruling on the motion was within the discretion of the trial judge, and, absent a showing of abuse of discretion, the ruling will not be disturbed on appeal. 7 Strong, N. C. Index 2d, Venue, § 8, p. 520.

[3, 4] Defendant assigns as error the order of reference in this case. Defendants' pleadings raised questions concerning numerous transactions between plaintiff and defendants with respect to warranties on merchandise (chain saws and parts), and numerous transactions between defendant and defendant's customers with respect to repairs under warranty and not under warranty. The mere fact that defendants did not question plaintiff's procedures in its accounting for merchandise shipped to defendants does not mean that the examination of a complicated account is not necessary. Where the trial of an issue requires the examination of a complicated account the trial court may, upon its own motion, order a reference. G.S. 1A-1, Rule 53(a)(2). In our opinion the reference was properly ordered in this case.

[5] Defendants assign as error that they were deprived of their right to trial by jury. G.S. 1A-1, Rule 53(b)(2) provides that a reference does not deprive a party of a jury trial and sets out the steps to be followed to preserve the right. In this case the issues submitted by defendants are not appropriate for a determination of the exceptions; and, having failed to formulate appropriate issues based upon the exceptions taken, defendants waived their right to jury trial. See, G.S. 1A-1, Rule 53(b)(2)c.

The findings of fact by the Referee are clearly supported by the evidence and the findings of fact clearly support the

conclusions of law. Therefore, we hold that Judge Falls was correct in approving and adopting the Referee's findings of fact and conclusions of law. Defendants' numerous exceptions and assignments of error to the findings of fact and conclusions of law are overruled.

[6] When plaintiff filed its motion asking the trial court to approve and adopt the Referee's Report, it inappropriately made a motion for a directed verdict. A motion for directed verdict and a directed verdict are not proper where the trial is before the judge sitting without a jury. See, G.S. 1A-1, Rule 50. See also, *Pergerson v. Williams,* 9 N.C. App. 512, 176 S.E. 2d 885 (1970). Judge Falls approved and adopted each of the findings of fact and conclusions of law by the Referee, and this was sufficient to support the final judgment which was entered. However, because of plaintiff's inappropriate motion for directed verdict Judge Falls added finding of fact 14 and conclusion of law 3 as follows:

> "14. The Court finds that after a careful review of the evidence on these actions that the evidence of the defendants is insufficient to raise issues of fact to be presented to a jury for trial, and that the plaintiff's motion for directed verdict on its claim against the defendants in each case should be allowed, and the plaintiff's motion for a directed verdict on the counterclaim of the defendant, Charles A. Jones, in case number 68 CvS 11 should be allowed."

> "3. The evidence introduced by the defendants is not sufficient to raise issues of fact to be submitted to a jury for trial. Upon the facts and the law, the defendants, nor either of them have shown any right to relief, either as a defense to the claims of the plaintiff or as a counterclaim against the defendant, and the motion for directed verdict made by the plaintiff as to its claims against the defendants should be and is hereby allowed, and the plaintiff's motion for directed verdict as to the counterclaim of the defendant, Charles A. Jones, against the plaintiff in Case No. 68 CvS 11 should be and is hereby allowed."

The above-quoted finding of fact 14 and conclusion of law 3 add nothing to the judgment which approved and adopted the findings of fact and conclusions of law by the Referee, and

enters the order for recovery recommended by the Referee. Therefore, finding of fact 14 and conclusion of law 3 are mere surplusage and should be stricken.

It is interesting to note that the two stipulations recited as findings of fact 1 and 2 in the above-quoted Referee's Report would seem to justify entry of the judgment as finally entered.

The judgment of Judge Falls is modified by striking therefrom finding of fact 14 and conclusion of law 3, and, as so modified, is affirmed.

Modified and affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JESSE LEWIS

No. 717SC124

(Filed 26 May 1971)

1. **Criminal Law § 29— inquiry into competency of defendant — request by defense counsel**

It was proper for defendant's counsel to request the court to conduct an inquiry to determine whether defendant had sufficient mental capacity to plead to the indictment and conduct a rational defense.

2. **Criminal Law § 29— mental competency to plead — determination by judge or jury**

Under G.S. 122-83 and G.S. 122-84, the question of whether the defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense may be determined by the court with or without the aid of a jury prior to the trial of defendant for the crime charged.

3. **Criminal Law § 29— incompetency to stand trial — felonious breaking and entering — commitment under G.S. 122-84**

It was proper for the court to proceed under G.S. 122-84 in committing to a State hospital a defendant accused of felonious breaking and entering who had been found incompetent to stand trial.

4. **Criminal Law § 29— commitment of defendant found incompetent to stand trial**

A defendant who has been found mentally incompetent to plead and stand trial may be committed to a State hospital under G.S. 122-84 without a finding that "the mental condition or disease of such

person is such as to render him dangerous either to himself or other persons, and that his confinement for care, treatment and security demands it," which applies to commitment of a person acquitted of crime.

5. **Criminal Law § 29— competency hearing for accused — due process**

No rules or procedures are provided by G.S. 122-83 or G.S. 122-84 as to how the judge shall conduct the inquisition to determine whether a person accused of crime is incompetent to plead, but due process must be observed.

6. **Criminal Law § 29— commitment of defendant unable to stand trial**

Provisions of G.S. 122-83 and G.S. 122-84 are not in irreconcilable conflict.

7. **Criminal Law § 29— incompetency to stand trial — failure of clerk to act — action by judge**

Failure of the clerk to institute proceedings under G.S. 122-91 for commitment of a defendant who is mentally incompetent to stand trial does not prevent a judge of the superior court from proceeding under the provisions of G.S. 122-84 in proper cases.

8. **Criminal Law § 29— incompetency to plead — commitment to hospital — necessary findings**

In order for a person accused of crime to be committed to a State hospital under the provisions of G.S. 122-84, the judge or jury must first ascertain by due course of law that such person is "charged with" or "accused of" the commission of a crime of the nature referred to in the statute and that he is without sufficient mental capacity to undertake his defense at the time of arraignment and for that reason cannot be put on trial.

9. **Criminal Law § 29— incompetency to stand trial — effect of commitment to State hospital**

Judgment committing defendant found mentally incompetent to stand trial to a State hospital operates to restrain defendant only until he is mentally fit for trial or other disposition is made in the premises.

APPEAL by defendant from *Cohoon, Judge,* 5 October 1970 Session of Superior Court held in NASH County.

A bill of indictment was returned against the defendant charging him with the crimes of breaking and entering with intent to steal, larceny, and receiving stolen goods knowing them to have been stolen. For reasons not necessary to this appeal [see the records, briefs, and opinions in the case of *State v. Lewis,* 1 N.C. App. 296, 161 S.E. 2d 497 (1968); *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177 (1968); and *State v. Lewis,* 7 N.C. App. 178, 171 S.E. 2d 793 (1970), *cert. denied and*

purported appeal as of right dismissed, 276 N.C. 328], the defendant was called upon to plead to the above bill of indictment which was returned against him at the January 1955 Term of Superior Court held in Nash County.

Before pleading, Samuel S. Woodley, court-appointed attorney for the defendant, filed a written motion dated 1 June 1970 in which he asserted that the defendant had been sent to Cherry Hospital by Judge Cowper in February 1967 and that a report from Cherry Hospital dated 12 April 1967 stated that the defendant was found to be competent to stand trial. In this motion defendant's attorney requested "that a formal hearing be conducted into the competency of this Defendant for trial before he is required to enter a plea or a plea is entered in his behalf, and that at such hearing the Court make such additional investigation and findings of fact as necessary to determine whether or not this Defendant should be committed to a State Hospital as provided by G.S. 122-83, G.S. 122-84, and G.S. 122-85."

Under date of 1 June 1970 and pursuant to G.S. 122-91, Judge Copeland, a superior court judge, ordered the defendant again committed to the State hospital at Goldsboro (Cherry Hospital) for a period of 60 days observation and examination.

On 5 October 1970 Judge Cohoon issued a notice to the defendant (which was served upon him the same date) that he would conduct a hearing on 8 October 1970 to determine whether the defendant was capable of pleading to the bill of indictment.

On 8 October 1970, in open court, after the bill of indictment was read to the defendant, his counsel again made a motion that the defendant not be required to plead to the bill of indictment pending a hearing on the competency of the defendant to stand trial. The motion was allowed.

After hearing the evidence offered, Judge Cohoon entered a "Judgment and Order" which included the substance of the pertinent testimony of the witnesses. This judgment and order is as follows:

> "The above entitled case being called at this term for trial and upon being arraigned and inquired as to his plea the defendant through his court-appointed attorney, Samuel S. Woodley, moved that he not be permitted to plead for

the reason that at this time the defendant did not have the capacity to comprehend his position nor to understand the nature and object of the proceedings against him nor to conduct his defense in a rational manner nor to cooperate with his counsel to the end that his defense might be interposed, the same being due to mental incapacity on the part of the defendant.

Upon the motion being made a hearing was conducted by the undersigned, there being offered testimony from Dr. I. Ritenis of Cherry Hospital and Dr. Billy W. Royal of Durham, together with two exhibits offered in evidence marked Defendant's Exhibit No. 1 and Defendant's Exhibit No. 2. The Court finds as a fact that Dr. Ritenis and Dr. Royal are experts in the practice of medicine, specializing in psychiatry. The Court further finds that Dr. Royal has practiced psychiatry for two years at Dorothea Dix Hospital and since 1962 has been engaged in private practice in Durham and in services rendered the Edgecombe-Nash Mental Health Clinic in Rocky Mount, and that Dr. I. Ritenis graduated in 1955 from the Universitiy of Adelaide in South Australia and that he has since worked twelve years in psychiatry, that he obtained a diploma in psychological medicine from the Royal College of Physicians and Surgeons in London, England, in 1965, and obtained a medical degree from the University of Erlangen, Germany, in 1959, and that he has been working and practicing in forensic psychiatry at Cherry Hospital since November 1, 1969. That in the course of duties of Dr. Ritenis at Cherry Hospital he saw the defendant, examined him August 26, 1970, and observed and treated him intermittently until October 5, 1970, said Lewis being in the hospital for mental observation. That the forensic psychiatry field involves examination of patients for ability to participate in trials in court.

That from the findings and examination of the aforesaid Dr. Ritenis that the defendant is suffering from deep-seated delusions as to identity, that his mental condition is such that the defendant does not at this time have the capacity to comprehend his position, to understand the nature and object of the proceedings against him, nor to conduct his defense in a rational manner, nor to cooperate with

his counsel with respect to the defense of the charges against him. That he had not observed any body chemistry changes in the defendant, did not consider that a condition with respect to blood sugar or cholesterol levels as having any relevancy with respect to the opinion which he formed concerning the defendant's lack of ability to participate in the defense of his trial.

That Dr. Royal observed the defendant in Nash County for approximately one and a half hours in April, 1969, being called for the purpose of determining whether or not the defendant was a medical doctor. That his report to the defendant's then attorney (not the attorney in this case) was confined to his findings with respect to whether or not the defendant was a medical doctor. That thereafter and after the trial the said doctor did furnish a written report which included additional matters other than the question as to whether the defendant was a medical doctor.

That based upon the findings of Dr. Ritenis, Dr. Royal is of the same opinion now as Dr. Ritenis to the effect that the defendant is unable to plead understandingly to the present charge against him or to comprehend his position or to conduct his defense in a rational manner or to cooperate with his counsel in said respect.

From the evidence offered in this hearing the Court finds as a fact that the defendant at this time is unable to plead to the bill of indictment charging him with felonious breaking and entering and larceny for that he does not have the capacity at this time to stand trial or to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, or to cooperate understandingly with his counsel with respect to his defense.

The Court further finds that the opinion of Dr. Ritenis is that the defendant is in need of further psychiatric treatment. The Court finds that he is in further need of psychiatric treatment.

IT IS, THEREFORE, ORDERED AND DECREED that the defendant be transported to Cherry Hospital in Goldsboro for further treatment as recommended and as provided in separate order attached to the commitment this day or-

dered issued in Case No. 68-CR-1059, and that he remain in said hospital after delivery until such time as the authorities of said hospital report to the Clerk of Superior Court of Nash County and to the Solicitor of the Seventh Judicial District and to the defendant's attorney, Samuel S. Woodley, Rocky Mount, N. C. (and that a copy of said report also be sent to Mr. Leon Henderson, Jr., Nashville, N. C., Attorney for the defendant in another case), to the effect that said defendant has improved to such condition that he is mentally capable to plead to the bill of indictment, confer with his counsel regarding his defense, and to stand trial upon the aforesaid felonious breaking and entering and larceny charges against him.

It is further directed that the authorities of said hospital do not release said defendant except upon a subsequent order of a Judge of the Superior Court for his return to trial as to the felonious breaking and entering charge or unless otherwise ordered for return to Nash County or elsewhere for hearing."

To the entry of and findings in the foregoing judgment and order, the defendant, in apt time, excepted and appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Covington for the State.

Battle, Winslow, Scott & Wiley, P. A., by Samuel S. Woodley for defendant appellant.

MALLARD, Chief Judge.

[1, 2] It was proper for the defendant's counsel to request the court to conduct an inquiry to determine whether the defendant had sufficient mental capacity to plead to the indictment and conduct a rational defense. 2 Strong, N. C. Index 2d, Criminal Law, § 29; 21 Am. Jur. 2d, Criminal Law, § 64. And it was proper for the court to conduct an inquiry. *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458 (1948). Under G.S. 122-83 and G.S. 122-84, the question of whether the defendant had sufficient mental capacity to plead to the indictment and conduct a rational defense may be determined by the judge or he may submit the issue to a jury prior to the trial of de-

fendant for the crime charged. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968).

The distinction between the test of the competency of a person to stand trial and the test of the mental responsibility in the commission of a crime is set forth in *State v. Propst, supra,* at page 70.

After the hearing the defendant insisted that he was competent to stand trial and requested his attorney to give notice of appeal. He then filed several written motions and requests that his present counsel be dismissed from the case. (Defendant had theretofore requested that his prior attorneys be dismissed, and his request had been allowed.) Thereafter, the defendant's counsel filed a petition bringing all these matters to the attention of the court and requested instructions from the court. Judge Cohoon acted on the request of defendant's attorney and entered the following order on 28 October 1970:

> "THIS CAUSE coming on to be heard before the undersigned Judge assigned to hold the Courts of the Seventh Judicial District upon motion of the Defendant's Court-appointed counsel, that the Defendant be brought before the Court and afforded a hearing in connection with the Defendant's Motion filed with the Court to dismiss his Court-appointed counsel; and the Court being of the opinion that the Defendant's appointed counsel, Samuel S. Woodley, Jr., is competent and capable of conducting the Defendant's defense and that he has acted in the Defendant's best interest in objecting to the Court's acceptance of any plea from the Defendant as to charges pending against him, for the reason that the Defendant is incompetent; and the Court being further of the opinion, in view of its previous finding that the Defendant is in fact incompetent and unable to plead or stand trial, that the Defendant is not, therefore, competent to determine who should represent him, nor to conduct his own defense, nor to determine what is in his best interest and instruct his appointed counsel with respect to his conduct of this case, so that any hearing afforded to this Defendant could serve no useful purpose.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to dismiss his Court-appointed counsel be and it is hereby denied; that Samuel S. Woodley, Jr., be and he is hereby retained as counsel for the Defendant, and is charged with the responsibility for the Defendant's defense; and that said attorney shall continue to conduct the Defendant's case as he, in his best professional judgment and opinion, deems to be in the best interest of this Defendant, without regard to the Defendant's instructions or requests to the contrary, for so long as the Defendant remains incompetent, as determined by the doctors and physicians charged with his care and treatment."

This appeal concerns itself only with that portion of the order committing the defendant to a State hospital for treatment until such time as he is competent to plead and stand trial. No contention is made in the defendant's brief that the evidence was insufficient to support the findings by the judge that the defendant was incapable of pleading to the bill of indictment. Defendant's attorney argues, however, that Judge Cohoon could not lawfully commit the defendant under G.S. 122-84 to a State mental institution without further finding, upon competent evidence, "that such commitment is in the defendant's best interest or that the protection of society demands it."

[3] Both the State and the defendant contend and argue that a person cannot be committed by a judge under the provisions of G.S. 122-83. (Defendant's counsel joins the State in this position on the oral argument, although in the motion he filed, he asserts that the defendant should be committed as provided by G.S. 122-83, G.S. 122-84, and G.S. 122-85. G.S. 122-85 relates to the committing of *convicts* who become mentally ill and is not applicable to the factual situation before us.) They both contend that when action is required in this connection, if the judge acts, he must proceed under the provisions of G.S. 122-84. It is noted that G.S. 122-83 applies to a person "charged with crime" while G.S. 122-84 is applicable to a person "accused of the crime of murder, attempt at murder, rape, assault with intent to commit rape, highway robbery, train wrecking, arson, or other crime," and this points out that one of the distinguishing provisions of the two statutes is the type of crime to which

it applies. Concerning this, see *State v. Craig,* 176 N.C. 740, 97 S.E. 400 (1918). The felony of breaking and entering with intent to steal is a crime importing serious menace to others, and it was proper in this case for the judge to proceed under G.S. 122-84. *State v. Craig, supra.* Under the assignments of error brought forward in the defendant's brief, it is not necessary for us to decide the question of whether the judge could have also proceeded under G.S. 122-83. The question is: Did he proceed properly under the provisions of G.S. 122-84?

In order to understand the question presented, it is necessary to look at the statutes involved. Both of the statutes now appearing as G.S. 122-83 and G.S. 122-84 were first enacted in 1899. Upon a casual reading, the two statutes appear to be in conflict with respect to what must be found in order for the judge to commit a mentally ill person who is charged with crime to a State mental hospital for detention, care and treatment but is found to be unable to plead to the bill of indictment. The question of whether the two statutes are irreconcilable does not appear to have been heretofore presented and decided.

G.S. 122-83 reads in pertinent part:

> "All persons who may hereafter commit crime while mentally ill, and all who, being charged with crime, *are adjudged to be mentally ill* at the time of their arraignment, and *for that reason cannot be put on trial* for the crimes alleged against them, *shall be sent by the court* before whom they are or may be arraigned for trial, *when it shall be ascertained by due course of law* that such *person is mentally ill and cannot plead,* to Dorothea Dix Hospital, or to Cherry Hospital, and they shall be confined therein under the rules and regulations prescribed by the board of directors under the authority of this article, and they shall be treated, cared for, and maintained in said hospital. * * *" (Emphasis added.)

If the defendant could have been committed under G.S. 122-83, it is clear that the statute does not require a finding by the judge that the commitment is in the defendant's best interest or that the protection of society demands that the defendant be committed before sending such person to a State hospital.

The findings by Judge Cohoon that the defendant was unable to plead to the bill "for that he does not have the capacity

at this time to stand trial or to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, or to cooperate understandingly with his counsel with respect to his defense" in the context of the order are sufficient findings that the defendant was mentally ill at the time of arraignment and for that reason could not plead. The defendant's counsel does not contend otherwise in his brief.

Defendant's counsel argues and contends that because of some of the provisions of G.S. 122-84, Judge Cohoon did not make sufficient findings to permit him to order the defendant committed to the State hospital for psychiatric treatment.

There are three paragraphs in G.S. 122-84, reading as follows:

> "When a person accused of the crime of murder, attempt at murder, rape, assault with the intent to commit rape, highway robbery, train wrecking, arson, or other crime, shall have escaped indictment or shall have been acquitted upon trial upon the ground of mental illness, or shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until an inquisition shall be had in regard to his mental condition. The judge shall, at the term of court at which such person is acquitted, cause notice to be given in writing to such person and his attorney, and, if in his good judgment it be necessary, to his nearest relative, naming the day upon which he shall proceed to make an inquisition in regard to the mental condition of such person. The judge shall cause such witness to be summoned and examined as he may deem proper or as the person so acquitted or his counsel may desire. At such inquisition the judge shall cause the testimony to be taken in writing and be preserved, and a copy of which shall be sent to the superintendent of the hospital designated in § 122-83. If upon such inquisition the judge shall find that the mental condition or disease of such person is such as to render him dangerous either to himself or other persons, and that his confinement for care, treatment, and security demands it, he shall commit such person to the hospital designated in § 122-83, to be kept in custody therein for treatment and care as herein provided. Such

person shall be kept therein, unless transferred under the previous provisions of this chapter, until restored to his right mind, in which event it shall be the duty of the authorities having the care of such person to notify the sheriff of the county from which he came, who shall order that he appear before the judge of the superior court of the district, to be dealt with according to law. The expense incident to such commitment and removal shall be paid by the county authorities from which such patient was sent.

When a person committed to a State hospital under this section as unable to plead shall have been reported by the hospital to the court having jurisdiction as being mentally able to stand trial and plead, the said patient shall be returned to the court to stand trial as provided in § 122-87. If the hospital authorities feel that an outright discharge or release of said person (in the event he is found not guilty), would be harmful or dangerous to himself or the public at large involved, and that further care and treatment is necessary, said authorities will when reporting that he is able to stand trial and plead, make a request for his return for further care and treatment, in the event he is found not guilty.

If at the trial it is determined that the defendant is not guilty of a criminal offense and it appears to the trial judge that the State hospital in its report has requested that the defendant be returned to said hospital for further care and treatment as an outright discharge or release of said defendant would be harmful or dangerous to himself or the public at large, the trial judge shall commit said defendant to the proper State hospital for care and treatment and shall require him to remain at said hospital until discharged by the superintendent thereof upon the advice of the medical staff."

What is now G.S. 122-84 was adopted in 1905 and appears in the Revisal of 1905. However, some amendments have been made since then, but paragraph one is substantially the same as when adopted in 1905. The Revisal of 1905 came after the prior statute relating to the same subject matter had been declared unconstitutional in *In re Boyett,* 136 N.C. 415, 48 S.E. 789 (1904). In *Boyett* the defendant was charged with murder; he pleaded not guilty and offered evidence tending to show he was

insane at the time of the killing. He was acquitted by the jury. The court immediately and without a hearing ordered him committed to the "Hospital for the Dangerous Insane." The defendant moved for an inquiry as to his mental condition at that time, and the motion was denied. The Supreme Court said:

> "The fatal infirmity in the statute is that the power to commit is vested in the Court to be exercised 'in its discretion.' No provision is made for notifying the person whose liberty is involved, nor is the Court required to make any investigation either by itself, by the examination of witnesses, by calling to its aid medical experts or otherwise. The order of his Honor expressly recites in the language of the act that, 'It is therefore ordered and adjudged by the Court in the exercise of its discretion.' * * * It may be that the wisdom of the Legislature will find, within constitutional limitations, a remedy for the objectionable features of the statute. We do not wish to be understood as saying that a person acquitted of a grave crime upon the ground of insanity may not be detained for a reasonable time, so that by some appropriate proceedings the condition of his mind may, either under the direction of the Judge presiding or some other judicial officer, or commission, be examined into for the purpose of ascertaining whether his own safety and that of other persons, or the public generally, requires that he be committed to the hospital for treatment and care. It is well settled that it is not necessary that a jury trial be had—it is sufficient if the inquiry be had in some way by some tribunal conforming to the constitutional requirement of due process of law. * * *"

When *Boyett* is compared with the provisions of the first paragraph of present G.S. 122-84 and the second and third paragraphs which were added in 1951 are taken into consideration (together with the other amendments since the Revisal of 1905), it appears to us that the proper construction of this statute is that the first sentence of the first paragraph of G.S. 122-84 deals with the authority of the judge to detain a person temporarily until an inquisition can be held and that the remainder of the first paragraph specifically establishes procedures for committing a person *after he has been acquitted* and does not specifically apply to a person accused of crime and found to be without sufficient mental capacity to undertake his defense. The

second and third paragraphs of G.S. 122-84 are concerned, among other things, with procedures for dealing with the person accused of crime and committed under this statute as unable to plead who subsequently becomes mentally able to stand trial and is thereupon acquitted.

[4, 5] When we look at the second sentence in the first paragraph of G.S. 122-84, we see that it begins a new thought which provides procedure for an inquisition to be held by the judge after a person is acquitted of a crime importing serious menace to others. *State v. Craig, supra.* The third sentence in this paragraph refers to witnesses for the "person so acquitted." The next two sentences point to "such inquisition." The remaining sentences in the paragraph all have to do with the inquisition and commitment of the person acquitted. While this portion of paragraph one is suggestive of procedures which are proper to follow in determining whether a person has sufficient mental capacity to undertake his defense, it does not require a finding before commitment thereunder that "the mental condition or disease of such person is such as to render him dangerous either to himself or other persons, and that his confinement for care, treatment, and security demands it." No rules or procedure are provided in G.S. 122-83 or G.S. 122-84 other than "by due course of law" (set out in G.S. 122-83) as to how the judge shall conduct the inquisition when he is called upon to determine whether a person *accused* of crime is unable to plead because of mental illness. However, due process must be observed. *State v. Propst, supra.*

The second paragraph in G.S. 122-84 applies to a person already committed to a State hospital as unable to plead under G.S. 122-84. This second paragraph provides procedures for after-commitment dealings with a person unable to plead as well as in the event such person is later tried and then acquitted.

[6] When the second and third paragraphs of G.S. 122-84 are considered and harmonized with the first paragraph, and also with G.S. 122-83, we are of the opinion and so hold that the provisions of these two statutes are not in irreconcilable conflict.

Under G.S. 122-84, the State and the defendant both contend that before the judge may commit a person thereunder who has been "* * * found by the court to be without sufficient mental capacity to undertake his defense," he must also find that "the mental condition or disease of such person is such as

to render him dangerous either to himself or other persons, and that his confinement for care, treatment and security demands it. * * *"

[7] The State, however, argues in its brief that the court substantially complied with this when the finding was made that the defendant "is in further need of psychiatric treatment." The State contends that this finding by the court is in effect a shorthand statement that the court finds the defendant in need of further psychiatric treatment because "his mental condition not only renders him incompetent to stand trial, but also is such as to render him dangerous to himself or others, and therefore, his confinement for further treatment is necessary." This interpretation of the findings of the trial judge in this case puts too much strain upon logic. The State asserts that there are two procedures whereby a person accused of crime and found not competent to stand trial may be hospitalized in a State hospital; one is G.S. 122-84 and the other is G.S. 122-91. The State further contends that if the court should find that G.S. 122-84 was not followed, then this case should be remanded with direction that G.S. 122-91 be applied. But on this record it does not appear that the superintendent of the State hospital has reported his findings and recommendations to the clerk of the superior court as required in G.S. 122-91. Absent such notification, the clerk could not institute proceedings under the statute. We hold that the failure to act under the provisions of G.S. 122-91 does not prevent a judge of the superior court from proceeding under the provisions of G.S. 122-84 in proper cases. In the motion filed for the defendant, the judge was requested to proceed under the provisions of G.S. 122-83, G.S. 122-84, and G.S. 122-85.

[2] Under our statutes G.S. 122-83 and G.S. 122-84, it is not specifically stated that the judge may empanel a jury to try the issue of mental illness, but in *State v. Sullivan, supra,* it was held that the common-law rule applies and that such determination may be made by the court with or without the aid of a jury. See also *State v. Propst, supra,* and *In re Boyett, supra.*

> "At common law, * * * the method of determining the defendant's present mental condition rests in the discretion of the trial judge. He may impanel a jury or decide the question himself. * * * [A] few statutes, including the federal, rather clearly intend that the issue shall be tried by the judge without a jury." H. Weihofen, Mental Disorder

as a Criminal Defense, p. 446 (1954). See also *Greenwood v. United States,* 350 U.S. 366, 100 L. Ed. 412, 76 S. Ct. 410 (1956).

[8] It is required before the issuance of a commitment to a State hospital of a person charged with crime of the nature referred to in G.S. 122-84, that the judge or the jury first ascertain by due course of law that such person is "charged with" or "accused of" the commission of such a crime and is without sufficient mental capacity to undertake his defense at the time of arraignment and for that reason cannot be put on trial.

In *State v. David L. Jones,* 278 N.C. 259, 179 S.E. 2d 433 (1971), the Court said:

> "If a defendant is capable of understanding the nature and object of the proceedings against him and to conduct his defense in a rational manner, he is sane for the purpose of being tried, though on some other subject his mind may be deranged. This is the common law rule to determine a defendant's capacity to stand trial."

Conversely, if he is incapable of understanding the nature and object of the proceedings against him and to conduct his defense in a rational manner, he is not competent to stand trial. We think that ordinarily it may be presumed that a person charged with a crime of the nature of those set forth in G.S. 122-84 who is without sufficient mental capacity to plead to the bill of indictment and undertake his defense is in need of psychiatric treatment. In this case the court found that the defendant was in need of psychiatric treatment.

[9] In his brief the defendant argues that under the statutes, he cannot be released by the authorities of the hospital unless he becomes competent to stand trial and is ordered by the court to be returned for trial. We do not agree with this interpretation and construction of the judgment and order entered herein or the applicable statutes. See *In re Wilson,* 257 N.C. 593, 126 S.E. 2d 489 (1962); *In re Harris,* 241 N.C. 179, 84 S.E. 2d 808 (1954); and *In re Tew,* 11 N.C. App. 64, 180 S.E. 2d 434 (1971). See also 41 N. C. Law Rev. 141, and 41 N. C. Law Rev. 279.

Defendant also argues that he might never be released "even though the medical authorities of the hospital might consider him safe to return to society, and an unfit candidate for useful or beneficial medical or psychiatric treatment, but nonetheless

incompetent to plead or stand trial." On this record the hospital authorities have made no such findings, and these questions are therefore not presented. We are not called upon to rule thereon. But in *Higgins v. United States,* 205 F. 2d 650 (9th Cir. 1953), it was pointed out that a commitment under the Federal statutes on the ground that an accused is mentally incompetent to stand trial operates to restrain the accused only until he is mentally fit for trial or other disposition is made in the premises.

The defendant here is charged with a felony which is a crime encompassed within the provisions of G.S. 122-84. He was afforded the opportunity to be heard and to prepare for the hearing. The order of the able and experienced trial judge who heard the matter provides that the authorities of the State hospital are not to release the defendant except upon a subsequent order of the superior court "for his return to trial as to the felonious breaking and entering charge or unless otherwise ordered for return to Nash County or elsewhere for hearing." The order entered herein is limited in effect, in that the restraint thereunder is only until the defendant is mentally fit for trial or other disposition made in the premises. *Higgins v. United States, supra.*

In the proceeding we find no error. The judgment and order entered herein by Judge Cohoon is affirmed.

Affirmed.

Judges PARKER and VAUGHN concur.

CLAUDE STIREWALT, PLAINTIFF v. VALDESE SAVINGS AND LOAN ASSOCIATION, ORIGINAL DEFENDANT, AND WACHOVIA BANK & TRUST COMPANY, N. A., THE NORTHWESTERN BANK, AND BETTY STIREWALT CARSWELL, THIRD PARTY DEFENDANTS

No. 7125SC166

(Filed 26 May 1971)

1. Banks and Banking § 11— action to recover payments from savings account — payment of funds to depositor's wife — implied authority of the wife

In a depositor's action to recover funds that were deposited with a savings and loan association and that allegedly were wrongfully paid out by the association to the depositor's wife, the evidence was sufficient to support a finding that the wife had implied authority to

draw checks on the depositor's account payable to the depositor, where the evidence was undisputed that the dispositor on several occasions had authorized his wife to obtain checks for him and that he did nothing differently on the occasions which he contends his wife was not authorized to act for him.

2. **Principal and Agent § 5— power of agent to bind his principal — negligence of principal**

The power of an agent to bind his principal may include not only the authority which has actually been conferred, but also the authority which may be implied as usual and necessary to complete the task entrusted to him; it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment.

3. **Banks and Banking § 11— authority of agent to endorse checks payable to principal**

An agent's power or authority to endorse checks payable to his principal cannot be inferred from express authority to receive checks for his principal.

4. **Banks and Banking § 11— endorsement of depositor**

A depositor is not required to examine the endorsements on its own genuine checks.

5. **Banks and Banking § 11; Estoppel § 8— depositor's action to recover payments from savings account — payments to depositor's wife — estoppel**

In a depositor's action to recover funds that were deposited with a savings and loan association and that allegedly were wrongfully paid out to the depositor's wife, the evidence was sufficient to support a finding that plaintiff's conduct over a nine-year period estopped him from asserting his claim against the association, especially where there was evidence (1) that the depositor had not looked at his account book during the period his wife had made withdrawals therefrom; (2) that he made no inquiry concerning the status of his account; (3) that the account book was left in a place accessible to his wife; (4) that he took his wife's word as to reporting of savings dividends on his income tax; and (5) that a statement of his account was mailed to him each year.

APPEAL by plaintiff from *Gambill, Judge,* 31 August 1970 Special Civil Session, Superior Court of BURKE County.

This is an action to recover funds deposited by plaintiff with Valdese Savings and Loan Association (Savings and Loan) and allegedly wrongfully paid out by Savings and Loan. By its answer, Savings and Loan averred that all withdrawals from the account of plaintiff were made by plaintiff, individually, and

by and through his duly authorized agents, Shirley Stirewalt, his wife, and Betty Stirewalt Carswell, his daughter, and that plaintiff received either the funds or the benefit therefrom of all checks issued by Savings and Loan and charged to his account; that plaintiff constituted, by his conduct, his wife and daughter as his agents and never withdrew their authority but condoned and ratified their actions; that plaintiff was guilty of negligence in placing his passbook in the hands of his agents and requesting withdrawals from time to time without withdrawing the authority duly given his agents; that plaintiff was negligent in failing to inspect his passbook from 1957 to the time of his wife's death in 1966; that plaintiff was negligent in failing to examine Federal Tax Forms 1099 sent each year showing earned interest and his income tax returns showing interest earned, both of which would have indicated steadily decreasing interest earned and, therefore, steadily decreasing principal. Savings and Loan also set up a plea of estoppel and set up cross actions against the estate of Shirley Stirewalt, Betty Stirewalt Carswell, The Northwestern Bank and The Wachovia Bank and Trust Company.

It was stipulated that as of 29 June 1957, in account number 31370 at Valdese Savings and Loan Association there was deposited $9,574.10; that there were withdrawals prior to that time by the same people; that three checks (dated 3 August 1944, 31 December 1957, and 6 June 1966) were drawn at the instance of plaintiff's wife with his authority and that he cashed them. It was further stipulated that the cross actions would not be heard but would be severed for later hearing. The matter was heard before the judge without a jury. The court, upon its findings of fact and conclusions of law, entered judgment against plaintiff and taxed plaintiff with the costs. Plaintiff appealed.

John H. McMurray for plaintiff appellant.

Mitchell and Teele, by H. Dockery Teele, Jr., for defendant appellee.

MORRIS, Judge.

Plaintiff testified that he was 56 years of age; that he was married to Shirley Stirewalt who died in November 1966; and that he had three children: Betty, age 34, Joan, age 30, and Steve, age 17; that he was a knitter at Valdese Alba for 26 years until 1957 when he quit and that he is now a painter, an occupa-

tion he started in 1960; that he and his wife lived together until her death; that he had an account in Valdese Savings and Loan, represented by optional savings share account book No. 31370, and on 29 June 1957 there was $9,574.10 in the account; that the check dated 31 December 1957, payable to him for $140 was endorsed by him but he didn't recall what he did with the money; that check dated 3 August 1964, for $1,142 payable to him was endorsed by him and he thought the money was "put in a furnace" but he wasn't sure; that check drawn on the Savings and Loan Association dated 6 June 1966 for $848 payable to him was endorsed by him and the proceeds used for the purchase of a car. He testified that he did not remember making any other withdrawals and did not authorize anyone to sign his name as endorser on any of the other checks than the three previously mentioned. He did not make any check or investigation of his account before the death of his wife. He laid the account book in a box and didn't even look at it. The money in the account was earned when he worked at Alba. He never went to the Savings and Loan until after his wife died. He kept the deposit book in a box at his home and had not seen it in a long time. His wife had made another book to lead him to believe that it was the same one. He first learned that there had been checks drawn on the account not authorized by him the day before his wife died. He found the real book in her pocketbook, examined it and knew what had happened. He made no inquiry about the account over the years because he thought it was safe. His wife filed joint tax returns during those years. Between 1957 and 1966 he had no dividend information from Savings and Loan indicating his account was diminishing. He looked at the tax returns, knew the dividends were reported for income tax, and signed the returns, but took his wife's word for the amount. He knew at the time what the amount was. He did not remember how he authorized her to withdraw the money which he testified he got and about which he had knowledge. She took the book, the check was made to him, she brought it to him, and he endorsed it. He looked at the book on those occasions, but she had fixed the book each time. The book used by his wife was for account number 32532. At the top of the first page, the name "Steve Stirewalt" is stricken through. Under that appears the name "Claude Stirewalt, Trustee" and the word "Trustee" is stricken through. The first page shows a deposit of $5 on 8 January 1960. The second page is pasted to that page, and written thereon is "Account brought forward from B & L Book No.

1." Various dates and dividends are shown. On 30 June 1964 deposits and dividends totaled $14,996.44. A withdrawal of $1,142.05 is indicated on 3 September 1964. Subsequent dividends are added and a withdrawal of $848 on 6 June 1966 leaving a balance indicated of $13,854.39. He went to the fifth grade in school.

On cross-examination plaintiff testified that after he quit Alba in 1957 he worked at different places and part of the time was unemployed. His wife finished high school. She paid the light and power bills because it was handy. She took care of paying some of plaintiff's bills. He paid the income tax by cash. He paid the county tax most of the time. She bought groceries. She bought the daughters' clothing but didn't pay for them. She was working but he didn't know how much she was making. He had been convicted of driving drunk but was not in an alcoholic condition for most of the period of time that his wife was handling the business matters in his home. The last time he authorized his wife to go to the Savings and Loan to withdraw some money was in 1966 but he didn't remember how that was done. "I would answer that as well as I can remember she would always get something from them, and I would sign it and she would take it back. I don't know exactly what I signed. Yes, I did tell her to go up there and get the money and she went and got it. I approved the way she did this as long as I could get something from them." He was satisfied and approved the way the $846 was withdrawn in June 1966. He did not tell the Savings and Loan not to let his wife withdraw any money at any other time. He was satisfied with the way the 3 August 1964 withdrawal of $1,142 was handled and did not tell the Savings and Loan not to let his wife withdraw any other funds. He assumed he would have to sign something before they would let the money out. He put the passbook in his wife's possession. It was kept in a box and they all knew where it was. "I trusted her with the passbook. I didn't hide it. I gave it to her and told her to go get the money out of the Savings and Loan." The withdrawal of the other checks was different. The difference was that notes were sent. When these withdrawals were made, she had the passbook and somebody took a note and the book and got them. Plaintiff remembered having only one account at the Savings and Loan, although account number 31368 was a joint account with him and his wife and he signed the signature card. He didn't remember when the account was opened nor who

withdrew funds therefrom nor whether he approved of the method she used to withdraw funds from that account. Form 1099 for 1963, 1964 and 1965 shows the dividends for those years. The address was Claude Stirewalt, Route 2, Connelly Springs. His wife was sick for seven months before she died and went to the doctor some two to four times a week. Sometimes he paid the medical bills and sometimes she did. Her father was killed in the war and she got his insurance and led him to believe she had about $3,000 in the bank. She wasn't the saving kind. Part of the money did come from the sale of land owned by him and his wife together and he deposited $2500 in the Savings and Loan two days after the property was sold. It could have sold for $5,000, but he did not remember whether he gave his wife any part of the money. When his wife died, they had some property in both names and he received the proceeds of her life insurance. She had a truck-van. He paid the bills she had. He did not remember whether he filed a claim in her estate. Check for $200 dated 4 August 1944; check for $250 dated 15 July 1950; check for $500 dated 5 September 1950; check for $225 dated 14 October 1955, all drawn payable to him and all endorsed by him got to him the same way. She brought the check and passbook back to him. Check dated 13 February 1957 for $1500 was payable to him but he was not certain whether the endorsement was his. When he sent her to get the money, he did not authorize her to sign his name.

Betty Carswell testified that she is the plaintiff's daughter and that she made a number of withdrawals from the Savings and Loan on plaintiff's account. On those occasions she took with her the passbook and a note signed by her mother. A typical example of the notes is the following: "Evelyn, Claude wants a check for $125.00. Thank you. Please give to Betty." "Evelyn, please give Betty a check for $50.00 for Claude. Shirley Stirewalt." All of the daughter's dealings were with her mother. Plaintiff never gave her the book nor authorized her to get a check, nor did she ever carry the book or check to him. They were carried to her mother. She signed her father's name on some of the checks but never received any money therefrom. The witness and her husband frequently took her mother to the doctor in Lenoir. Her mother was pretty sick for a while before she died. Plaintiff did go with his wife to the doctor on occasions. Plaintiff drank a lot on weekends. Her mother handled the payment of bills but witness did not know if it was her money.

Joan Reid testified that she is a daughter of plaintiff and that on a few occasions she would take notes written by her mother to the Savings and Loan, and "they would give me a check in an envelope and I would take it to her, and I never saw the check or how much it was." Her mother was sick with cancer for seven months before her death. Her mother started to work when witness was six years old and worked until she got sick.

L. E. Deaton, Vice-President of Savings and Loan, testified that no question was ever raised by plaintiff as to any withdrawals by his wife from funds on deposit. After the first or second withdrawal, the witness did not handle the account. The policy is that "if we know a member of the family, such as the wife, we know who they are, if we know who is the wife, if she brings a written statement from her husband, along with the passbook, and requested a withdrawal, why, we have honored it, but it's always done by check drawn on the account of the account holder." In this instance, in the latter years, the wife had signed the note "but the pattern had been set, and we never suspected there was anything wrong; if you don't honor a wife on these things, well, it would make an awful lot of people mad." Forms 1099 were mailed to plaintiff. Plaintiff never notified the witness not to allow his wife to withdraw the funds either in the joint account or in his individual account.

On cross-examination he testified that all of the checks were paid by either Wachovia Bank or Northwestern Bank, came back to the Savings and Loan, and were held in their file. At no time did he have any written authorization in the file for any checks to be paid or delivered against the Claude Stirewalt account or for anyone to sign his name to his individual account.

All of the checks in question were introduced into evidence. The endorsements thereon indicate that 31 of the checks were cashed by hospitals, drug stores, and doctors—the total amount of these being some $4200.

On the evidence the court found as facts the following:

"That the Plaintiff was married to Shirley Stirewalt and lived continuously with her up until her death on November 20, 1966; that the Plaintiff was the owner of an Optional Savings account in The Valdese Savings and Loan Association bearing Account No. 31370 and as of June 30, 1957,

had $9,574.00 in said account; that between June 30, 1957, and November 20, 1966, sixty-five withdrawals were made from the individual account of the Plaintiff in The Valdese Savings and Loan Association leaving a balance of $77.62 as of the date of the death of Shirley Stirewalt, the Plaintiff's wife.

That the Plaintiff and his wife also were the owners of a joint Optional Savings account in The Valdese Savings and Loan Association bearing Account No. 31368, which account showed deposits and withdrawals from said account of several thousand dollars over a period of years and that all withdrawals from said account were made by Shirley Stirewalt without objection by the Plaintiff, Claude Stirewalt; that said account is still in existence at The Valdese Savings and Loan Association although the Plaintiff denies any knowledge of this account or any of its deposits and withdrawals.

That on numerous occasions the Plaintiff caused his wife, Shirley Stirewalt, to go to The Valdese Savings and Loan Association with his passbook and make withdrawals from his individual account; that his wife would on such occasions bring the checks back to him for his endorsement on said checks and that he received said funds or the benefit therefrom; that he approved of the method of such withdrawals and held his wife out as his agent to The Valdese Savings and Loan Association on such occasions; that he never revoked any authority given his wife to make such withdrawals and thereby held her out as his agent with authority or apparent authority to make other withdrawals on his behalf.

That all sixty-five checks were drawn payable to Claude Stirewalt and delivered to his agent or apparent agent; that all of said checks were withdrawn by the agent or apparent agent of Claude Stirewalt in the same manner even though the Plaintiff contends that he had only authorized his wife to make withdrawals on certain occasions.

That the Plaintiff filed joint income tax returns with his wife, Shirley Stirewalt, for the years during which said withdrawals were made, that said returns showed or should have shown the amount of interest credited by The Valdese

Savings and Loan Association to his account each year and he knew or should have known that the declining interest each year indicated a reduction in the balance of his account; that he should have been put on notice that the balance in said account was reducing each year and had the opportunity to have discovered the withdrawals which he claims were improperly made by his wife, Shirley Stirewalt; that Form 1099 was mailed to the address of the Plaintiff by The Valdese Savings and Loan Association for the calendar years 1963, 1964 and 1965 showing a sharp reduction in the interest credited to his account each year and he knew or should have known that improper withdrawals were being made and had the opportunity to have discovered the same.

That the Plaintiff's wife, Shirley Stirewalt, was sick for many years prior to her death on November 20, 1966; that she had migraine headaches and other infirmities which ultimately resulted in her death from a prolonged illness with cancer; that the sixty-five checks introduced into evidence show that 31 checks were cashed at the offices of doctors, hospitals and drug stores totalling $4,215.83, and the Court finds as a fact that such sums of money was *(sic)* used or apparently used for the medical treatment and care of the wife of the Plaintiff for which he would have been legally liable;

That the Plaintiff did not present his passbook to The Valdese Savings and Loan Association from 1957 until the date of death of his wife for the crediting of dividends or interest; that he made no effort during all of said years to ascertain the true balance of his account, but that he entrusted such matters to his wife; that he made no effort to discover the improper withdrawals although he had many opportunities to do so."

Based on the findings of fact the court concluded as a matter of law:

"1. That the Plaintiff by his own conduct in constituting his wife, Shirley Stirewalt, his agent to make withdrawals from The Valdese Savings and Loan Association in his Optional Account No. 31370 on numerous occasions and his failure to withdraw such authority, was such that he did make his wife, Shirley Stirewalt, his agent with

authority or apparent authority to make all of such withdrawals from his account in The Valdese Savings and Loan Association.

2. That the Plaintiff was put on notice or should have been put on notice of the unauthorized withdrawals and his failure to discover such unauthorized withdrawals constituted negligence on his part and such negligent conduct on his part precludes any recovery from The Valdese Savings and Loan Association.

3. That because of the conduct of the Plaintiff as set forth in the foregoing findings of fact, The Valdese Savings and Loan Association would be held to a higher standard of care than required by law and the Plaintiff should not be allowed to recover because of his own conduct.

4. That the Plaintiff take nothing by his action and that the Plaintiff be taxed with the costs of Court."

Plaintiff excepts to the findings of fact on the ground that they are not supported by competent evidence and to the conclusions on the ground that they are based on findings not supported by evidence and are in law erroneous.

He contends that evidence of Forms 1099 and other evidence as to income tax is inadmissible. Plaintiff testified with respect to Forms 1099 on cross-examination. No objection to the testimony was interposed. Defendant in its answer had raised the issue of estoppel and plaintiff's own negligence. The evidence was competent on these issues.

[1, 2] In our opinion the testimony certainly constitutes more than a scintilla of evidence tending to show that the wife had implied authority to request checks to be drawn on plaintiff's account payable to plaintiff.

" 'While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by the principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof, and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which

> the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who, in order to avail himself of the rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority.' (Citations omitted). 'Accordingly, persons who do not know what the agent's authority really is are justfied in dealing with him upon the assumption that he has the authority which the principal indicates by his conduct that the agent possesses.' " *Warehouse Co. v. Bank,* 216 N.C. 246, 4 S.E. 2d 863 (1939).

The power of an agent to bind his principal may include not only the authority which has actually been conferred, but the authority which may be implied as usual and necessary to complete the task entrusted to him, and " 'it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment'." *Smith v. Kappas,* 218 N.C. 758, 12 S.E. 2d 693 (1940).

The evidence is undisputed that on several occasions during the existence of plaintiff's account, he had authorized his wife to obtain a check for him and accepted the benefits therefrom. His own evidence was that he did nothing differently on the occasions which he contends his wife was not authorized to act for him.

[3, 4] We are aware that an agent's power or authority to endorse checks payable to his principal cannot be inferred from even express authority to receive checks for his principal.

Construction Co. v. Trust Co., 266 N.C. 648, 147 S.E. 2d 37 (1966). There is nothing in the evidence before us to indicate any authority whatever of plaintiff's wife or daughter to endorse his name on the checks. Savings and Loan, in this situation, was a depositor of Wachovia Bank and Trust and of Northwestern Bank. As a depositor, it is not required to examine the endorsements on its own genuine checks. *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693 (1966). Plaintiff might well look to his agent for reimbursement.

[5] Plaintiff contends that the evidence is insufficient to allow defendant to prevail upon its plea of estoppel. Justice Johnson in *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953), said:

> "Therefore, in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. (citations omitted)."

In our opinion, the evidence on the record before us is sufficient to support a finding that plaintiff's conduct was sufficient to estop him from successfully asserting a claim against defendant. Certainly the evidence of his negligence is plenary. By his own negligence he put it in the power of his wife to commit the wrong of which he now complains.

Plaintiff contends that findings of fact that 31 of the funds obtained by plaintiff's wife were used to pay medical bills and drug bills for which he was legally responsible are not supported by competent evidence. With these contentions we are constrained to agree. The evidence was that plaintiff's wife had been very sick for seven months before she died, that she had severe headaches and suffered from cancer. It is true that 31 of the checks obtained by her were cashed by a hospital, drugstore, or doctor, but no check was obtained by her during the seven months preceding her death. There is no evidence of any illness of the wife prior thereto which would have necessitated or supported a finding that the funds were used for payment of sums for which plaintiff was legally responsible. The last check issued prior to death of plaintiff's wife was on 6 June 1966 in the amount of $848. This check plaintiff admits was obtained upon his request, endorsed by him, and used for the purchase of a car in Charlotte. The judgment must, therefore, be modified to omit that portion which is the subject of plaintiff's exception 32 as follows: " . . . and the Court finds as a fact that such sums of money was *(sic)* used or apparently used for the medical treatment and care of the wife of the plaintiff for which he would have been legally liable." With this modification the judgment of the trial court is

Affirmed.

Judges BROCK and HEDRICK concur.

W. F. INGOLD v. CAROLINA POWER & LIGHT COMPANY

No. 715SC330

(Filed 26 May 1971)

1. Electricity § 5— fall of power lines — negligence

Plaintiff's evidence was sufficient to show that power lines owned and maintained by defendant power company fell as a result of specific acts of negligence on the part of defendant.

2. Negligence § 8— proximate cause

In order for an act of negligence to be considered a proximate cause of an injury, a plaintiff must prove a causal relationship between the act and the injury.

3. Evidence § 3— judicial notice

A court may take judicial notice of a fact within a field of any particular science which is so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by resort to readily accessible sources of indisputable accuracy.

4. Electricity § 5— fallen electrical wires — shock to train engineer — proximate cause

Evidence of plaintiff railroad engineer failed to show that fallen electrical wires owned and maintained by defendant power company were a proximate cause of an electrical shock received by plaintiff when he grasped the brake handle of the diesel engine he was operating at about the time the wires fell.

APPEAL by plaintiff from *Fountain, Judge,* 10 November 1970 Session of Superior Court held in NEW HANOVER County.

Plaintiff filed complaint on 5 January 1967 alleging that he was injured by an electric shock on 9 January 1964 while employed as a fireman-engineer for the Seaboard Airline Railroad. The shock allegedly occurred when power lines owned and maintained by defendant fell to the ground during a rain storm and near the track on which plaintiff was operating a diesel engine in the course of his employment. At one place in the record it is indicated the voltage carried by the lines was 12,000 volts. Another part of the record indicates the voltage as having been 1200 volts.

At the conclusion of plaintiff's evidence defendant moved for a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure (G.S. 1A-1, Rule 50). Two grounds for the motion were specified: "First, that the evidence does not disclose that the defendant was guilty of any negligence as alleged in the complaint; and second, that the evidence does not disclose that the wire on the ground was the proximate cause of any shock received by Mr. Ingold."

Defendant's motion was allowed and plaintiff appealed.

Stevens, McGhee, Ryals & Aycock by Karl W. McGhee and Rives, Peterson, Pettus, Conway & Burge by W. Eugene Rutledge for plaintiff appellant.

Poisson, Barnhill & Jackson by L. J. Poisson, Jr., Thomas E. Capps and Sherwood H. Smith, Jr., for defendant appellee.

GRAHAM, Judge.

In determining the sufficiency of the evidence to withstand a motion for a directed verdict made by a defendant under the provisions of Rule 50, we are guided by the same principles that prevailed under our former procedure with respect to motion for nonsuit. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396; *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820. All evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47, and cases therein cited.

The burden was upon plaintiff to produce evidence, either direct or circumstantial, sufficient to establish the two essential elements of actionable negligence, namely: (1) that defendant was guilty of a negligent act or omission; and (2) that such act or omission proximately caused his injury. *Sowers v. Marley*, 235 N.C. 607, 70 S.E. 2d 670.

[1] Plaintiff undertook to prove that the power lines fell as a result of specific acts of negligence on the part of defendant. We feel it unnecessary to set forth the evidence bearing on this question. Suffice to say, in our opinion, plaintiff's evidence was sufficient to withstand a motion for a directed verdict made on the ground "the evidence does not disclose that the defendant was guilty of any negligence. . . . " See *Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E. 2d 320; *Murphy v. Power Company*, 196 N.C. 484, 146 S.E. 204; *Ellis v. Power Co.*, 193 N.C. 357, 137 S.E. 163; *McAllister v. Pryor*, 187 N.C. 832, 123 S.E. 92; *Shaw v. Public-Service Corporation*, 168 N.C. 611, 84 S.E. 1010; *Turner v. Power Co.*, 154 N.C. 131, 69 S.E. 767.

[2] Whether there was any evidence that the fallen wires were a proximate cause of the shock received by plaintiff is a more difficult question. In order for an act of negligence to be considered a proximate cause of an injury, a plaintiff must prove a causal relationship between the act and the injury. *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397; *Wall v. Trogdon*, 249 N.C. 747, 107 S.E. 2d 757.

Taking plaintiff's evidence in the light most favorable to him, we must accept as true his testimony that he received a shock when he grasped the brass brake handle of the diesel engine and that the shock occurred at about the time the wires in question fell. However, plaintiff's evidence also showed that the poles supporting the wires were located, by exact measurement, 29 feet from the nearest track rail. The wires fell straight down onto the ground and bushes in line with the poles and approximately 27 feet from the nearest rail. They did not come in contact with the diesel engine or the track on which it was being operated. We find no evidence that anything which the wires came in contact with could have conducted the electricity to the engine and its brake handle, or that the electricity could have arced or "jumped" that distance.

The theory of plaintiff's complaint appears to be that the electricity was conducted along the ground. "[S]uddenly and without warning the power lines of the defendant company adjacent to the railroad track broke, fell to the ground and thus conducted into the body of plaintiff tremendous voltage of electricity. . . . " Also, " . . . Carolina Power & Light Company . . . attempted to perform temporary repairs on said cable which it knew . . . would not be suitable and safe, but would be subject to breakage without undue strain, and thus conduct *onto the ground* large voltage of electricity. . . . " (Emphasis added). However, the record contains no evidence that the ground conducted the electric current the 27-foot distance from the fallen wire to the diesel engine or that it was capable of doing so.

[3] A court may take judicial notice of a fact within a field of any particular science which is so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by resort to readily accessible sources of indisputable accuracy. *Kennedy v. Parrott,* 243 N.C. 355, 90 S.E. 2d 754; *Hopkins v. Comer,* 240 N.C. 143, 81 S.E. 2d 368; Stansbury, N. C. Evidence 2d, § 11. Under this principle it may be noted that wire or metallic substances will conduct electricity, whereas string ordinarily will not. *Pugh v. Power Co.,* 237 N.C. 693, 75 S.E. 2d 766. It is also generally known that "if a human body, which is also a good conductor, is in contact with a wire charged with electricity, it will pass through it to the ground; or if near it, if the charge is strong enough, it is likely to seek it and pass to the ground, the human body being a better conductor

than air." *Starr v. Telephone Co.*, 156 N.C. 435, 72 S.E. 484.

In our opinion, however, it would be pure speculation to hold, in the absence of evidence, that the ground is a sufficient conductor of electricity to conduct it a distance of 27 feet, and then through or over wooden cross ties to the rails, and finally to the diesel engine and its brake handle. Such a conclusion is rendered even more speculative in view of the fact the cab of the engine was insulated. This is shown by the uncontradicted testimony of one of plaintiff's witnesses that "If a line had fallen across the train, the crew would have been safe in the cab. . . . "

The only evidence of a scientific nature relating to the conduct of electricity was the testimony of plaintiff's witness, Lloyd F. Cox. He testified that when a wire comes down and lies on the ground, the electricity in the wire "goes the nearest route to the ground, nearest thing that it touches to ground compared to least resistance." What happens to electricity after it goes to the ground is not shown.

In *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392, plaintiff testified that each time she used defendant's hair rinse her scalp became irritated. She had never had this trouble before. After using the rinse a third time she consulted a physician who found she had dermatitis of her entire scalp. In sustaining a judgment of nonsuit Justice Parker (later Chief Justice) stated: "It may be that there was a poisonous substance in the hair rinse, but there is no evidence to support such a conjecture."

It may be that in this case the electricity was conducted 27 feet along the ground to the engine, but there is no evidence to support such a conjecture.

On oral argument plaintiff's counsel suggested that the bushes and undergrowth, especially when wet, could have furnished the path along which the electricity traveled to the engine. Perhaps this is true. But the evidence fails to connect the bushes to the engine or the track. Furthermore, to so hold would be to speculate about a highly technical and scientific principle on which there has been no evidence.

Plaintiff argues that the case of *Lynch v. Telephone Co.*, 204 N.C. 252, 167 S.E. 847, is controlling on the question of causal connection between the fallen wire and his shock. In

that case it was established that lightning entered a house along a telephone wire and injured plaintiff as she walked within two feet of the telephone connected to the wire. Recovery from the telephone company was allowed upon a showing that the company had failed to properly ground the wire leading into the house. The case of *Starr v. Telephone Co., supra,* is similar. There the defendant company had removed a telephone from plaintiff's house but had left wires leading into plaintiff's porch with loose ends twisted together and hanging down six to eight inches from the plate of the porch. At the same time, defendant had removed the lightning arrestor and severed the ground connection of the wires. During a storm, plaintiff arose from his porch to go into his house and as his head came within eighteen inches of the wire a ball or bolt of lightning came from the wires and struck him on the head. In both cases the Supreme Court rejected contentions that the cases should have been nonsuited, pointing out that the evidence justified the jury in finding that the lightning entered along the wires and caused plaintiff's injuries.

We find little similarity between those cases and the one at hand. There, plaintiffs offered direct evidence that the wires conducted the lightning to the immediate vicinity of plaintiffs and onto their persons. More evidence of causation would undoubtedly have been required had the wires been located 27 feet from the houses where plaintiffs sustained injuries.

More in point is the recent case of *Trull v. Well Co.,* 264 N.C. 687, 142 S.E. 2d 622. In that case plaintiff offered evidence that his house vibrated while defendant was engaged in well drilling operations nearby. Damage to the walls of the house occurred suddenly. There had been no damage to the house prior to defendant's drilling and the damage ceased when the drilling ceased. In affirming a judgment of nonsuit the Supreme Court noted that no witness had undertaken to explain the direct physical cause of the damage and stated:

> "[T]he direct physical cause of the damage to the house rests in the realm of speculation. The vibrations from the machine caused the 'quivering' of the house. But were they responsible for the sudden opening of walls and ceiling? . . . This much we are told—the damage suddenly occurred after the drill had been in operation for some time. The drilling was stopped. When it was resumed, no

further damage resulted by reason of vibrations or from any other cause."

In *Christensen v. Northern States Power Co. of Wisconsin,* 222 Minn. 474, 25 N.W. 2d 659, plaintiff sought to recover damages for the death of fish allegedly electrocuted when defendant's tower, charged with 66,000 volts of electricity, fell and discharged electrical current into plaintiff's lake. Plaintiff offered no proof as to what effect the discharge of electricity into the lake might have had. The court reversed a verdict for the plaintiff on the ground any conclusion reached by the jury would be a matter of conjecture.

[4] In the case at hand we are told that wires fell 27 feet from a diesel engine being operated by plaintiff. Plaintiff felt a shock. Did the shock result from the fallen wires? In order to find that it did a jury would have to speculate that the electric current somehow got from the fallen wires a distance of at least 27 feet to the diesel engine. How did it traverse this distance? Was it conducted along the ground? There is no evidence that the ground was a sufficient conductor of electric current to have permitted this. Could the current have arced or jumped the 27-foot distance? We find no evidence in the record to even suggest that it might have. There is evidence that light from the fire caused by the falling wires was seen flashing against the engine. Electricity is invisible. Was the light, which was most certainly not electricity, evidence that the electricity was arcing to the engine? The record affords us no guidance with respect to this technical question. There was evidence that the diesel engine contained at least two electrical systems. Could they have caused the shock experienced by plaintiff?

In short, we find that plaintiff failed to "fill the gap" that obviously exists with respect to the question of causation. We may not assume his laboring oar and do so for him. The theory of *post hoc, ergo propter hoc* (after this, therefore because of this) is not sufficient. Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion by defendant for a directed verdict. *Henderson v. R. R.,* 159 N.C. 581, 75 S.E. 1092.

We conclude that the directed verdict for defendant was properly entered.

Affirmed.

Judges CAMPBELL and BRITT concur.

KATHLEEN BRYSON MOORE AND HUSBAND, J. MEREDITH MOORE v. T. D. BRYSON, JR., AND WIFE, CAROLYN F. BRYSON; LILLIAN BRYSON MARTIN AND HUSBAND, JOHN W. MARTIN; ELIZABETH BRYSON STONE AND HUSBAND, JOHN W. STONE; MARION BRYSON ENGLISH AND HUSBAND, WALTER T. ENGLISH; E. C. BRYSON AND WIFE, ANNE BRYSON

No. 7130SC179

(Filed 26 May 1971)

1. **Rules of Civil Procedure § 56— summary judgment — nature of the remedy**

Summary judgment is an extreme remedy and should be cautiously invoked to the end that parties will always be afforded a trial where there is a genuine issue of facts between them.

2. **Rules of Civil Procedure § 56— summary judgment — basis for the remedy**

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 any party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c).

3. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

Upon motion for summary judgment the burden is on the moving party to establish the lack of a triable issue of fact.

4. **Fiduciaries; Tenants in Common § 6— cotenant's purchase of property adjoining the common property — breach of fiduciary duty — question of fact**

A question of fact existed as to whether a tenant in common, who was also executor of the testator who devised the common property, occupied a fiduciary relationship with cotenants in common at the time when he individually purchased the testator's homeplace which adjoined the common property, and as to whether the homeplace was so vitally connected with the common property as to render his purchase a breach of his fiduciary relationship with his fellow cotenants, especially where there was evidence that the tenant learned through his position as executor that the homeplace was for sale; consequently, the trial court improperly granted the tenant's motion for summary judgment.

5. **Fiduciaries; Executors and Administrators § 9— executor as fiduciary**

An executor acts in a fiduciary capacity. G.S. 32-2(a).

6. **Tenants in Common § 3— creation of fiduciary relationship between cotenants**

A fiduciary relationship may arise between tenants in common as a result of their conduct.

7. **Fiduciaries — acquisition of title adverse to cestuis**

A fiduciary who acquires an outstanding title adverse to his *cestuis que trustent* is considered in equity as having acquired it for their benefit.

8. **Fiduciaries — conflict of interest**

A person occupying a place of trust and confidence may not place himself in a position where his own interest may conflict with the interest of those for whom he acts.

Judge BRITT dissenting.

APPEAL by petitioners from *Snepp, Judge,* 21 October 1970 Session of SWAIN County Superior Court.

Daniel Rice Bryson died 22 December 1955, leaving a will which has been probated and recorded in the office of the clerk of court of Swain County. In Item III of the will he devised "[t]o my niece, Edith B. Franklin . . . the house and lot where I live." Item III further provided that the remainder of Bryson's property be divided among his nephews T. D. Bryson, Jr. and E. C. Bryson and his nieces Kathleen Bryson Moore, Lillian Bryson Martin, Betsy Bryson Stone and Marion Bryson Singleton (now Marion Bryson English). All beneficiaries under this item in the will are brothers and sisters.

The house and lot (homeplace) devised to Edith Franklin fronts on Everett Street in Bryson City. Included in the residuary estate is 12 acres of "bottom land" adjoining and lying immediately to the rear of the homeplace. This tract has no access to Everett Street, except through the homeplace property.

In petition for partition, filed 19 January 1970, petitioners allege: E. C. Bryson purchased the homeplace and took title in his individual name while acting in a fiduciary capacity to Mrs. Moore and other co-owners of the 12-acre tract; that by virtue of his fiduciary obligations he holds the homeplace in trust for all the tenants in common of the 12-acre tract, subject to a charge for the amount of funds used in the purchase. The petition asks that the 12 acres of bottom land and the homeplace be sold as a single tract, and after the payment of costs, that the proceeds be distributed among the parties as their interests may appear.

E. C. Bryson and wife filed an answer in which Mr. Bryson alleges that for consideration in the amount of $10,000, he acquired title to the homeplace by deed, dated 16 May 1962, and

that by virtue of the deed he owns the property in fee simple. All other respondents filed answer denying any interest in the homeplace.

On 2 October 1970, E. C. Bryson filed motion requesting summary judgment "to the extent that the Court declare as a matter of law that this defendant is the owner of that tract of land referred to in paragraph 3 of the Petition as 'the old D. R. Bryson homeplace' . . . and that said tract be eliminated from this proceeding."

On 16 October 1970 petitioners filed motion for summary judgment requesting the court to declare as a matter of law that the homeplace is held in trust by E. C. Bryson for himself and the other cotenants of the remainder interest in the D. R. Bryson estate, subject to a charge for the amount of personal funds used by Bryson in purchasing the property. The motions came on for hearing before Judge Snepp. Petitioners' motion was denied and the motion of E. C. Bryson was allowed. Petitioners appealed.

Clark and Tanner by David M. Clark for petitioner appellants.

J. Francis Paschal and E. C. Bryson, Jr., for defendant appellee.

GRAHAM, Judge.

[1-3] Summary judgment is an extreme remedy and should be cautiously invoked to the end that parties will always be afforded a trial where there is a genuine dispute of facts between them. *United Meat Co. v. Reconstruction Finance Corp.*, 174 F. 2d 528 (D.C. Cir. 1949). It 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 any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). " '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)." *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101. The burden is on the moving party to establish the lack of a triable issue of fact. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425.

[4] We think it clear that the court properly overruled petitioners' motion for summary judgment. A more difficult question arises as to whether the motion for summary judgment, made by respondent E. C. Bryson, was properly allowed. The effect of granting this motion was to hold that a consideration of the pleadings and affidavits shows that no question of fact exists as to whether E. C. Bryson occupied a fiduciary relationship with Mrs. Moore and other cotenant owners of the 12 acres of bottom land at the time he purchased the Bryson homeplace; and if he did occupy such a relationship, whether the homeplace property was so vitally connected with the 12-acre tract as to render it improper for E. C. Bryson to purchase it for himself. We are of the opinion that facts contained in petitioners' affidavits raise jury questions as to each of these issues.

It is undisputed that on 27 December 1955, E. C. Bryson qualified as an executor of his uncle's estate and that to this day no final accounting has been filed. In fact, a recent effort by petitioners to force an accounting was successfully resisted by E. C. Bryson and his co-executor as being barred by the statute of limitations. (See *Moore v. Bryson,* 11 N.C. App. 149). E. C. Bryson contends, however, that his duties as an executor did not extend in any way to the 12-acre tract of real estate and could not render him a fiduciary with respect to this property. Ordinarily this would be quite true, for real estate normally is not considered a part of an estate to be administered by an executor, unless the personal estate is insufficient to discharge debts. G.S. 28-148; *Pearson v. Pearson,* 227 N.C. 31, 40 S.E. 2d 477.

Here, however, if affidavits filed by petitioners were found to be true and accurate, an inference that E. C. Bryson dealt with the 12-acre tract as if it were included within his administrative responsibilities as executor would be raised. For instance, taxes on the property accruing subsequent to the testator's death were paid by the executors from estate funds. E. C. Bryson, on behalf of all the owners, negotiated with the Southern Railroad for the purchase of a strip of land intersecting the 12-acre tract—in order to improve the tract's value. It would also appear that the executors negotiated a sale of a portion of the 12-acre tract to the State Highway Commission, received the proceeds from the sale, and disbursed the proceeds in accordance with their own judgment. This is illustrated by a letter, dated 22 October 1968, from E. C. Bryson to Mrs. Moore:

"Following receipt of your letter yesterday I called T. D. and suggested that he pay all taxes in both the D. R. Bryson property and the T. D. Bryson property and the [*sic*] divide the balance in six equal parts and send the checks to me and I would distribute them. I am talking now about the money received from the State. Actually there are no other funds anyway."

A later letter indicates that E. C. Bryson's suggestion was followed by his co-executor, though plaintiff contends the interest of the owners of the T. D. Bryson property was not identical to the interest of the owners of the 12-acre tract.

An affidavit of Edith B. Franklin permits an inference that it was because of E. C. Bryson's position as executor that he was made aware of her interest in selling the Bryson homeplace. She states that Mr. V. L. Cope, who had been renting the 12 acres of bottom land, inquired about purchasing the Bryson homeplace. Her affidavit continues: "I did not wish to do anything underhanded about it, so I informed my brother, E. C. Bryson, one of the Executors of the Estate, who lived in Durham, that I was seriously considering selling the place; my brother E. C. Bryson, then called me immediately and asked would I sell to him. . . ." Her affidavit also tends to show that E. C. Bryson recognized the value of the homeplace to the 12-acre tract and at one time contended that a portion thereof was included within that tract. Paragraph 4 of Mrs. Franklin's affidavit provides in part:

"4. That my brothers, E. C. Bryson and T. D. Bryson, Jr., qualified as Executors of the Will of D. R. Bryson shortly after his death; that said Executors recognized from the outset that without access to Everett Street the value of the bottom land of the D. R. Bryson Estate was greatly diminished, and they initially took the position that the devise to me had included only the narrow strip on which the house rested and did not include the portion of the homeplace on which the maid's quarters rested . . . that in light of this controversy, I enlisted the assistance of my uncle, S. W. Black, Esq., of Bryson City, North Carolina, who had practiced law with my father, T. D. Bryson, before he became a superior court judge; that Mr. Black checked the records at the Courthouse for me which demonstrated that the house and lot was on an L-shaped lot; that after

S. W. Black demonstrated this, my brothers apparently abandoned the position that the entire L-shaped lot did not belong to me."

The trial court, though granting Mr. Bryson's motion for summary judgment, nevertheless found that he had generally acted as agent for his cotenants in the management of the 12-acre tract. These findings are as follows:

"9. After qualifying as Executors under the Will of Daniel Rice Bryson, the defendant, E. C. Bryson, together with the defendant, T. D. Bryson, Jr., generally attended to the payment of taxes on the property devised under the Residuary Clause of the Will; negotiated with the State Highway Commission for a right-of-way over the property; made inquiries as to the possible purchase of adjoining property; on occasions, advised with their co-tenants as to the matters affecting the common property, and, in general, acted as agents for their tenants-in-common in the management of the property devised under the Residuary Clause of the Will of Daniel Rice Bryson."

[4-6] An executor acts in a fiduciary capacity. G.S. 32-2(a); *Allen v. Currie, Commissioner of Revenue,* 254 N.C. 636, 119 S.E. 2d 917; *In re Will of Covington,* 252 N.C. 551, 114 S.E. 2d 261; *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231. Also, while a fiduciary relationship ordinarily does not arise between tenants in common from the simple fact of their cotenancy, such a relationship may be created by their conduct, "as where one cotenant assumes to act for the benefit of his cotenants." 86 C.J.S., Tenancy in Common, § 17, p. 377. Furthermore, it is not necessary that there be a technical or legal relationship for a fiduciary relationship to exist. 36A C.J.S., Fiduciary, p. 387. "[T]he relationship exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing confidence." 4 Strong, N. C. Index 2d, Fiduciaries, p. 17, and cases therein cited. Thus, if as an executor under the will of his uncle, as a cotenant, or simply as an individual, E. C. Bryson undertook to manage and generally control the 12-acre tract for the benefit of his co-owners, causing them to respose special faith, confidence and trust in him to represent their best interest with respect to the property, he occupied a fiduciary relationship to them. Under the facts heretofore set out, we hold that this is a triable issue.

A question remains as to whether E. C. Bryson's purchase of the homeplace, while acting as a fiduciary with respect to the 12-acre tract, constituted such a breach of his fiduciary relationship as to require in equity that the purchase be regarded as having been made for the benefit of all of the owners of the 12-acre tract. We hold this also to be a triable issue, the answer depending upon the relationship which the homeplace had to the 12-acre tract. If, at the time the homeplace was purchased by E. C. Bryson, it was so connected or related to the 12-acre tract as to vitally affect the value of the 12-acre tract, the answer would be in the affirmative.

A tenant in common may unquestionably purchase for his own use adjoining property which does not affect the value or use of the property commonly held. *Woodlief v. Woodlief,* 136 N.C. 133, 48 S.E. 583; *Brickell v. Earley,* 115 Pa. 473, 8 A. 623. Here, however, petitioners' affidavits tend to show that at the time E. C. Bryson purchased the homeplace, the 12-acre tract was completely landlocked. Its value was particularly dependent on whether access to a public street could be obtained through the homeplace property which separates the tract from a main street in Bryson City. Conceivably, whether the 12-acre tract is of substantial value or virtually worthless may turn upon the success of the owners in acquiring the homeplace or a right of way over it. Now, Mrs. Moore and other owners are placed in the position of having to deal with the very person they entrusted with the management of their property with respect to this matter.

[7] It may be argued that petitioners are no worse off than if Edith B. Franklin, rather than E. C. Bryson, retained ownership to the homeplace. A similar argument could be advanced if E. C. Bryson had purchased from a third party and for his own benefit a mortgage or adverse claim affecting the property. Yet, it is well established that a fiduciary who acquires an outstanding title adverse to his *cestuis que trustent* is considered in equity as having acquired it for their benefit. *Pearson v. Pearson, supra; Haskill v. Freeman,* 60 N.C. 585; *Brantly v. Kee,* 58 N.C. (5 Jones Eq.) 332. Also, " '[i]f one of several tenants in common should buy in an outstanding title affecting the common property, equity will declare him to have purchased for the benefit of the others.' " *Gentry v. Gentry,* 187 N.C. 29, 121 S.E. 188, and cases therein cited. "The foundation of the doctrine which disables a cotenant from asserting an adverse title against

the other cotenants is that, while the relation continues, there is a community of interest which gives rise to a community of duty, and creates a relation of trust and confidence, which disables each cotenant from doing anything which would prejudice the others in reference to the common property." 4 Thompson on Real Property, § 1802, p. 141.

[8] A person occupying a place of trust and confidence may not place himself in a position where his own interest may conflict with the interest of those for whom he acts. "[F]iduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act." *Miller v. McLean,* 252 N.C. 171, 113 S.E. 2d 359.

The portion of the trial court's order which denies petitioners' motion for summary judgment is affirmed.

The portion of the court's order which allows respondent E. C. Bryson's motion for summary judgment is reversed.

Affirmed in part and reversed in part.

Judge CAMPBELL concurs.

Judge BRITT dissents.

Judge BRITT dissenting:

The effect of the majority opinion is to say that if at trial petitioner offers competent evidence commensurate with her showing at the hearing on the motions for summary judgment, she would be entitled to go to the jury on her contention that E. C. Bryson holds the D. R. Bryson homeplace in trust for the benefit of petitioner and other tenants in common of the 12 acre tract. I respectfully disagree.

At the hearing, the following undisputed facts were shown: Petitioner and her cotenants regarded the homeplace as a parcel of land completely separate and apart from the 12 acre tract. In November 1958, petitioner recommended "that Edith be given a deed and title to her portion of Uncle Doc's estate." On 6 May 1961, petitioner and the other tenants in common (together with their spouses) executed a deed for the homeplace to Mrs. Franklin describing the same by courses and distances. Thereafter, a Mr. Cope contacted Mrs. Franklin about purchasing the home-

place; she then contacted E. C. Bryson and advised him that she was seriously considering selling the homeplace. E. C. Bryson called Mrs. Franklin immediately and inquired if she would sell to him and the price she was demanding. She agreed to sell to E. C. Bryson for $10,000 and a few days thereafter she received a check from him in the amount of $10,000 together with a deed for the property for her to execute. The deed to E. C. Bryson was executed on 16 May 1962, duly filed for registration, and the check accepted in payment for the land.

Petitioner makes no allegation or showing that she has at any time made any offer to pay E. C. Bryson any part of the purchase price which he paid Mrs. Franklin for the property; she makes no allegation or showing that at any time prior to the filing of her petition herein on 19 January 1970 that she ever claimed any interest whatsoever in the homeplace. Petitioner alleges that E. C. Bryson holds the homeplace in trust for her and the other tenants in common of the 12 acre tract; the four tenants in common, other than petitioner and E. C. Bryson, deny that they own any interest in the homeplace. Petitioner's contention that the 12 acre tract is "landlocked" and its sale value is greatly diminished by excluding the home tract is not borne out by the maps introduced by petitioner at the hearing. The maps disclose that the 12 acre tract is bordered on one end by a new highway and street; they also disclose that various other owners own considerable property between the 12 acre tract and Everett Street thereby making them prospective purchasers.

Neither party has cited nor does our research disclose any case from this jurisdiction similar to the instant case. The case of *Brickell v. Earley,* 115 Pa. 473, 8 Atl. 623 (1887) appears to be somewhat similar and in denying relief as demanded by petitioner herein, the Pennsylvania court said: "In order to sustain a proposition of this kind, the plaintiffs are bound to show that [defendant] obtained his title in fraud of their right, or that their money was used in its acquisition." The undisputed facts in the instant case do not meet this sound principle. To accept petitioner's position would impose an unreasonable duty and burden on a tenant in common.

I vote to affirm the judgment appealed from.

G. R. BARNACASCEL AND EDNA B. BARNACASCEL, HIS WIFE; W. J. BARNACASCEL AND BERTHA L. BARNACASCEL, HIS WIFE; MAGGIE M. BARNACASCEL, UNMARRIED; MARGARET B. GREGORY AND WILLIAM T. GREGORY, HER HUSBAND; JEAN B. SEARS AND JOHN R. SEARS, JR., HER HUSBAND; DOROTHY B. BAKER AND JOHN L. BAKER, JR., HER HUSBAND; EDYTHE S. DUNSTAN AND F. M. DUNSTAN, JR., HER HUSBAND; BLANCHE S. WHITE AND E. R. WHITE, HER HUSBAND; RUTH S. WHITEHURST AND JOHN E. WHITEHURST, HER HUSBAND; INEZ E. TADLOCK AND L. B. TADLOCK, JR., HER HUSBAND; A. B. EVANS AND ELLA H. EVANS, HIS WIFE; H. W. EVANS AND RUBY P. EVANS, HIS WIFE; WILLIE E. CHAMBLEE AND JOHN S. CHAMBLEE, HER HUSBAND; CAROLYN E. SCALES AND A. H. SCALES, HER HUSBAND; JANE BUTTERTON COBB AND VERNON COBB, HER HUSBAND; ANN P. HUGHES AND J. O. HUGHES, HER HUSBAND; SALLY P. GIORDANO, DIVORCED; SOPHIA W. COBB AND HILARY J. COBB, HER HUSBAND; MARTIN H. WHITE AND ELIZABETH B. WHITE, HIS WIFE; WALTER T. WHITE AND SUE W. WHITE, HIS WIFE; AND SOPHIA B. WHITE, WIDOW, PETITIONERS v. R. B. SPIVEY, ADMINISTRATOR OF THE ESTATE OF ANNA W. PHELPS; PAUL WATERS AND PATRICIA C. WATERS, HIS WIFE; EDLA B. WICKER AND TRAVIS A. WICKER, HER HUSBAND; DONNEL G. WATERS AND EUNICE S. WATERS, HIS WIFE; CECIL B. WATERS AND NEVA F. WATERS, HIS WIFE; CORA L. NEWBERN AND KENNETH W. NEWBERN, HER HUSBAND; MERELYNN W. BAKER AND MAVIN E. BAKER, HER HUSBAND; HELEN R. WATERS, UNMARRIED; JAMES E. WATERS AND CELIA W. WATERS, HIS WIFE; MARY E. WATERS, WIDOW; EUGENE W. WATERS AND PRISCILLA G. WATERS, HIS WIFE; CONNIE W. WRIGHT AND STANFORD W. WRIGHT, HER HUSBAND; NANCY W. DUNAWAY AND PAUL W. DUNAWAY, HER HUSBAND; GLADYS W. HARDING, WIDOW; RUTH W. BOND, WIDOW; SARA W. SQUIRE AND EDWARD A. SQUIRE, HER HUSBAND; CATHERINE W. GOUGH AND MELVIN N. GOUGH, HER HUSBAND; WILLIAM N. WATERS AND RUTH S. WATERS, HIS WIFE; FRANK B. ANTHONY, JR., AND BARBARA J. ANTHONY, HIS WIFE; LEON L. BAKER AND LILLIAN V. BAKER, HIS WIFE; H. CLYDE BAKER AND EDNA C. BAKER, HIS WIFE; NETA B. THREEWICTS, WIDOW; BULA B. DARDEN AND EDWIN A. DARDEN, JR., HER HUSBAND; LELLA S. JENKINS, WIDOW; ADDIE S. SWAIN, WIDOW; T. B. SITTERSON, JR. AND MARY B. SITTERSON, HIS WIFE; BEACHER W. SITTERSON AND ANNE M. SITTERSON, HIS WIFE; JACK SITTERSON AND DORIS N. SITTERSON, HIS WIFE; KATHRYN S. PEELE AND ROBERT E. PEELE, HER HUSBAND; ALLEN E. SITTERSON AND SHEILA M. SITTERSON, HIS WIFE; JEAN S. LAFATA AND PAUL S. LAFATA, HER HUSBAND; HELEN S. SPIVEY, WIDOW; AND SADIE S. HOGGARD, WIDOW; RESPONDENTS

No. 716SC193

(Filed 26 May 1971)

1. Wills § 33— Rule in Shelley's case — lapsed devise

Rule in Shelley's case did not apply to devise to testator's son for life with the remainder "to his children in fee simple"; consequently, the son received only a life estate and upon the death of the son without having a child or children, the devise of the remainder lapsed.

2. Wills § 52— residuary clauses — construction

Testator intended to dispose of the residue of his real property by Item Eighth of his will which devised "all the lands owned by me at the time of my death (and not otherwise disposed of herein)," and to dispose of the residue of his personal property by Item Tenth which divided "all the residue of my estate after taking out the devises and legacies hereinbefore mentioned"; consequently, a lapsed devise of a remainder interest in real property passed under Item Eighth of the will.

APPEAL by respondents from *Tillery, Judge,* November 1970 Civil Session of the Superior Court held in BERTIE County.

This is a Special Proceeding for sale of a tract of land in Bertie County, N. C., on petition for partition. An issue as to title being raised by the pleadings, the cause was submitted to the Judge of Superior Court for determination. The pertinent facts, which are established by the pleadings, and the varying contentions of the parties, may be summarized as follows:

Asa Phelps died seized of the land which is the subject of this proceeding and which was known as the Hymans Ferry Plantation. He left a last will dated 19 August 1893 which was probated in Bertie County on 27 January 1897. Item Sixth of this will contains the following:

> "SIXTH. I loan to my son James Dorsey Phelps during his life my Hymans Ferry Plantation which I bought of Kenneth Sallenger and others and upon which my said son now lives and after his death I give and devise the same to his children in fee simple."

James Dorsey Phelps, the devisee of the life estate named in Item Sixth, died on 7 November 1940 without having had a child or children.

Items Eighth and Tenth of the will of Asa Phelps are as follows:

> "EIGHTH. I loan to my daughters Minnie J. Phelps, Maggie A. Phelps, Bertie Caroline Phelps and Blanche Cleveland Phelps all the lands owned by me at the time of my death (and not otherwise disposed of herein) during their lives and give and devise the same in fee simple to their children. Should any of them die without children their interest goes to the survivors of my said daughters

during their life time and to the children of such my said daughters as leave children surviving them.

"I especially request that my 'Brimage' Plantation be kept in the family and that under no circumstances it be disposed of."

* * * * *

"TENTH. My will and desire is that all the residue of my estate (if any) after taking out the devises and legacies hereinbefore mentioned and the payment of debts and funeral expenses shall be equally divided and paid over to my wife Fruzy A. Phelps, to my son John R. Phelps and to my daughters Minnie J. Phelps, Maggie A. Phelps, Bertie Caroline Phelps and Blanche Cleveland Phelps share and share alike."

Fruzy A. Phelps, wife of Asa Phelps, died intestate and her only children and heirs were her son, John, and her four daughters, Minnie, Maggie, Bertie, and Blanche, who were the other beneficiaries named in Item Tenth of the will of Asa Phelps. All five of these children are now deceased. The petitioners in the present proceeding are children or successors in interest to the children of the four daughters, Minnie, Maggie, Bertie and Blanche. Respondents are successors in interest to the son, John.

All parties to this proceeding agree that upon the death of James Dorsey Phelps without having had child or children, the devise of the remainder interest in the Hymans Ferry Plantation lapsed. Petitioners contend that such remainder thereupon passed to them or to their predecessors in interest under Item Eighth of the Asa Phelps will and that collectively they are now the owners of the entire interest in the property. Respondents contend that the lapsed devise passed under Item Tenth and not under Item Eighth of the will, that petitioners collectively hold only a four-fifths undivided interest in the property, and that respondents, as successors in interest to the son, John R. Phelps, are the owners of the remaining one-fifth undivided interest.

After hearing the parties, Judge Tillery entered an order making findings of fact from the allegations and admissions in the pleadings, upon which he concluded and adjudged as follows:

"From an examination of the pleadings and of the pertinent provisions of the will of Asa Phelps, which are

set forth therein, the Court concludes that, except for orders with respect to sale of the lands described in the petition and disbursement of the proceeds, which may be made by the Clerk upon the proceeding's being remanded to him for further proceedings, the sole question before the Court is whether the Eighth Item or the Tenth Item of the will of Asa Phelps governs the disposition of real property forming a part of his residuary estate, which is a question of law.

"Upon considering the will of the said Asa Phelps, the Court makes the following conclusions of law:

"1. That the said will must be construed as a whole.

"2. That, so far as is possible, apparent inconsistencies, if any, in provisions of the will must be resolved, and effect must be given to every part.

"3. That the Eighth Item and Tenth Item of the will of Asa Phelps are not inconsistent or repugnant to each other and effect can be given to both of them if the Eighth Item is construed to dispose of real property and the Tenth Item to dispose of personal property.

"4. That an intention on the part of the testator that the Tenth Item should relate only to personal property appears from the reference in that item to 'the residue of my estate (if any) after taking out the devises and legacies hereinbefore mentioned' and the provision therein that the residue 'shall be equally divided and paid' to the beneficiaries named.

"5. That the proper construction to be placed upon the will is that the Eighth Item relates to real property, including the remainder in the Hyman Ferry Farm after the death of James Dorsey Phelps without a child or children, and the Tenth Item relates to personal property.

"6. That it follows from such construction of the will and admissions in the pleadings that the petitioners named in Paragraph 17 of the petition are the owners in fee simple as tenants in common of the Hyman Ferry Farm, their respective undivided interests being as stated in that paragraph.

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

"1. That the petitioners named in Paragraph 17 of the petition are the owners in fee simple as tenants in common of the Hyman Ferry Farm, their respective undivided interests being as stated in said paragraph.

"2. That the respondents have no estate or interest in the said tract of land.

"3. That this special proceeding is remanded to the Clerk of the Superior Court of Bertie County for further orders and proceedings with respect to the sale of the Hyman Ferry Farm for partition, as prayed in the petition.

"This 18 day of November, 1970.

"s/ L. BRADFORD TILLERY
"Judge Presiding"

To this judgment respondents excepted and appealed.

Gillam & Gillam, by M. B. Gillam, Jr., for petitioner appellees.

Pritchett, Cooke & Burch, by W. L. Cooke, for respondent appellants.

PARKER, Judge.

[1] We agree with the parties and with the trial judge that by Item Sixth of the will of Asa Phelps his son, James, received only a life estate and that the devise of the remainder after his death "to his children in fee simple" did not invoke the Rule in *Shelley's* case. *Wright v. Vaden*, 266 N.C. 299, 146 S.E. 2d 31; *Griffin v. Springer*, 244 N.C. 95, 92 S.E. 2d 682; *Moore v. Baker*, 224 N.C. 133, 29 S.E. 2d 452. Therefore, upon the death of James without having had a child or children, the devise of the remainder lapsed. By virtue of the statute in effect at the date of the testator's death, being Sec. 2142 of the Code of 1883, unless a contrary intention shall appear by the will, a lapsed devise "shall be included in the residuary devise (if any) contained in such will." The only question presented by this appeal is whether "the residuary devise" under which the lapsed devise passes in

this case is Item Eighth or Item Tenth of the will. We agree with the trial court's conclusion that it passed under Item Eighth.

[2] Upon a superficial examination, there is an apparent inconsistency in the Asa Phelps will in that either Item Eighth or Item Tenth, looked at alone, might adequately serve as a residuary devise. Upon closer inspection, however, and examining the entire will, as we are required to do, the apparent inconsistency disappears. "The intent of the testator is his will, and such intent as gathered from its four corners must be given effect unless it is contrary to some rule of law or is in conflict with public policy." *Kale v. Forrest,* 278 N.C. 1, 178 S.E. 2d 622. Further, "[i]t is a cardinal principle in the interpretation of wills that inconsistencies are to be reconciled, if reasonably accomplishable, so as to give effect to each in accordance with the general purpose of the will." *Bank v. Corl,* 225 N.C. 96, 33 S.E. 2d 613. Any apparent inconsistency in the Asa Phelps will disappears when Item Tenth is construed as a disposition of the residue of the testator's personal property and Item Eighth is construed as a disposition of the residue of the testator's real property. The words employed by the testator in both Items, as well as their position in the will, lend support to this construction. In Item Eighth the testator expressly disposed of "all the lands owned by me at the time of my death (and not otherwise disposed of herein)." As pointed out by Walker, J., in *Faison v. Middleton,* 171 N.C. 170, 171, 88 S.E. 141, 142, ". . . no particular mode of expression is necessary to constitute a residuary clause. The words 'rest,' 'residue,' or 'remainder' are commonly used in the residuary clause, whose natural position is at the end of the disposing portion of the will; but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial." In Item Eighth Asa Phelps did dispose of all lands "not otherwise disposed of." This effectively disposed of all lands owned by the testator at the time of his death. In Item Tenth he disposed of "all the residue of my estate (if any) after taking out the devises and legacies hereinbefore mentioned. . . . " Among the devises "hereinbefore mentioned" was the devise in Item Eighth of *all* lands owned by the testator at the time of his death not otherwise disposed of in the will. Further, Item Tenth directed that any residue passing under that Item should be "equally divided and

paid over," words more appropriate for disposition of personal property than for real property.

Respondents contend that in resolving any inconsistency between Items Eighth and Tenth the latter provisions must prevail in accordance with the general rule of construction of wills. To produce this effect, however, the two clauses must be wholly inconsistent and incapable of reconciliation. *Andrews v. Graham,* 255 N.C. 267, 120 S.E. 2d 734; *Bank v. Corl, supra.* As above noted, we agree with the trial court's conclusion that the two Items of the Asa Phelps will involved in this case are capable of reconciliation and in our opinion the trial court's judgment is in accord with a correct construction of the will. Accordingly, the judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

ROBERT C. ROBINSON v. SHERRILL D. McMAHAN AND COCA-COLA BOTTLING COMPANY OF ASHEVILLE, NORTH CAROLINA, AND U. S. PLYWOOD-CHAMPION PAPERS, INC.

No. 7128SC293

(Filed 26 May 1971)

1. **Rules of Civil Procedure § 56— summary judgment — failure of defendants to respond to motion**

Although defendants did not respond by affidavits or otherwise to plaintiff's supported motion for summary judgment, the court could enter summary judgment against them only "if appropriate" under all of the circumstances.

2. **Rules of Civil Procedure § 56— summary judgment — negligence cases**

It is only in the exceptional negligence case that summary judgment should be invoked, since even when there is no substantial dispute as to what occurred, it usually remains for the jury to apply the standard of the reasonably prudent man to the facts of the case.

3. **Automobiles § 56— rear-end collision — summary judgment for plaintiff**

Summary judgment was improperly entered in favor of plaintiff on the issue of negligence in this action to recover for personal injuries received by plaintiff when defendants' truck collided with the rear of plaintiff's automobile while the vehicles were traveling in a dense fog.

4. Automobiles §§ 11, 56— rear-end collision — evidence of negligence

While ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent, it does not as a matter of law compel that conclusion.

APPEAL by defendants, Sherrill D. McMahan and Coca-Cola Bottling Company of Asheville, from *Martin (Harry C.), Judge,* 4 January 1971 Session of Superior Court held in BUNCOMBE County.

Plaintiff instituted this action against the original defendants, Sherrill D. McMahan (McMahan) and Coca-Cola Bottling Company of Asheville (Bottling Company) to recover damages for personal injuries received by plaintiff when a truck owned by Bottling Company and driven by its employee, McMahan, collided with the rear end of plaintiff's automobile. The collision occurred when both vehicles were traveling west on Interstate Highway 40 in Haywood County, N. C., at a time when the highway was covered by fog. (After instituting his action against the original defendants, plaintiff asserted a cause of action against the defendant, U. S. Plywood-Champion Papers, Inc., alleging failure on the part of that defendant to exercise due care in conducting its industrial operations contributed to creating the fog; no question relating to the asserted cause of action against that defendant is involved on this appeal.) As against the original defendants, plaintiff alleged in an amended complaint, and such defendants in their answer either admitted or did not deny, the following:

At approximately 8:30 a.m. on 16 September 1969 plaintiff was driving his Ford automobile in a westerly direction on Interstate Highway 40 at a point about six miles east of the city limits of Waynesville, Haywood County, N. C. At that place Interstate Highway 40 is a four-lane highway, with two lanes for westbound and two lanes for eastbound traffic, the westbound lanes being separated from the eastbound lanes by a median. A truck, owned by Bottling Company, was being driven westwardly on Interstate 40 by its employee, McMahan, who was acting in the course and scope of his employment. A collision occurred, the front portions of defendants' truck colliding with the rear of plaintiff's automobile.

Plaintiff alleged McMahan was negligent in operating the Bottling Company's truck in that he failed to keep a proper look-

out or to keep the truck under proper control, drove at a speed greater than reasonable under circumstances then existing with reference to the highway and traffic thereon and particularly with reference to the heavy fog, followed too closely, failed to decrease speed in order to avoid the collision, and operated the truck at a speed and in a manner to endanger the person of the plaintiff in willful disregard for the rights and safety of the plaintiff. Plaintiff alleged these negligent acts and omissions were the proximate cause of the collision and his resulting injuries. McMahan and the Bottling Company filed answer to the amended complaint in which they denied they were negligent and, if the jury should find them negligent, pleaded that plaintiff was contributorily negligent in that he failed to use due care for his own safety in driving on the inside or southernmost westbound lane when the right-hand lane was free of any traffic. (In a second further answer, McMahan and the Bottling Company also asserted a cross-claim against the codefendant, U. S. Plywood-Champion Papers, Inc., for contribution in the event plaintiff should recover against them; no question concerning this cross-action is involved on this appeal.)

Plaintiff moved for summary judgment in his favor on the negligence issues against the original defendants, McMahan and the Bottling Company, on the grounds that there existed no genuine issues of fact requiring a trial other than the issue as to the amount of damages. Plaintiff supported this motion by an affidavit of one Maltry and by the deposition which he had taken of the defendant McMahan. In the affidavit, Maltry stated that he was personally acquainted with the section of Interstate Highway 40 lying in Buncombe and Haywood Counties, that he knew the point of the collision involved in this action, and that at the time of the collision there were two large signs situated on the right-hand shoulder of the highway as traffic is proceeding in a westerly direction, one of which stated "Fog—35 M.P.H.," which was posted 7.3 miles from the point of collision, and one of which stated "Dense Fog Likely Next 4 Miles, Adjust Speed," which was posted approximately 7 miles from the point of collision. The pertinent portions of the deposition of defendant McMahan may be summarized as follows:

On 16 September 1969 he was a salesman and driver employed by the Bottling Company with a sales area in Haywood County. On that date he was driving the truck loaded with

Coca-Colas westwardly on Interstate Highway 40. He first encountered fog right after he got on the four-lane highway, five to seven miles back. It started getting foggy there, and some spots were lighter than others. After he got on the Interstate Highway and before the collision took place he did not see any signs with reference to any fog warning. As he traveled west on Interstate 40, he had been in both lanes according to how dense the fog was. Sometimes it helped to get over in the left lane and go along the median. The fog was real thick in spots, and was bad in some spots and not so bad in others. Where the collision took place was the worse spot that he had run into. After encountering the fog, he turned on his headlights and four-way flashers which made yellow flashing lights on the front and rear of the truck. At the time of the collision the truck was in the left lane and just before and at the time of the collision was doing around 25 to 30 miles an hour. He first saw the rear of the car which he struck when he was about 35 to 40 feet away from it. He believed he saw lights on the rear of the car, but he didn't really recollect if he did or not. Before the collision took place, he was traveling in the left lane. He meant to get in the right lane but couldn't because there was a little pickup truck by his right side. The pickup truck had been at his right side for about the last one-half or three-fourths of a mile. They were both traveling pretty slow and were staying pretty even as far as speed was concerned. The pickup truck was at his right side at the time of the collision and the pickup truck stopped, but he did not know the name of the driver. After the collision, the Ford which he struck went across the median into the other two lanes and came to rest at an angle in the lane next to the median, headed a little toward the east but not turned all the way around. The Bottling Company truck stopped sitting straight down the westbound lane. He could not remember how far his truck traveled after it struck the Ford. It sort of addled him when he hit, and he didn't really remember. When he first saw the car, he blew his horn and applied his brakes. He believed the brakes took effect, but did not remember for sure. There was a lot of weight on the truck, and it is hard to get one stopped with it loaded down. He did not have an opinion as to how fast the Ford was going at the time he struck it in the rear, "but it was going pretty slow, and to be in the left lane."

The defendants McMahan and Bottling Company did not file any affidavits in opposition to plaintiff's motion for sum-

mary judgment but did file an answer, verified by their attorney, in which they contended that genuine issues for trial existed both as to negligence of defendants and contributory negligence of the plaintiff.

After hearing, the court entered an order finding there was "no genuine issue of fact as to the question of the Plaintiff's injuries being caused by the negligence of the Defendants, McMahan and Coca-Cola, and that Plaintiff's Motion should be allowed except on the issue as to the amount of damages." On these findings the court granted plaintiff summary judgment against the defendants McMahan and the Bottling Company "on the issue of negligence" and ordered a jury trial on the issue of damages. From this order, defendants McMahan and the Bottling Company appealed.

S. Thomas Walton for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Hyde, by O. E. Starnes, Jr., for defendant appellants.

PARKER, Judge.

It is not the purpose of the summary judgment procedure to resolve disputed material issues of fact, but rather to determine if such issues exist. "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." *Haithcock v. Chimney Rock Company,* 10 N.C. App. 696, 179 S.E. 2d 865 (decided 31 March 1971).

[1] When a motion for summary judgment is made and supported as provided in Rule 56, "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." (Emphasis added.) Rule 56(e). In the present case the appealing defendants did not respond to plaintiff's motion "by affidavits or as otherwise provided in this rule." Nevertheless, the summary judgment

against them was proper only "if appropriate" under all of the circumstances of this case.

[2-4] "While neither the federal rules nor the North Carolina rule excludes the use of the procedure (for summary judgment) in negligence actions, it is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied." *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425; also see 6 Moore's Federal Practice 2d, § 56.17(42). It is only in the exceptional negligence case that the rule should be invoked. *Rogers v. Peabody Coal Company,* 342 F. 2d 749 (6th Cir. 1965). This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries. In our opinion, such was the present case. Even accepting as true all facts admitted in the pleadings and disclosed by the affidavit and deposition filed by plaintiff in support of his motion, it is our opinion that reasonable men could reach different conclusions in this case on the issues of negligence and proximate cause. While "[o]rdinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent," *Clark v. Scheld,* 253 N.C. 732, 737, 117 S.E. 2d 838, 842, it does not as a matter of law compel that conclusion. This is particularly so when the collision occurs while both vehicles are moving in an obscuring fog, a circumstance which must be considered, along with all other circumstances disclosed by the evidence, in order to determine whether the drivers of the two vehicles involved were exercising the care which a reasonable and prudent driver would have exercised under the conditions confronting them. See *Racine v. Boege,* 6 N.C. App. 341, 169 S.E. 2d 913. It was for the jury to apply that standard to the facts of this case, and the summary judgment is

Reversed.

Chief Judge MALLARD and Judge VAUGHN concur.

RUTH M. HOLLAND v. SAM C. WALDEN (ALSO KNOWN AS SAMUEL C. WALDEN) AND WIFE, DIANNA S. WALDEN

No. 7126SC39

(Filed 26 May 1971)

1. **Contracts § 6— what constitutes a general contractor**

A person who contracted and undertook to construct a house for others at an agreed price of $67,500 became a "general contractor" and was subject to the licensing provisions of G.S. 87-10. G.S. 87-1.

2. **Contracts § 6— contractor entitled to maintain action for purchase price**

A person who was a licensed contractor for eighteen and one-half months out of the twenty-one months during which she constructed a house for the defendants is entitled to maintain an action against the defendants for the balance of the contract price.

3. **Contracts § 6— purpose of contractor's licensing statute**

The purpose of the contractor's licensing statute is to protect the public from incompetent builders.

APPEAL by plaintiff from *Martin (Harry C.), Judge,* 31 August 1970 Civil Non-Jury Session of Superior Court held in MECKLENBURG County.

Plaintiff appeals from a summary judgment sustaining defendants' plea in bar and dismissing her action. In this action plaintiff seeks to recover $12,008.79 which she alleges defendants owe her as the unpaid balance on an express contract under which plaintiff built a house for defendants. Defendants admit the contract, but deny they owe plaintiff anything under it. As a plea in bar they allege that when the contract was entered into and for some time thereafter while plaintiff was performing work under it, she was not licensed as a general contractor as required by the General Statutes of North Carolina. As a counterclaim defendants allege that plaintiff failed to follow the plans and specifications in building the house and that some of the work was defective.

Both parties moved for summary judgment in their favor on the issue raised by defendants' plea in bar, supporting their motions by affidavits and by defendants' answers to plaintiff's interrogatories. Upon considering these and uncontroverted portions of the verified pleadings, the trial judge was of opinion that there was no genuine issue as to any material fact bearing upon defendants' plea in bar and entered an order making find-

ings of fact, which are summarized (except where quoted) as follows:

FINDINGS OF FACT

On or about 15 March 1967 plaintiff and defendants entered into a contract pursuant to which plaintiff, as general contractor, agreed to build a house for defendants upon land owned by them in Mecklenburg County. In this contract plaintiff undertook to build a complete home for defendants at a lump sum price of $67,500.00 to be paid by defendants. All extras, changes and modifications were made through plaintiff, and defendants had no contractual arrangements with and did not select the laborers, subcontractors and materialmen. Construction commenced shortly after 5 May 1967, and by 12 July 1967 the footings and foundations were complete and framing was underway. Prior to 12 July 1967 plaintiff had never been granted any license by the North Carolina Licensing Board for Contractors. On 12 July 1967 that Board granted her a limited building contractor's license (G.S. 87-10) permitting her to engage in general contracting on projects having a value of no more than $75,000.00. This limited license remained in effect and was the only one granted to plaintiff until 5 February 1970, when she was granted an intermediate license. While there were delays in construction from time to time and disagreements between the parties with respect to same, plaintiff did work on defendants' home until 31 January 1969. Much more material and labor was furnished to the home by plaintiff after 12 July 1967 than was furnished before that date. At various times defendants paid plaintiff a total of $62,750.00, and "while the record is not clear as to the dates, amounts and exact work for which defendants paid to plaintiff a total of $62,750.00, it is probable that plaintiff has been paid in full by defendants for all work done by her prior to July 12, 1967." "That from time to time as work progressed on the house, the parties agreed upon certain extras, which amounted to $8,520.35; that the dates upon which these extras were agreed upon or were furnished by plaintiff do not appear in the record; that the record reveals that defendants paid to plaintiff $950.00 for roof extras, paid to plaintiff $62,750.00 in addition, and that plaintiff claims the amount of $12,008.79 as being due her under the contract, including extras, or a total of $75,708.79."

Based on these findings of fact, the court made the following:

"CONCLUSIONS OF LAW:

"1. That while the only general contractors license which plaintiff had during the time she worked on defendants' home authorized her to work only on projects having a maximum value of $75,000.00 each, and while it is possible that defendants' home had a contract price or value of slightly more than this amount when the basic contract price and the price for extras are added together, the record is not sufficiently clear for the court to say that the total contract price was or was not in excess of $75,000.00. Therefore, the conclusions reached herein do not reflect a determination upon this point.

"2. That the basic contract for $67,500.00 remained in effect throughout the course of dealing between the parties, and the extras were merely supplemental thereto and were the sort of changes that, often and perhaps usually, occur during the course of the construction of a house of this price.

"3. That since the plaintiff never had any North Carolina general contractors license prior to July 12, 1967, that since the basic contract was entered into about March 15, 1967, at a time when plaintiff was unlicensed, and since plaintiff did do a considerable amount of work under the contract prior to July 12, 1967, the court finds that said contract as supplemented by the extras, which is the real basis of this action, was and is in violation of Chapter 87, Article 1, of the General Statutes of North Carolina and that plaintiff is not entitled to recover thereon in view of defendants' plea in bar set forth in their first further answer and defense.

"4. That plaintiff's motion for summary judgment should be denied.

"5. That defendants' motion for summary judgment on the matters and things raised by their first further answer and defense should be granted and allowed."

In accord with these conclusions of law, the court entered judgment granting defendants' motion for summary judgment

on the matters raised by their plea in bar and dismissing plaintiff's cause of action, retaining the case for hearing upon defendants' counterclaim. To the entry of this judgment plaintiff excepted and appeals.

Harkey, Faggart, Coira & Fletcher, by Henry L. Harkey, Harry E. Faggart, Jr., and Francis M. Fletcher, Jr., for plaintiff appellant.

Ruff, Perry, Bond, Cobb & Wade, by James O. Cobb, for defendant appellees.

PARKER, Judge.

[1] By contracting with defendants and undertaking to construct a house for them at the agreed price of $67,500.00, plaintiff became a "general contractor" and engaged in the business of general contracting in this State within the definition contained in G.S. 87-1. Thereby she became subject to the licensing provisions of G.S. 87-10. Unless she substantially complied with those provisions, she may not recover against defendants either on her contract or upon *quantum meruit. Builders Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507; *Construction Co. v. Anderson,* 5 N.C. App. 12, 168 S.E. 2d 18. It is our opinion, however, that the factual situation presented in the present case is sufficiently different from the situations which were presented in *Builders Supply v. Midyette* and in *Construction Co. v. Anderson, supra,* as to require that we distinguish it. In our opinion the plaintiff in the present case, in the course of performing her contract with defendants, did substantially comply with the licensing requirements of the statute so that she is entitled to maintain her action upon the contract.

In *Builders Supply v. Midyette, supra,* the plaintiff stipulated that at all times pertinent to the litigation it was not licensed to construct buildings where the cost was $20,000.00 or more. In *Construction Co. v. Anderson, supra,* the parties also stipulated that while the plaintiff had previously held a limited license as a general contractor, this license had expired some months before the contract was entered into and was not renewed after its expiration. Thus, each of those cases presented a situation in which the party who acted as a general contractor was unlicensed not only at the time the contract was entered into but at all times thereafter while undertaking to perform

under it. Under those circumstances the Supreme Court in *Builders Supply v. Midyette, supra,* and this Court in following that decision in *Construction Co. v. Anderson, supra,* held that the unlicensed contractor could not maintain its action.

[2, 3] In the present case plaintiff was not licensed when the contract was entered into on or about 15 March 1967 nor when she commenced construction of the house shortly after 5 May 1967. She did, however, receive a valid limited general contractor's license on 12 July 1967 which entitled her under G.S. 87-10 to engage in general contracting in this State with respect to any single project of a value not in excess of $75,000.00. She continued to hold this license until and after 31 January 1969, when she ceased work on the house. Thus, she did hold a valid license for eighteen and one-half months out of the total of approximately twenty-one months during which she was engaged in constructing defendants' house. For 88 percent of the construction time, during which the major portion of the construction work was performed, she was duly licensed. For such portion of the work as she did perform prior to 12 July 1967 while she was unlicensed, she has already been paid. As pointed out in the opinion in *Builders Supply v. Midyette, supra,* the purpose of Article 1 of Chapter 87 of the General Statutes is to protect the public from incompetent builders. We do not see how that purpose would be promoted by denying the plaintiff under the circumstances of this case the right to maintain her action on the contract here sued upon.

We note that if the cost of the "extras," which amounted to $8,520.35, is added to the basic contract price of $67,500.00, the result may be that the building "project" had a value slightly in excess of $75,000.00, while plaintiff, as holder of a limited license, was not entitled to engage in the practice of general contracting "with respect to any single project of a value in excess of seventy-five thousand dollars ($75,000.00)." G.S. 87-10. The trial judge concluded that the record before him on the motions for summary judgment was not sufficiently clear for the court to determine this matter and expressly declined to base his determination upon that point. We agree that the record was not sufficiently clear to permit the court in ruling on a motion for summary judgment to determine whether defendants' house with the "extras" was or was not "a single project of a value in excess of seventy-five thousand dollars," within the meaning of G.S. 87-10. On this record we do not reach the ques-

tions whether the "extras" could or should be considered as separate projects, or as new contracts, or as renegotiations and renewals of the original contract. We note, however, that even if it should be determined that the "project" with the "extras" added was a single project having a value in excess of $75,000.00, *Tillman v. Talbert,* 244 N.C. 270, 93 S.E. 2d 101, which was one of the cases cited and relied upon in the opinion in *Builders Supply v. Midyette, supra,* is authority supporting plaintiff's right to recover at least upon a *quantum meruit* for work done on the contract up to the time that changes, made at the request of defendants, resulted in the project having a value in excess of the limitations of plaintiff's license.

The summary judgment sustaining defendants' plea in bar and dismissing plaintiff's action is reversed and this cause is remanded.

Reversed and remanded.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. MILTON BEST

No. 718SC48

(Filed 26 May 1971)

1. **Robbery § 5— armed robbery — submission of common law robbery**

In a prosecution for attempted armed robbery, the trial court did not err in charging on attempted common law robbery where the State's evidence was conflicting as to whether defendant knew before the attempted robbery that an accomplice had a gun and was going to use it in the robbery.

2. **Constitutional Law § 29; Criminal Law § 98— right to jury trial — defendant ordered into custody during recesses**

Fact that the court ordered defendant into custody during recesses of the trial does not indicate that defendant was being penalized or punished for exercising his constitutional right to a jury trial.

3. **Constitutional Law § 29; Criminal Law § 138— right to jury trial — determination of punishment — testimony by accomplice**

The fact that the trial court received testimony of accomplices for the purpose of imposing punishment does not signify that defendant was being penalized or punished for exercising his right to a trial by jury.

4. **Constitutional Law § 29; Criminal Law § 170— right to jury trial — imposition of sentence — remark by court**

Trial court's remark, prior to imposition of an active prison sentence, that "The first step in rehabilitation is an admission of guilt" was not a sign that the court was penalizing or punishing defendant because of his plea of not guilty.

5. **Arrest and Bail § 9; Constitutional Law § 29; Criminal Law § 151 — appeal bond — right to jury trial**

The fact that after defendant was sentenced and gave notice of appeal he was ordered held in custody until he posted a $4,000 appearance bond does not show that he was being penalized for having pleaded not guilty.

6. **Constitutional Law § 29; Criminal Law § 138 — probationary sentence for accomplice — active sentence for defendant**

Fact that an accomplice who pleaded guilty to attempted common law robbery received a probationary sentence while defendant received an active sentence upon being found guilty of the same crime by a jury does not disclose that defendant was being penalized or punished for pleading not guilty.

APPEAL by defendant from *Copeland, Judge,* 7 July 1970 Session of Superior Court held in WAYNE County.

The defendant, Milton Best, was tried on a bill of indictment charging him with attempted robbery with firearms or other dangerous weapons.

The evidence for the State tended to show that Mr. and Mrs. Jamie Lee Taylor operated a grocery store and fish market on Highway #117, south of Goldsboro. On 25 April 1969 at about 10:30 p.m., they were closing the store. Mr. Taylor was restocking a soft drink box, and Mrs. Taylor was standing behind the counter at the cash register when four boys walked in. The defendant Best was one of them. A Pepsi-Cola was ordered, and Mr. Taylor put it on the counter. Someone threw a quarter on the counter top, and as Mrs. Taylor reached to pick it up, Mitchell L. Bright, one of the four, pointed a gun at her and demanded money. Mrs. Taylor testified:

> "I said I don't have any money and I dropped under the counter and reached for my gun in the drawer and pulled out my gun and when I did they left. * * * They all ran out the door and I handed my husband the gun and told him to shoot them."

Bright, a witness for the State, testified that he left a place called the Playboy Club with defendant Best and the two other boys. All four of them discussed robbing Taylor's store and all agreed to rob it. Bright stated that "Milton Best first suggested going into the store." His testimony was conflicting as to whether the defendant had knowledge that he had a gun or was planning to use a gun in the robbery before they entered the store. Bright also testified:

> "In answer to your question 'Mitchell, when you took the gun out in the car were either of the defendants, Earl Rodgers or Milton Best, in the car?', my answer is 'Yes sir.'
>
> Q. Did they see the gun?
>
> A. Yes sir, both of them."

Defendant offered no evidence.

The jury returned a verdict of guilty of attempted common-law robbery, and from a judgment of imprisonment for a term of not less than four nor more than five years, with a recommendation that this sentence be served in a youthful offenders' camp, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Price for the State.

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

MALLARD, Chief Judge.

Defendant assigns as error the refusal of the trial court to sustain his motion for nonsuit. There was ample evidence to require submission of this case to the jury, and this assignment is overruled.

[1] Defendant also assigns as error certain portions of the charge. He contends that the court improperly charged the jury on the offense of attempted common-law robbery and asserts that there was no evidence as a basis for such a charge. He contends that the evidence in the record supports only a charge of attempted armed robbery. We do not agree. The evidence of the State's witness Bright was conflicting on whether defendant Best knew that he, Bright, had a firearm before the four of

them entered the store and whether defendant Best had knowledge that a firearm was to be used in the robbery. The robbery they had planned was not completed and ended as an attempt to rob. Therefore, it was proper for the judge to instruct the jury on an attempt to commit common-law robbery in addition to attempted robbery with firearms [see *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24 (1969)]. Moreover, in *State v. Quick,* 150 N.C. 820, 64 S.E. 168 (1909), the Supreme Court said:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him."

See also *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364 (1950).

As to the defendant's other exceptions to the charge, it is said in *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971), that "[a] charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." When the charge in the case at bar is thus considered, we find no prejudicial error.

The defendant contends that the trial court imposed punishment on him "because of his plea of not guilty and demand for trial by jury." He argues that this was evidenced when (1) the court ordered him into custody during recesses of the trial; (2) after conviction, the court received testimony of accomplices for the purpose of imposing punishment; (3) after hearing defendant's plea of leniency, the judge remarked, "The first step in rehabilitation is an admission of guilt"; (4) ordered defendant into custody of the Department of Correction until he was released on $4,000 bail pending appeal; and (5) gave the State's witness Bright a seven-to-ten-year prison sentence and put him on probation after Bright had subsequently entered a plea of guilty to attempted common-law robbery. These contentions are without merit.

It is elementary that upon a plea of not guilty, the only way for a person charged with crime to be tried in the superior courts of this State is by jury. Therefore, one does not have to "demand" a jury trial in a criminal case in superior court.

[2] The record does not reveal why the judge ordered the defendant into custody. The defendant does not contend that this was done in the presence of the jury or that the jury knew whether or not he was in custody. Neither is it contended that ordering the defendant into custody constituted an unwarranted burden upon him and his counsel in the conduct of the case. In 8 Am. Jur. 2d, Bail and Recognizance, § 25, it is said:

> "It is the general rule in the states that the trial court has the right, in its discretion, to order a defendant who has been at large on bail into custody during the trial, or during recess, even though the offense of which the defendant is charged is bailable. * * *"

And in 23 C.J.S., Criminal Law, § 977, it is stated: "It is within the discretion of the trial court whether the accused should be placed in custody." See also *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39 (1957), and *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291 (1953). In *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371 (1968), Justice Sharp said:

> "Historically, the presumption has been that a judge will act fairly, reasonably, and impartially in the performance of the duties of his office, *State v. Young, supra.* Our entire judicial system is based upon the faith that a judge will keep his oath. 'Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed.' 1 N. C. Index 2d, Appeal and Error § 46 (1967). Since, however, *all* judges are human, from time to time one or more will err. Notwithstanding, we have no choice but to make men judges. Judge Curtis Bok, in his book, *I Too Nicodemus,* said that the real crime of criminals was that they 'have made it necessary to judge them and have so tarnished those who do it.' So long as errants make it necessary for other men to judge them it is best to indulge the presumption that a judge will do what a judge ought to do. Actually we have no other choice. Furthermore, men seek to justify the confidence they believe to be reposed in them.
>
> It would demean the entire judiciary for the appellate branch to assume that trial judges—who bear the brunt of the administration of justice and from whose ranks so many ascend to courts of last resort—will penalize with 'harsher' sentences one who appeals or exercises a constitutional right

> which entitles him to a new trial. In our lexicon a sentence is harsh only when it exceeds merited punishment."

The presumption is that Judge Copeland exercised a proper discretion in ordering the defendant into custody. The record does not indicate that the defendant was penalized or punished for exercising a constitutional right to trial by jury.

[3] The fact that the trial court received evidence of accomplices does not signify that the defendant was being penalized or punished for exercising his right to a trial by jury. The court is permitted wide latitude on the question of punishment, and the rules of evidence will not be strictly enforced. *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591 (1965); *State v. Pope,* 257 N.C. 326, 126 S.E. 2d 126 (1962).

[4] The record shows that after the jury returned its verdict, the experienced trial judge heard evidence on the question of punishment and heard the defendant's plea for leniency. Subsequently, and before imposing an active prison sentence, the trial judge remarked, "The first step in rehabilitation is an admission of guilt." Such a philosophical remark was gratuitous and could have been left unsaid, but while it is some indication of the contemplated judgment, it was not a sign that the judge was penalizing or punishing the defendant because of his plea of not guilty.

[5] The fact that after defendant was sentenced and gave notice of appeal he was ordered held by the Department of Correction until he posted a $4,000 bond, does not show he was being penalized for having pleaded not guilty. A $4,000 appearance bond for one who has been sentenced to prison for a term of not less than four nor more than five years is not excessive.

[6] Because the judge later gave the State's witness Bright a seven-to-ten-year prison sentence and put him on probation after he had pleaded guilty to attempted common-law robbery, does not disclose that the defendant Best was being penalized or punished for pleading not guilty. The rule with respect to different punishments is stated in 3 Strong, N. C. Index 2d, Criminal Law, § 138, p. 63, as follows:

> "The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within

statutory limits, being within the sound discretion of the trial judge."

An attempt to commit robbery is an infamous crime. *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853 (1956). The sentence imposed on this defendant was not excessive under the provisions of G.S. 14-3 and G.S. 14-2. *State v. Bailey, supra.* It would be an exercise in futility for this court to delve into the mental processes by which Judge Copeland decided to impose an active prison sentence on this defendant. The defendant's attempts to assign improper motives to the lawful procedures, statement, and actions of Judge Copeland in sentencing this defendant are without merit.

In the trial of the defendant, we find no prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN LEWIS NEWBORN

No. 718SC73

(Filed 26 May 1971)

1. **Automobiles § 3— driving while license suspended — sufficiency of evidence**

The State offered sufficient evidence to support a jury finding of defendant's guilt of driving on the public highway while his operator's license was suspended, although defendant himself had testified that he had never had an operator's license. G.S. 20-28(a).

2. **Automobiles § 3— driving while license suspended — erroneous instructions**

In a prosecution charging defendant with operating a motor vehicle on the public highways while his license was suspended, wherein defendant entered a plea of not guilty and testified that he had never had an operator's license, the trial court erred in failing to instruct the jury that before they could return a verdict of guilty they must find that defendant (1) had operated a motor vehicle (2) on the public highways (3) at a time when his license was in a state of suspension.

APPEAL by defendant from *Cowper, Judge,* August 1970 Criminal Session of Superior Court held in LENOIR County.

In an addendum to the record it was stipulated:

"1. The judgment appearing on page 4 of the Record is the judgment of the District Court.

2. Defendant appealed therefrom to the Superior Court only upon the charges of driving while license revoked and failing to report an accident.

3. In Superior Court, defendant was arraigned and tried solely upon the charge of driving while license revoked. He was not tried on the charge of failing to report an accident."

In superior court defendant pleaded not guilty. The jury's verdict was guilty as charged. From the judgment imposed, the defendant appealed to the Court of Appeals.

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

Turner & Harrison by Fred W. Harrison for defendant appellant.

MALLARD, Chief Judge.

The evidence for the State tended to show that on 8 March 1970 at about 10:00 p.m. the defendant backed a 1959 model station wagon onto a highway that "runs into another highway off U. S. 70" and in doing so collided with another automobile. The defendant gave the owner of the other car his "license number" and his "insurance number" but did not give his driver's license number. On direct examination the investigating highway patrolman testified that he secured a warrant and went to the defendant's home but that the defendant "did not present a valid operator's license and he has not presented one to me since that time." On cross-examination the highway patrolman testified:

"In reference to the Notice which I received from the Department, *his license was revoked for the offense of driving under the influence.* The record does not say whether or not he had ever had a license. If he had had a set at the time, it would have been listed. I do not know whether the record would reflect if he had ever been issued a license or not." (Emphasis added.)

A "Drivers License Record Check for Enforcement Agencies" and a letter of "Official Notice and Record of Revocation of Driving Privilege" were introduced into evidence but were lost and not transmitted as a part of this record. However, under date of 10 May 1971, the attorney for the defendant and the Attorney General have filed in this case what they call "Exhibit 1 and Exhibit 2," and they stipulate they may become a part of the record in lieu of the actual exhibits introduced at the trial and that these exhibits "are true and correct facsimiles of the exhibits introduced at trial except that the search date of May 4, 1971 appearing on Exhibit 1 and the Notary Public suscription *(sic)* date of 4 May 1971 appearing on Exhibit 2 are not the dates which appeared upon the original exhibits." The exhibit "Drivers License Record Check for Enforcement Agencies" shows a "revocation" with effective date of suspension "09 21 69"; date eligible for reinstatement "09 21 70"; and reason for revocation "driving under the influence—1st. off."

At the close of the evidence for the State, the defendant's motion for a "directed verdict of not guilty" was denied.

The defendant offered evidence which in substance tended to show that he owned the 1959 station wagon that struck the automobile of the State's witness. At that time Milton Campbell was driving the defendant's automobile. The defendant testified:

> "I never drove the car at any time that evening. I did not have a Driver's license and I have never had an Operator's license. I was convicted of driving under the influence. Other than that, I have never been convicted of anything."

On cross-examination, the defendant testified:

> "* * * I have never had an Operator's license because every time I get on the road, they stop me and say it has been revoked or something like that; and they have never been revoked but one time and that was September 21, 1969. I have never had a set of Driver's license because they won't let me have one.
>
> Yes sir, I received a copy of the letter which you have there, telling me not to drive. It told me that my license had been revoked; but I have never had any license. * * *"

[1] At the close of all the evidence, the defendant moved for a "directed verdict" which was denied; and on oral argument,

defendant's counsel concedes that his motions for "directed verdicts" were intended to be motions for judgment of nonsuit. We think that the direct and circumstantial evidence was sufficient to require submission of the case to the jury.

The defendant was charged with a violation of G.S. 20-28(a), the pertinent parts of which read as follows:

> "Any person whose operator's or chauffeur's license has been suspended or revoked * * * as provided in this chapter, who shall drive any motor vehicle upon the highways of the State *while such license is suspended or revoked* shall be guilty of a misdemeanor * * *." (Emphasis added.)

The defendant assigns as error that portion of the charge reading as follows:

> "* * * I have ruled, as a matter of law, that even though one does not have a valid driver's license, that the State might suspend that privilege; and if one drives after the privilege has been suspended that he might be found guilty of this statute.
>
> So I instruct you that if the State has satisfied you from the evidence and beyond a reasonable doubt that the State of North Carolina had revoked the driving privilege of John Lewis Newborn; and if the State has further satisfied you beyond a reasonable doubt that on the night of March 8th, 1970, he operated a motor vehicle on the public highways of this State, it would be your duty to return a verdict of guilty as charged."

Defendant contends that all the evidence in this case tended to show that he had never possessed a driver's license; that upon his conviction in September 1969 of operating a motor vehicle while under the influence of intoxicating liquor, his operator's license could not have been suspended or revoked because he did not have one; that the fact that he was thereafter officially notified that his license had been revoked was of no consequence; that the State could not revoke or suspend a license which he had never had; that even if he was driving an automobile on the highway within the time during which there was a suspension or revocation of his "driving privilege," the most he could have been guilty of was operating a motor vehicle on the public highway without a valid operator's license in violation of G.S. 20-7;

and that the trial judge committed error in failing to instruct the jury that if the defendant had never had a license, they should return a verdict of not guilty.

Defendant also argues in his brief that the court's charge, hereinabove set out, "first of all, contains a misstatement of the law; and it is apparent that the Trial Court adopted the State's interpretation of G.S. 20-23.1."

The State contends that under the provisions of G.S. 20-23.1, the suspension or revocation of the operating privilege of a person is the equivalent of the suspension or revocation of the operator's or chauffeur's license of such person under Chapter 20 of the General Statutes. G.S. 20-23.1 is as follows:

> "In any case where the Department would be authorized to suspend or revoke the license of a person but such person does not hold a license, the Department is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held an operator's or chauffeur's license, and the provisions of this chapter governing suspensions, revocations, issuance of a license, and driving after license suspended or revoked, shall apply in the discretion of the Department in the same manner as if the license had been suspended or revoked."

In the case of *In re Revocation of License of Wright,* 228 N.C. 584, 589, 46 S.E. 2d 696, 699 (1948), the Supreme Court said:

> "A license to operate a motor vehicle *is a privilege* in the nature of a right of which the licensee may not be deprived save in the manner and under the conditions prescribed by statute." (Emphasis added.)

Under the provisions of G.S. 20-23.1 and G.S. 20-28(a), when a person who does not hold a driver's license has his operating privilege revoked or suspended in the manner and under the conditions prescribed by statute, and while such operating privilege is thus suspended or revoked he drives a motor vehicle upon the highways of this State, he violates the above-quoted portion of G.S. 20-28(a). However, in order to convict a person of a violation of G.S. 20-28(a), such person must have (1) operated a motor vehicle (2) on a public highway (3) while his operator's

license or operating privilege was lawfully suspended or revoked. *State v. Cook,* 272 N.C. 728, 158 S.E. 2d 820 (1968).

[2] "A plea of not guilty puts in issue *every essential element of the crime charged.*" *State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56 (1968). Although the defendant in his testimony seems to have admitted that his operating privilege had been suspended or revoked, he did not judicially admit that it was in a state of suspension or revocation on the date of the offense alleged in the warrant. The defendant had not withdrawn or modified his plea of not guilty. In this final mandate of the charge the jury was not instructed that before they could convict the defendant of the crime charged, they must find beyond a reasonable doubt that the defendant, on the date alleged, was (1) operating a motor vehicle (2) on the public highways and (3) that at the time thereof his operator's license or operating privilege was in a state of revocation or suspension. In failing to do this, there was error. *State v. Cook, supra.*

For the reasons above stated, the defendant's assignment of error to that portion of the charge hereinabove set out is well taken. The defendant is entitled to a new trial.

New trial.

Judges PARKER and VAUGHN concur.

IRA BYRD v. THE STAR RUBBER COMPANY, ORIGINAL DEFENDANT, AND TOM TURNAGE AND CAISON TURNAGE, DOING BUSINESS AS NASHVILLE RECAPPERS, THIRD PARTY DEFENDANTS

No. 717SC286

(Filed 26 May 1971)

Sales § 14— breach of warranty — privity of contract

Employee of a retailer of new tractor tires does not have a cause of action for breach of warranty against the tire manufacturer for injuries received when a tire exploded while the employee was mounting it upon the wheel of a tractor owned by a customer of the retailer since there is no privity of contract.

Judge BROCK dissenting.

APPEAL by plaintiff from *Cohoon, Judge,* December 1970 Civil Session, Superior Court of NASH County.

Plaintiff instituted this action to recover damages for injuries sustained when a new tractor tire exploded while plaintiff was mounting it upon the wheel of a tractor belonging to a customer of plaintiff's employer. The tire was allegedly manufactured by Star Rubber Company, original defendant, and sold by it to plaintiff's employer, Nashville Recappers, third party defendant. Plaintiff's first cause of action was grounded in negligence. In his second cause of action, he alleged that the tire was defective; that it exploded while he was mounting it, adopting the usual method of mounting tractor tires used in the industry; and that defendant is liable to him for his injuries which resulted from original defendant's breach of warranty that the tractor tire was fit for the purpose for which it was sold and could be mounted with safety upon a tractor wheel using the usual methods used in the industry.

At pretrial conference, the court, by agreement of the parties through counsel, considered an oral motion of original defendant that the plaintiff's second cause of action be dismissed for that the complaint fails to state a claim upon which relief can be granted under G.S. 1A-1, Rule 12(b). After hearing, the court entered an order allowing the motion and dismissing the second cause of action. Plaintiff excepted and appealed, and under G.S. 1A-1, Rule 41(a) (1), filed a stipulation of dismissal as to his first cause of action.

Fields, Cooper and Henderson, by Milton P. Fields, for plaintiff appellant.

Battle, Winslow, Scott and Wiley, P. A., by J. B. Scott, for Star Rubber Company, original defendant appellee.

Spears, Spears, Barnes and Baker, by Alexander H. Barnes, for Nashville Recappers, third party defendant.

MORRIS, Judge.

This appeal raises one single question which is whether a plaintiff, not an ultimate consumer and not one in privity of contract with the manufacturer, has a cause of action for breach of warranty if injured in the use of the product while an employee of a purchaser for resale to the ultimate consumer of the product manufactured by defendant.

Our Supreme Court in *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967), held that in a *tort* action for *neg-*

ligence against a manufacturer, whether privity of contract exists is immaterial when it said ". . . the time has come for us to recognize that the exceptions to the general rule of non-liability of a manufacturer for *negligence* because of lack of privity of contract have so swallowed up the general rule of non-liability that such general rule for all practical purposes has ceased to exist. Its principle was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We have abandoned it in this jurisdiction." (Emphasis ours.) There the Court allowed a cause of action in *tort* and a cause of action for breach of warranty in an action by the ultimate consumer against the manufacturer. The product was a chemical weed killer, sold in labeled sealed containers, which plaintiff alleged he had used as directed but had suffered damages to his peanut and soy bean crops planted the succeeding year in fields in which he had used the weed killer on his corn crop the previous year. Prior to *Corprew,* exceptions to the privity rule in negligence had begun to appear; i.e., the dangerous instrumentalities exception, *Jones v. Elevator Co.,* 231 N.C. 285, 56 S.E. 2d 684 (1949); food and drink cases, *Broadway v. Grimes,* 204 N.C. 623, 169 S.E. 194 (1933); *Perry v. Bottling Co.,* 196 N.C. 175, 145 S.E. 14 (1928); *Broom v. Bottling Co.,* 200 N.C. 55, 156 S.E. 152 (1930). *Corprew* abolished any privity requirements in negligence cases. However, the question before us was neither raised nor discussed.

The most recent decision of our Supreme Court discussing the question now before us is *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21 (1960). There an action was brought to recover damages for personal injuries sustained by plaintiff while operating, as an employee of Neal Hawkins Construction Company, an International Harvester Loader sold by defendant to the construction company, employer of plaintiff. The matter was heard in the trial court on defendant's demurrer to the amended complaint which attempted to allege two causes of action—one in *tort* and one alleging a breach of warranty "of merchantability and fitness." The Supreme Court affirmed the trial court in sustaining the demurrer. As to the cause of action in *tort,* the Court said the factual allegations of the complaint were insufficient to show that plaintiff's injury was proximately caused by the negligence of defendant. As to the cause of action alleging breach of contract, the Court said:

" 'Subject to some exceptions and qualifications, it is a general rule that only a person in privity with the warrantor may recover on the warranty.' 77 C.J.S., Sales § 305(b); 46 Am. Jur., Sales § 306.

Our decisions are in accord. *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30, and cases cited. Absent privity of contract, there can be no recovery for breach of warranty except in those cases where the warranty is addressed to an ultimate consumer or user. *Ordinarily, the rule that a seller is not liable for breach of warranty to a stranger to the contract of warranty is applicable to an employee of the buyer. Berger v. Standard Oil Co.*, (Ky.), 103 S.W. 245, 11 L.R.A. (N.S.) 238. *Negligence is the basis of liability of a seller to a stranger to the contract of warranty. Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582, and cases cited; *Caudle v. Tobacco Co.*, 220 N.C. 105, 16 S.E. 2d 680." (Emphasis ours.)

It is true that there has been some slight erosion in this State of the privity requirement in breach of warranty actions. This has been limited to food and drink and insecticides in sealed containers which had warnings on the label which reached the ultimate consumer. In *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753 (1964), Justice Sharp in a concurring opinion made an exhaustive survey of the privity requirement in this State and other jurisdictions and discussed many of the reasons advanced for its loss of vitality in other jurisdictions. Perhaps the rationale for abandoning the requirement in negligence actions applies with equal force to breach of warranty actions. However, we find no case in this State accomplishing for breach of warranty actions what *Corprew* accomplished for negligence actions. *Wyatt* remains the applicable rule in this case. To hold otherwise would, in our opinion, require us to ignore or overrule *Wyatt*. This we cannot do.

Affirmed.

Judge HEDRICK concurs.

Judge BROCK dissents.

Judge BROCK dissenting:

The majority opinion relies upon *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21, to dispose of the question involved here. It seems to me that the *Wyatt* rule can stand reexamination in the light of developments in product liability case law in the past ten years.

But, in any event, *Wyatt* was concerned with ruling upon a demurrer to a complaint which was treated as alleging an express warranty made by the defendant to plaintiff's employer. Because of this I view *Wyatt* as holding that a recovery cannot be had by a person not in privity with the warrantor of an *express* warranty. My view of this is strengthened by the fact that *Wyatt* cited *Berger v. Standard Oil Co.* (Ky.), 103 S.W. 245 (1907) as authority to exclude an employee of the buyer from the benefits of an express warranty by the seller to the buyer. Both *Wyatt* and *Berger* were concerned with allegations of an *express* warranty to the employer of plaintiff; there appears to have been no allegation or effort to recover on *implied* warranty.

In a later Kentucky case, *Dealers Transport Co. v. Battery Distributing Co.* (Ky.), 402 S.W. 2d 441 (1966) the following is said: "The Berger case actually involved an express warranty, and is not authority for the rule applicable to an implied warranty." In the same case it was also stated: "We are unable to perceive a valid basis for requiring privity of contract in a products liability claim based on breach of implied warranty and disregarding privity in such claims based on negligence."

In the case *sub judice* the allegations of the complaint seem to allege an implied warranty and for that reason is distinguishable from the case relied upon by the majority. I vote to reverse the order of dismissal.

STATE OF NORTH CAROLINA v. BYRON CARLTON CUMBER

No. 715SC324

(Filed 26 May 1971)

1. **Criminal Law § 84— admissibility of exhibits — voir dire hearing into lawfulness of search**

An objection to the admissibility of exhibits which merely challenged the insufficiency of their identification did not require the trial court to hold a *voir dire* hearing into the legality of the search which uncovered the exhibits.

2. **Criminal Law § 84— voir dire hearing — patrolman's description of what he saw inside a car**

Trial court was not required to hold a *voir dire* hearing before allowing a highway patrolman merely to describe what he saw in plain view inside a station wagon while he was standing on the outside.

3. **Criminal Law § 86— credibility of testifying accomplice — inadmissibility of impeaching evidence showing offer of leniency**

The right of a defendant under some circumstances to offer evidence tending to show that an accomplice had reason to expect lenience in return for testifying for the State, *held* not to extend to evidence of a conversation overheard in jail between an accomplice and some unidentified person who was offering leniency to the accomplice in exchange for becoming a State's witness.

APPEAL by defendant from *Cowper, Judge,* 26 October 1970 Criminal Session of Superior Court held in NEW HANOVER County.

Defendant was charged in separate bills of indictment with breaking and entering two school buildings in New Hanover County and larceny of property therefrom.

The State presented evidence tending to show the following: At approximately 11:00 p.m. on 27 September 1970 Jackie Talbert, a State Highway Patrolman, went to a picnic area on U. S. Highway 17 near Hampstead in response to a call. There he found Jackie Watts sitting in a station wagon under the steering wheel. No one else was in the station wagon. Talbert observed in the back seat and cargo area of the station wagon a Remington typewriter, two table model radios, an adding machine cover and other items. The items were in plain view. Sheriff's deputies were called and the station wagon was taken to Topsail School where the items of property were identified by

school officials as having been located in the two school buildings which had been entered earlier in the evening.

As Talbert left the picnic area he observed James Cumber squatting down in front of a sign. At approximately 3:00 a.m. the following morning a truck being driven by defendant's father was seen turning off Highway 17 onto a rural paved road next to the Martha Ann Restaurant in Hampstead. Defendant was a passenger in the truck.

Jackie Watts testified for the State. He stated that he is a nephew of defendant and James Cumber. About dark on 27 September 1970 the three men left their homes in Wilmington to return to Virginia where they were employed. They were traveling in defendant's station wagon. Watts was driving. On their way out of town Watts stopped the station wagon twice and each time near a school building. Defendant left the car on each occasion. Once he returned with a radio. The second time he returned with a typewriter and an adding machine. After leaving the area of the second school building, the three men drove to the Martha Ann Restaurant in Hampstead. Defendant and James Cumber again left the car and started walking down the road. Watts drove to the picnic area a short distance away and was waiting there when the patrolman came. Watts identified various items of property as objects which had been placed in the station wagon on the night of 27 September 1970 by defendant.

Defendant did not testify but he presented several witnesses whose testimony tended to establish an alibi.

The jury returned verdicts of guilty on all charges and defendant appealed from judgments entered upon the verdicts.

Attorney General Morgan by Staff Attorney Giles for the State.

Smith and Patterson by Norman B. Smith and Michael K. Curtis for defendant appellant.

GRAHAM, Judge.

Two New Hanover County school officials identified various State's exhibits as property owned by the schools and located in the school buildings on the evening of 27 September 1970. One of these witnesses also identified the exhibits as the property

which he observed in defendant's station wagon on 27 September 1970. The only objections made by defendant to any of this testimony were to statements by one of the witnesses as to what he thought certain of the items had cost. These objections were sustained. At the conclusion of the testimony of these witnesses the record reflects that the following transpired:

"MR. COBB: I would like to introduce this evidence and these exhibits into evidence.

MR. NEWTON: Objection.

COURT: On what grounds?

MR. NEWTON: Especially the last two at Bradley Creek; been no positive identification of those, just common items.

COURT: Overruled.

MR. COBB: I would like to introduce them at this time.

COURT: All right."

[1] Defendant contends that the court erred in not ordering a *voir dire* hearing at this stage of the trial to determine if the evidence had been obtained by an illegal search. If defendant had properly raised an issue as to the legality of the State's acquisition of this evidence this assignment of error would indeed be well taken. *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407; *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334; *State v. Wood,* 8 N.C. App. 34, 173 S.E. 2d 563. The objection entered, however, was directed to what defendant contended was a lack of sufficient identification of some of the items. "When an objection is made upon certain grounds stated, only those stated can be made the subject of review, except where the evidence is excluded by statute." 2 McIntosh, N. C. Practice 2d, § 1532(7).

In inquiring of defendant's counsel as to the grounds for the objection, the trial judge was undoubtedly seeking to determine if a *voir dire* hearing would be necessary. Counsel's response limited the objection to the question of identification of the property. No *voir dire* hearing was necessary in order to pass upon an objection made on these grounds.

[2] Defendant also assigns as error the failure of the court to order a *voir dire* hearing before allowing testimony by the Highway Patrolman as to what he observed in the station wagon.

This assignment of error is without merit. The patrolman did not testify that he conducted a search or that he seized any of the items introduced into evidence. His testimony simply described what he saw as he stood outside the station wagon and looked inside. He stated: "It was in plain view when I went up to the car and talked to Watts." This testimony was clearly competent, irrespective of whether grounds existed at that time to search the vehicle. Furthermore, at the time the patrolman testified, the subject items had already been introduced into evidence and no question had been raised as to whether they had been illegally obtained by the State.

The case of *State v. Wood, supra,* which is relied upon by defendant is clearly distinguishable. There, the introduction into evidence of cartons of cigarettes alleged to have been stolen was directly challenged on the ground that the evidence had been obtained by an illegal search. Rather than conducting a *voir dire* hearing to inquire into the constitutionality of the search, the trial court undertook to examine, in the presence of the jury, the officer who had seized the property. This examination revealed that the officer saw some cigarettes in the car before he searched it and seized various items of property. The objection interposed in that case was not directed to testimony by the officer concerning what he saw without benefit of a search, but to the legality of the search which resulted in the seizure of the property. Here, no question was raised during the trial as to whether the items of property in question were illegally obtained by the State. Compare *State v. Woody, supra.*

[3] Defendant contends the court committed prejudicial error by excluding the proposed testimony of a prisoner. If permitted to testify, the prisoner would have stated that he overheard an unidentified person tell State's witness Watts that if Watts testified he would be walking the streets free and if he stayed quiet he would be liable to get some time. This alleged conversation occurred in the conference room of the jail. The court sustained the State's objection to the testimony when the witness admitted that he could not identify the person whom he had heard talking to Watts.

It is true that under certain circumstances a defendant may offer evidence tending to show that an accomplice has reason to expect leniency in return for testifying for the State. *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277. However, we hold that

this right does not extend to include evidence of a jail conversation between an accomplice and some unidentified person.

Defendant's other assignments of error are directed to the charge. We have examined the charge in its entirety and hold that no error sufficiently prejudicial to require a new trial appears therein.

No error.

Judges CAMPBELL and BRITT concur.

HELEN R. WILLIAMS, EXECUTRIX OF THE ESTATE OF MANUEL SAMUEL WILLIAMS v. ANN B. LEWIS, LLOYD W. BAILEY AND J. C. D. BAILEY, AS EXECUTORS OF THE ESTATE OF DR. C. W. BAILEY, DECEASED, AND PARK VIEW HOSPITAL ASSOCIATION, INCORPORATED

No. 716SC341

(Filed 26 May 1971)

1. **Hospitals § 3— charitable immunity**

Doctrine of charitable immunity applies in an action against a nonprofit hospital which arose prior to the decision of *Rabon v. Hospital*, 269 N.C. 1.

2. **Hospitals § 3— electrical failure — failure to show negligence**

There was no showing of negligence on the part of any employee of defendant hospital or of the hospital administration in this action for wrongful death based upon the alleged negligence of the hospital in failing to provide an uninterrupted flow of electric current in the operating room while an electric suction pump was being used to draw excess blood from decedent's throat during surgery, where the hospital's emergency generating equipment was in good repair and was superior to similar equipment maintained by other hospitals in the community, and the emergency generator was activated within 30 to 90 seconds after city which supplied power to the hospital, without warning, voluntarily terminated the supply of power to the hospital.

APPEAL by plaintiff from *Cowper, Judge*, 1 February 1971 Civil Session, HALIFAX County Superior Court.

Plaintiff, as the executrix of the Estate of Manuel Samuel Williams, instituted this action for the wrongful death of Manuel Samuel Williams (Williams) as the result of alleged negligence on the part of defendants. Plaintiff alleged that Williams was a

patient of Dr. C. W. Bailey, since deceased, and was admitted to the defendant Park View Hospital Association, Incorporated (Hospital) for the purpose of an operation to remove his tonsils and adenoids. During the course of the operation, on July 15, 1964, Williams experienced some difficulty and stopped breathing. In order to facilitate breathing, Dr. Bailey attempted to put an opening in the trachea but severed an artery in the process. An electric suction pump was used to draw out excess blood in the throat. Immediately after the incision had been made in the trachea, the electric current cut off in the operating room plunging it into total darkness and stopping the suction pump. Shortly thereafter, the lights came on again and Dr. Bailey continued to make the incision in Williams' trachea and while doing so, the electric current cut off for a second time, leaving the operating room without power for about one and one-half minutes. Plaintiff's intestate, Williams, again stopped breathing while the current was off for the second time and died.

Plaintiff alleged that Dr. Bailey was negligent in the manner in which he conducted the operation, and that the Hospital was negligent in that it failed to provide proper and adequate emergency power facilities, and failed, after the first power failure, to take proper precautions to place the emergency power facilities in proper working order. Plaintiff alleged that the negligence of the defendants was the sole proximate cause of the death of plaintiff's intestate.

Both defendants denied the allegations of negligence, and, as a further defense, the Hospital alleged that it was a nonprofit, charitable institution chartered under the laws of North Carolina and had at all times in connection with plaintiff's intestate used due and proper care in the selection and retention of its servants and employees. As a second further defense, the Hospital alleged that it had available an emergency electrical system superior to that maintained by other hospitals in the community; that the Hospital had a proper and adequate source of electricity from the City of Rocky Mount, which had customarily advised the Hospital should the City voluntarily terminate the supply of electrical current to the Hospital; that the Hospital had installed and maintained a large diesel engine to provide emergency electricity to the operating room as well as other emergency areas within the Hospital; that the starting mechanism was in an area with personnel in the immediate vicinity who could and did activate it; that the Hospital used

due care in the selection and maintenance of the regular lighting and power equipment and the emergency power and lighting equipment, and used due care in keeping the same ready and available for use in the event of an emergency.

Defendant Hospital then moved for summary judgment based on portions of plaintiff's complaint, an affidavit of the Executive Director of the Hospital to the effect that the Hospital is a non-profit, charitable organization, and the certificate of incorporation of the Hospital.

Plaintiff also moved for summary judgment against the Hospital and introduced in support of its motion portions of the complaint and answer of defendant Hospital, the death certificate of Williams with statement of cause of death attached, signed by Dr. Bailey, answers of the Executive Director of the Hospital to interrogatories submitted by plaintiff, and an affidavit of the maintenance supervisor of the Hospital.

After consideration of the materials presented in support of the motions for summary judgment, the trial judge granted summary judgment in favor of defendant Hospital, and plaintiff appeals to this Court.

Allsbrook, Benton, Knott, Allsbrook & Cranford by J. E. Knott, Jr., for plaintiff appellant.

Battle, Winslow, Scott & Wiley by J. Brian Scott and Samuel E. Woodley, Jr., for defendant appellee, Park View Hospital Association, Incorporated.

CAMPBELL, Judge.

Plaintiff's sole exception is to the granting of summary judgment in favor of defendant Hospital. 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." G.S. 1A-1, Rule 56(c).

Plaintiff's contention is that the Hospital was under a duty to provide adequate supplies and facilities; that this duty includes the duty to provide a reasonably reliable and uninterrupted flow of electric current for the operation of the electrical lighting system and suction pumps in the operating room; and

that the Hospital failed in this capacity and therefore is liable to plaintiff.

The materials presented in support of the motions for summary judgment show that the first power interruption came without warning to the Hospital and lasted from 4 to 30 seconds. An employee of the Hospital, in charge of activating the emergency equipment, immediately called the city electrical department, (the City of Rocky Mount furnishes electric power to the Hospital) and talked to a Mr. Strickland whom he personally knew. Mr. Strickland was unaware of the power failure but promised to check it out and also promised to call the Hospital prior to any further power interruption. It appeared that the initial power failure was caused by a railroad crane striking a power line. The second power interruption also came without warning to the Hospital and lasted from 30 to 90 seconds, until the emergency generator could be activated. The second interruption was caused when the power servicing the Hospital area was shut off by the city at its local substation in order to repair the damaged circuit. At the time of the second interruption, the maintenance supervisor was a short distance down the hallway from the emergency generator switch and immediately proceeded to cut it on. It took 10 to 15 seconds for the emergency generator to build up enough revolutions per minute to supply power for the Hospital. The emergency generator was checked frequently and started immediately when cut on.

[1, 2] After consideration of the materials presented in support of the motions for summary judgment the trial judge correctly ruled that there was no genuine issue as to any material fact and granted summary judgment in favor of the Hospital. This case arose prior to *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485 (1967). Thus the prior *Rabon* rule of charitable immunity applies. However, we do not think that this makes any difference. There is no showing of negligence on the part of any employee of the Hospital or of the Hospital administration. The emergency generating equipment was in good repair, was superior to similar equipment maintained by other hospitals in the community, and was promptly activated when the power furnished by the City of Rocky Mount was unexpectedly cut off. The Hospital was under no duty to anticipate that the City of Rocky Mount would voluntarily terminate the supply of electric power to the Hospital with no advance warning when, minutes before, an employee of the City had informed the Hospital that such a

warning would be given. The only fact in dispute was the length of time that the power was off on the two occasions. The trial judge viewed this in the light most favorable to plaintiff and found that if the power was off for the longest period of time claimed by plaintiff, it still did not raise an inference of negligence on the part of the Hospital. The trial judge made full findings of fact supported by the evidence and those findings of fact supported the judgment which he entered.

Plaintiff, in her brief, presents the question of whether the death certificate, including the attachment thereto, would be admissible in evidence if the case is tried before a jury. This question is not properly presented by the record before us, and, in view of the decision, would be purely academic, thus we refrain from discussing it.

For the reasons stated, the order of the trial judge granting summary judgment in favor of defendant Hospital is

Affirmed.

Judges BRITT and GRAHAM concur.

BENNIE TERRELL v. H. & N. CHEVROLET COMPANY, INC.

No. 713DC148

(Filed 26 May 1971)

1. **Bailment § 1— creation of bailment — delivery of automobile to garage**

When an owner delivers possession of an automobile which is accepted by a garage owner for the purpose of making necessary repairs, a bailment is created for the mutual benefit of the bailor and bailee.

2. **Appeal and Error § 50— erroneous instruction — stipulation of issue**

An instruction that the parties had stipulated to the issues in the case was erroneous where the parties had not so stipulated.

3. **Rules of Civil Procedure § 51— instructions to jury — use of hypothetical facts**

Trial court's use of hypothetical facts in his instructions to the jury, while probably not prejudicial *per se*, may have tended to further confuse the jury when considered with other erroneous portions of the charge. G.S. 1A-1, Rule 51.

4. Rules of Civil Procedure § 51— peremptory instruction on damages — credibility of evidence

An instruction requiring the jury to answer the issue of damages in the amount of $507, *held* erroneous in not permitting the jury to pass upon the credibility of the evidence.

APPEAL by defendant from *Roberts, District Judge*, 12 October 1970 Session of District Court held in CRAVEN County.

Plaintiff left his 1969 automobile with defendant for defendant to perform some repair work on the engine. Thereafter, before completing the repair work, defendant informed plaintiff that someone had stolen the transmission, gear shift, gear shift lever mechanism, and two wheels and tires alleged to be worth a total of $615 from the automobile. Plaintiff alleged that the relationship of bailor-bailee existed between the parties and that the defendant was guilty of negligence which proximately caused the loss of the foregoing equipment and resulting damage to plaintiff. Defendant refused to pay for the replacement of the parts stolen from plaintiff's automobile, forcing plaintiff to pay for those replaced.

The jury found that the relationship of bailor-bailee existed, that defendant did not exercise ordinary care, and that the plaintiff was entitled to recover damages in the amount of $507. From the judgment entered, the defendant appealed and assigned error.

Barden, Stith, McCotter & Sugg by F. Blackwell Stith for defendant appellant.

No counsel for plaintiff appellee.

MALLARD, Chief Judge.

After the plaintiff put on his evidence and rested, the defendant made a motion for a directed verdict; and at the close of all the evidence, the defendant again made a motion for a directed verdict. After the verdict the defendant made five motions including one for judgment notwithstanding the verdict. All of these motions were denied. None were properly made because none of them incorporated the rule number under which movant was proceeding. See Rule 6 of the "General Rules of Practice for the Superior and District Courts Supplemental to Rules of Civil Procedure Adopted Pursuant to G.S. 7A-34."

[1] While we do not specifically rule on defendant's assignments of error relating to the motions, we think it is proper to say that when an owner delivers possession of an automobile which is accepted by a garage owner for the purpose of making necessary repairs, a bailment is created for the mutual benefit of the bailor and bailee. In *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416 (1954), it is said:

> * * * "[I]n such case the duty of the bailee is to exercise due care and his liability depends upon the presence or absence of ordinary negligence. * * *
>
> A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition. * * *"

See also *Dellinger v. Bridges*, 259 N.C. 90, 130 S.E. 2d 19 (1963), in which the Supreme Court held:

> "Plaintiff's evidence tends to show that he delivered his automobile to Piedmont, that Piedmont accepted it, and thereafter had possession and control of it, and that it failed to return the automobile and had it in its possession and control in a damaged condition. This made out a *prima facie* case of actionable negligence against Piedmont. (Citations omitted.)
>
> While plaintiff's evidence makes out a *prima facie* case of negligence against Piedmont, the ultimate burden of establishing negligence is on plaintiff, the bailor, and remains on him throughout the trial. (Citations omitted.)"

[2] In the case at bar the judge said in charging the jury:

> "There are three issues in this case, which have been stipulated and are agreed to by counsel for both sides. That is, counsel for the plaintiff and defendant agree that these are the questions you as a jury must answer."

The defendant excepts to this and asserts that it did not so stipulate. The record does not reveal such a stipulation and therefore does not support this part of the charge. Absent a stipulation to that effect in the record, it was error for the trial

judge to instruct the jury that the parties had so stipulated. See *Highway Commission v. Phillips,* 267 N.C. 369, 148 S.E. 2d 282 (1966).

The judge further charged the jury:

> "I charge you that the degree, for example, of care to be used against a fire damage wherein there was no fire-fighting equipment for miles around would be a great deal more care than that to be used probably by a business or organization next door or one block from the fire station."

[3] Defendant assigns this portion of the charge as error. Under the provisions of G.S. 1A-1, Rule 51, the judge is required to "declare and explain the law arising on the evidence given in the case." The judge is not required to declare and explain the law on a set of hypothetical facts. *State v. Street,* 241 N.C. 689, 86 S.E. 2d 277 (1955). There was no evidence in this case about fire and fire-fighting equipment, and therefore the evidence introduced does not permit the application of this principle. *State v. Street, supra; Ross v. Greyhound Corp.,* 223 N.C. 239, 25 S.E. 2d 852 (1943). In the case of *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194 (1946), the Court said:

> "In explaining legal principles to a lay jury the trial judge's use of illustrations should be carefully guarded to avoid suggestions susceptible of inferences as to the facts beyond that intended. And this Court has on occasion awarded new trials where illustrations or hypothetical references were deemed to constitute prejudicial error."

While the instructions here complained of may not have been prejudicial *per se,* when viewed in the light of the remainder of the charge, we think it may have tended to further confuse the jury.

[4] The defendant also excepts and assigns error to the following instructions to the jury:

> "Now, if you get to this, the third issue, I charge you that you would answer that in the amount of $507, there being no evidence to the contrary as to the amount."

The vice in this part of the charge is that the jury was not permitted to pass upon the credibility of the evidence. See *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892 (1949). The burden of proof on the issue of damages was on the plaintiff, and it was preju-

dicial error to fail to permit the jury to pass upon the credibility of the evidence. In *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961), the Court said:

> "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. * * *"

The new rules of civil procedure have not abolished peremptory instructions in proper cases. See *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971). In 7 Strong, N. C. Index 2d, Trial, § 31, p. 321, there appear the following directions on how to peremptorily instruct a jury:

> "The correct form of a peremptory instruction is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue."

In further instructions on the third issue in the case before us, to which defendant excepts, the judge said:

> "If you answer the second issue No, then you will ignore the third issue. If you answer the second issue No, you will answer the third issue $507, or, I believe I charged you you would have to answer that—you may answer it $507 or some lesser amount, there being no evidence of any values other (than) that, but you could not answer it more than $507."

The error in this part of the charge is that it is contradictory and confusing, both as to the circumstances under which the third issue was to be answered, as well as to how it should be answered.

It is not necessary for decision in this case to discuss defendant's other assignments of error, some of which may have merit.

For errors in the charge, the defendant is entitled to a new trial.

New trial.

Judges PARKER and VAUGHN concur.

ERIC R. WESTBROOK BY HIS NEXT FRIEND, WILLIE WESTBROOK v. McCABE ROBINSON

No. 7126SC115

(Filed 26 May 1971)

1. **Appeal and Error § 50— instructions — harmless error — directed verdict against appellant**

   Error in the court's charge to the jury will be deemed harmless when the evidence was such that the trial court should have directed a verdict against appellant.

2. **Automobiles §§ 41, 63— striking child who suddenly darts into road**

   Motorist driving at a lawful speed was not liable for injuries to a seven and a half year old child who ran into the street from between two parked vehicles so suddenly that the motorist could not avoid striking him.

APPEAL by plaintiff from *Martin (Harry C.), Judge*, 14 September 1970 Schedule "A" Civil Session of Superior Court held in MECKLENBURG County.

Plaintiff instituted this action to recover damages for personal injuries resulting from a collision between plaintiff, a pedestrian, and an automobile driven by defendant. Plaintiff, a seven and a half year-old boy, alleged that the proximate cause of his injuries was the defendant's negligent operation of his automobile.

Defendant denied negligence and alleged that the proximate cause of the plaintiff's injuries was plaintiff's negligence in running out from concealment between two parked cars without looking when it was impossible for defendant to stop in time to avoid a collision. Defendant further alleged that the accident complained of was an unavoidable accident brought about by the sudden emergency created by the action of the minor plaintiff

in running out into the street in front of defendant's automobile.

Plaintiff's evidence tended to show the following. Waccamaw Street on which the accident occurred is 20 feet wide, and is an east-west street. The street has a rough surface and might have been cobblestone at one time, but is now covered with coarse asphalt. There is a concrete sidewalk on the north side of Waccamaw, but there is no sidewalk on the south side of the street because the buildings on the south side are situated very near the street. The Waccamaw Street area is a very heavy residential area, with one-family houses and duplexes thickly placed on the north side and apartments on the south side of the street.

At the time of the accident two automobiles were parked on the north side of Waccamaw Street near the curb. Defendant was proceeding eastwardly on Waccamaw. At the point of impact there is a slight upgrade on Waccamaw Street. The speed limit on Waccamaw is 35 miles per hour. Immediately prior to the accident, plaintiff's sister, then age eleven, had chased plaintiff out of their home after he had struck her with a toy bear.

Plaintiff's own testimony is, in substantial part as follows:

". . . I don't recall what I was doing five, ten or fifteen minutes prior to the time I had this collision. Oh yes—I was running from my sister. I ran down there by Mrs. Pullen's house and went down there at Red Hill's and ran across the street and ran back. . . . After I ran down there where the house was I ran across the street. I ran across the street where the cars were and then I ran back. When I ran back across over onto the other side of the street, this was not the time I was struck.

". . . When I ran across and then I ran back that's when I got hit. I don't know how long it took me to run across the street from where Mrs. Pullen lives and back across the street when I got struck. No sir, I don't have an opinion as to how much time it was. I don't know whether it was immediately after I cross the street over there. I stop running when I was over there by them cars. And I didn't stay over there a minute. I ran out between two cars and I don't remember how far those two cars were apart. . . ."

. . .

". . . She chased me down Irvin Avenue—and I did not know that she had turned around and started back

home. I still kept running—and I ran across Waccamaw and then back. I was not hiding between these cars. I stopped over there by the cars and stayed over there a minute or so then after I had been there a little while, then that's when I started—I ran out between those cars to go back across Waccamaw, and it was at that time that I was hit. I did not know whether Maretta was still chasing me or not. I did not know where she was. I thought she was still around there somewhere. . . ."

Defendant was called as a witness for the plaintiff and testified in substance, except where quoted, as follows. He is familiar with the area and formerly lived on Waccamaw Street. He operates an automobile upholstery business a short distance from the site of the accident. He was leaving his place of business on the day in question on a routine business trip. He saw a group of small children standing on the sidewalk on the north side of Waccamaw and had seen children playing along the street and in a nearby lot in the past. Defendant, the only eyewitness except the plaintiff, described the collision:

". . . [W]hen Eric ran out between these cars I would say that I was about a length and a half or two lengths of a car from him. In terms of feet—I imagine the average car is about 20 feet—I was about 1 and a half or two lengths beyond Eric when he ran out in between the cars. At that time when he ran out between the cars I was traveling between twenty to twenty-five miles an hour. I keep my car in pretty average condition. When I first observed him come between the cars I was about two car lengths from him—I would say approximately. . . . [I]n about the instant I seen him, Eric was darting in front of my car, between the parked cars and I started braking. I said I was going about 25 miles an hour possibly when I seen Eric, when I started braking my car.

". . . These two cars that I said was located on the north side of Waccamaw Street did obstruct the youngster going between the car—it cut off my vision and I didn't see him until the instant he darted from behind one. . . ."

. . . .

"When Eric came out he was running and as soon as I saw him run out I hit my brakes. I saw him the instant he came from behind the car. . . ."

"The left tip of my bumper and I believe part of the headlight rim struck Eric. . . ."

Officer Fenlong of the Charlotte Police Department testified that there were 28 feet of skid marks to the rear of the point of impact and 22 feet of skid marks beyond the point of impact. Officer Fenlong said, "From the physical evidence, his car stopped where it struck, approximately where it struck. The child was still lying there when I got there. . . . Eric Westbrook was lying approximately at the rear wheels of the car. . . ."

At the close of the plaintiff's evidence, defendant moved for a directed verdict. That motion was denied. Without putting on any evidence, defendant rested and renewed his motion for a directed verdict. Again his motion was denied. The jury answered the issue of defendant's negligence in the negative. From a judgment entered pursuant to the verdict, plaintiff appealed.

W. B. Nivens for plaintiff appellant.

Jones, Hewson and Woolard by William L. Woolard for defendant appellee.

VAUGHN, Judge.

[1] All of appellant's assignments of error are directed to the charge of the court. We are inclined to agree that the charge was not free of error.

In our deliberations as to the proper disposition of this appeal, however, we have considered the following principles set out in *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159, a case in which the Supreme Court agreed with the appellant that there was error in the charge.

"But this we need not now decide for technical error alone is not sufficient. New trials are not granted for error and no more. The burden is on the appellant not only to show error but also to show that he was prejudiced to the extent that the verdict of the jury was thereby probably influenced against him. [Citations omitted.]

"The error must be 'material and prejudicial, amounting to a denial of some substantial right,' *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797, and an error cannot be regarded as prejudicial to a substantial right of a litigant

unless there is a reasonable probability that the result of the trial might have been materially more favorable to him if the error had not occurred. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486.

"In applying this rule, we have consistently held that when, upon a consideration of the whole record, it clearly appears that the appellant, under no aspect of the testimony, is entitled to recover and that the evidence considered in the light most favorable to him is such that the trial judge would have been fully justified in giving a peremptory instruction, or directing a verdict against him on the determinative issue or issues, any error committed during the trial will be deemed harmless. *Gray v. Power Co.,* 231 N.C. 423, 57 S.E. 2d 316; *McArthur v. Byrd,* 213 N.C. 321, 195 S.E. 777; *Foxman v. Hanes,* 218 N.C. 722, 12 S.E. 2d 258; *Clark v. Henrietta Mills,* 219 N.C. 1, 12 S.E. 2d 682; *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E. 2d 476."

[2] The evidence in the present case, when considered in the light most favorable to the plaintiff, was such that the trial judge should have granted defendant's motion for a directed verdict. The rule applicable to the situation at hand is found in *Dixon v. Lilly,* 257 N.C. 228, 125 S.E. 2d 426:

" 'Thus, when a motor vehicle is proceeding upon a street at a lawful speed, and is obeying all the requirements of the law of the road and all the regulations for the operation of such machine, the driver is not generally liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid injuring him.' "

See also *Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543; *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610; *Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540.

No error.

Chief Judge MALLARD and Judge PARKER concur.

IN RE AMY HOPE MOORE, A MINOR

No. 712DC203

(Filed 26 May 1971)

1. **Rules of Civil Procedure § 42— consolidation of actions — cases involving custody of sisters**

The district court properly consolidated the case involving the custody of a minor girl with the case involving the custody of her two older sisters. G.S. 1A-1, Rule 42(a).

2. **Parent and Child § 6; Infants § 9— custody of children — rights of surviving parent who murdered his wife**

The desires of the surviving parent with reference to the custody of his children are not binding on the court, especially where the parent is currently serving a life sentence for the murder of his wife.

APPEAL by petitioner from *Ward, District Judge,* October 1970 Session of BEAUFORT County, the General Court of Justice, District Court Division.

Petitioner instituted this action by filing a writ of *habeas corpus* seeking the custody of Amy Hope Moore. Petitioner alleged that Amy Hope Moore is one of three children born to Sam Nick Moore and JoAnn Woolard Moore; that Sam Nick Moore is presently an inmate in the State's prison, having been convicted of killing JoAnn Woolard Moore; that petitioner is the paternal aunt of Amy Hope Moore, and that respondent, Mrs. Mary B. Woolard is the maternal grandmother; that in a proceeding involving the custody of the two older children, Vickie Ann Moore and Sandra Annette Moore, petitioner was granted complete control and custody of those two children; that Amy Hope Moore was not included in the custody proceeding involving the two older children and has been living with respondent, and respondent has refused to allow her to come live with her sisters; and that the growth of strong ties compels that the sisters should all live in the same home if possible. Petitioner prays that she be granted full and complete custody of Amy Hope Moore.

The proceeding involving the custody of the two older children, In the Matter of Vickie Ann Moore and Sandra Annette Moore, was transferred from the superior court to the district court by an order entered 24 July 1970. On 8 September 1970, the trial judge allowed respondent's motion to consolidate the two cases. Respondent then filed a motion in the cause seeking

the custody of Vickie Ann Moore and Sandra Annette Moore. Respondent had previously filed an answer seeking to retain custody of Amy Hope Moore.

After hearing the evidence presented by the parties, the trial judge made findings of fact to the effect that both the petitioner and the respondent are fit and proper persons to have custody of the minor children; that all three children have adjusted well to their present environments and are being properly cared for; and that Sam Nick Moore, the father of the children, serving a life sentence in prison for the murder of his wife, desires that petitioner be granted exclusive custody of all three children. The trial judge then concluded that it is in the best interest of Amy Hope Moore to place her in complete custody and control of respondent, and that there is insufficient evidence to warrant removing Vickie Ann Moore and Sandra Annette Moore from the custody of petitioner. Based on the findings of fact and the conclusions of law, the trial judge ordered that respondent be granted custody of Amy Hope Moore, and that petitioner be granted custody of Vickie Ann Moore and Sandra Annette Moore.

From this order petitioner appeals to this Court.

Frazier T. Woolard for petitioner appellant.

Wilkinson & Vosburgh by John A. Wilkinson for respondent appellee.

CAMPBELL, Judge.

[1] Petitioner's first assignment of error is directed at the order of the trial judge consolidating the case involving the custody of Amy Hope Moore with the case involving the custody of her two older sisters, Vickie Ann Moore and Sandra Annette Moore. There is no merit in this assignment of error. Rule 42(a) of the North Carolina Rules of Civil Procedure provides:

> "When actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all of the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. When actions involving a common question of law or fact are pending in both the superior and the district

court of the same county, a judge of the superior court in which the action is pending may order all the actions consolidated, and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Both cases were pending in the district court. While the case involving the custody of the two older children had originated in the superior court, it had been transferred to the district court by an order entered 24 July 1970. Both cases being properly before the district court, it was within the discretion of the trial judge as to whether consolidation should be allowed. G.S. 1-1A, Rule 42(b); *Davis v. Jessup* and *Carroll v. Jessup*, 257 N.C. 215, 125 S.E. 2d 440 (1962); *Phelps v. McCotter*, 252 N.C. 66, 112 S.E. 2d 736 (1960); see also 1 McIntosh, N. C. Practice 2d, § 1342 (Supp. 1970). 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 (1970). Moreover, when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom. *Davis v. Jessup* and *Carroll v. Jessup, supra.* From the record before us, no abuse of discretion, injury or prejudice is made to appear.

[2] Petitioner next assigns as error the action of the trial judge in "failing to recognize the rights of Samuel Nick Moore regarding his position as a surviving parent and the custody of his children." Petitioner specifically contends that because Samuel Nick Moore expressed a desire that all three of his children live together with petitioner, the trial judge erred in disregarding that desire. There is no merit in this contention. " 'The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody.' . . ." *Wilson v. Wilson*, 269 N.C. 676, 153 S.E. 2d 349 (1967). The desires of the surviving parent with reference to the custody of his children are not binding on the court. See 3 Lee, N. C. Family Law, § 225, p. 30 (1963). Samuel Nick Moore, currently serving a life sentence for the murder of his wife (see *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); and *State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970)), is not in a position to decide the custody of his children.

We have reviewed the record in this case and the evidence adduced at the hearing supports the findings of fact of the trial judge and those findings support the judgment entered.

For the reasons stated, the judgment of the district court is

Affirmed.

Judges BRITT and GRAHAM concur.

HOOPER JOHNSON v. GLADYS EDWARDS BROWN

No. 715SC155

(Filed 26 May 1971)

1. **Negligence § 40— instructions on proximate cause — reversible error**

Trial court's instructions on proximate cause in an automobile accident case, in which the court mistakenly used the word "plaintiff" instead of "defendant" in instructing on a defendant's negligent breach of duty, *held* reversible error when the instruction is considered with the court's further instruction that the jury must find that defendant's negligence was "one of the proximate causes of the collision."

2. **Damages §§ 3, 16— damages for personal injuries — instructions which erroneously assumed permanent injuries**

It was error for the court to instruct the jury that they could assess damages for permanent personal injuries to the defendant where the defendant offered no evidence that he had sustained permanent injuries.

APPEAL by plaintiff from *Tillery, Judge,* September 1970 Session of Superior Court held in NEW HANOVER County.

Plaintiff alleged that on 22 April 1969 he received permanent personal injuries and his automobile was damaged by the actionable negligence of the defendant in the operation of her automobile at the intersection of Second and Market Streets in the City of Wilmington. Defendant denied the material allegations of the complaint and in a counterclaim alleged that she sustained personal injuries in the collision and her automobile was damaged by the actionable negligence of the plaintiff.

The plaintiff offered evidence which in substance tended to show that on the date alleged, he entered the intersection of Second and Market Streets as he traveled North on Second Street when the automatic traffic control signal facing him was green and that the defendant, who was operating her automobile East on Market Street, entered the intersection thereafter on a red traffic signal and collided with his car, causing him to suffer permanent personal injuries and damages.

The defendant offered evidence which in substance tended to show that on this occasion she entered this intersection when the traffic control signal facing her was green and that thereafter the plaintiff entered on a red traffic signal and caused the collision with her car, in which her car was damaged and she received personal injuries.

Issues were submitted and answered by the jury as follows:

"1. Was the plaintiff injured in his person and damaged in his property by the negligence of the defendant, as alleged in the Complaint?

ANSWER: No.

2. Did the plaintiff, by his own negligence, contribute to his injuries and damage, as alleged in the Answer?

ANSWER: _____

3. In what amount is plaintiff entitled to recover of the defendant for the injuries to his person?

ANSWER: _____

4. In what amount is plaintiff entitled to recover of the defendant for his property damage?

ANSWER: _____

5. Was the defendant injured in her person, and damaged in her property by the negligence of the plaintiff?

ANSWER: Yes.

6. Did the defendant, by her own negligence, contribute to her injuries and damage as alleged?

ANSWER: No.

7. In what amount is the defendant entitled to recover of the plaintiff for injuries to her person?

ANSWER: $1,500.00.

8. In what amount is the defendant entitled to recover of the plaintiff for her property damage?

ANSWER: $476.26."

From judgment on the verdict, the plaintiff appealed.

Aaron Goldberg for plaintiff appellant.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellee.

MALLARD, Chief Judge.

[1] Plaintiff assigns as error the following portion of the court's instruction to the jury on the first issue:

> "Was the plaintiff's negligent breach of duty the proximate cause or one of the proximate causes of resulting injury and damage?"

In this portion of the charge relating to proximate cause, the court used the word "plaintiff's" instead of "defendant's." While this, standing alone, may be considered harmless *lapsus linguae,* we think it may have confused the jury when it is considered with another portion of the charge on the first issue on proximate cause and assigned as error which reads:

> "It is required, however, that the plaintiff satisfy you from the evidence and by its greater weight that negligence on the part of the plaintiff was a proximate cause or one of the proximate causes of injury and damages."

In this latter instruction the court required the plaintiff to show by the greater weight of the evidence that negligence of "plaintiff" was "a proximate cause or one of the proximate causes of injury and damages." This is another confusing instruction on the first issue about proximate cause.

In the final mandate on this first issue, to which there was no exception, the court instructed the jury that if it was found that defendant's negligence "was one of the proximate causes of the collision between the vehicles and any resulting damage," to answer the first issue in the affirmative. When the words "was one of the proximate causes" are considered with the portions of the charge excepted to and assigned as error, we are of the opinion that the jury may have been confused as to what plaintiff had to prove in order to prevail on the first issue.

[2] Plaintiff also contends that the trial court committed error in charging the jury on the seventh issue as follows:

> "The rules for compensation, or the measure of damages on this issue for the defendant is the same as I gave to you before on the same issue for the plaintiff. The defend-

ant contends that you should answer this issue in the sum of $1500 or some other substantial amount."

In stating the rule as to the measure of damages on the third issue, the court said:

"The rule is that when a person is entitled to recover in a case of this kind, he is entitled to recover one compensation in a lump sum for all injuries, past, present and future, which you find to be the direct, natural, proximate result of the defendant's negligence. I charge you that as to any future suffering or damages which you may find as a result, that you would decrease any award along that line down to its present cash value, upon the theory that a dollar to be paid now for something that will occur in the future is worth more than if paid later. So, you will award upon that phase of the case, that is future suffering of damage, the present cash value of any future loss you may find Mr. Johnson may sustain. As to the things you may consider in determining the amount of money you will award to the plaintiff, if you award him anything, you may consider his age and occupation, the nature and extent of his business, the value of his services, any actual monetary loss he has had or will have in the future such as nurses' wages, doctor bills, medicine, hospital, and you will also consider the amount, if any, you find to be fair and reasonable compensation for suffering, both of body and mind, that you find proximately resulting to the plaintiff from the negligent act or acts of the defendant."

The plaintiff contends, and we agree, that upon the allegations and evidence of the plaintiff, it was proper for the court to instruct the jury on the third issue as to the measure of damages for *permanent* injuries. Plaintiff also contends, and we agree, that the defendant did not allege or offer any evidence of permanent injuries proximately resulting from the collision.

The defendant contends that the measure of damages in personal injury cases is the same and that it is only the application that differs. We do not agree. In Black's Law Dictionary, 4th Ed., the term "measure of damages" is defined as "the rule, or rather the system of rules, governing the adjustment or apportionment of damages as a compensation for injuries in actions at law." The rule or system of rules governing the adjustment or apportionment of damages as a compensation for

permanent injuries in *tort* actions is not the same as in *tort* actions where there are no permanent injuries. The main difference is that where there are no permanent injuries, there can be no award for future suffering or damages or for monetary loss in the future, "such as nurses' wages, doctor bills, medicine, hospital," and there is no necessity to decrease any award for future suffering or damages down to its present cash value.

Defendant argues that in connection with the third issue the court instructed the jury on permanent injury but that on the seventh issue the jury was not instructed on permanent injury. We do not agree. On the seventh issue the court said:

> "The *rules* for compensation, or the measure of damages on this issue for the defendant is the same as I gave to you before on the same issue for the plaintiff." (Emphasis added.)

When this instruction is compared with the instructions hereinabove set forth as given on the third issue which begins with "the rule is," we are unable to logically make the distinction defendant argues. This charge on permanent damages on the third issue was emphasized by the court in the final mandate on the seventh issue which begins with "I instruct you to use the same *rules* for compensation or measured damages as I gave you for the plaintiff * * *." (Emphasis added.) The rule or system of rules the jury was instructed to apply on the seventh issue thus embraced permanent damages.

"There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty." *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965). It is error to instruct the jury that they may assess damages for permanent personal injuries when there is no evidence from which a conclusion of permanent personal injuries proximately resulting from the wrongful act complained of may be drawn. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40 (1964); *Hood v. Kennedy,* 5 N.C. App. 203, 167 S.E. 2d 874 (1969); *Rogers v. Rogers,* 2 N.C. App. 668, 163 S.E. 2d 645 (1968).

Plaintiff has several assignments of error relating to the admission or rejection of evidence, most of which related to the physical condition of the plaintiff. The questions presented may not recur on a new trial. We hold that the error in the charge

on the question of proximate cause relating to the first issue, together with the error in the charge on the measure of damages, require that a new trial be had on all issues. It is so ordered.

New trial.

Judges PARKER and VAUGHN concur.

FRED WALLACE v. THE MUSIC SHOP, II, INC. AND ROYAL INDEMNITY COMPANY

No. 718IC306

(Filed 26 May 1971)

Master and Servant § 71— computation of average weekly wage in exceptional case — carpenter who was receiving Social Security

In computing the average weekly wage of a carpenter who was being employed for less than 52 weeks and whose earnings could not exceed $1680 annually under Social Security regulations, the Industrial Commission properly based its award on the carpenter's actual earnings in the job in which he was injured. G.S. 97-2(5).

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission filed 17 December 1970.

This proceeding was originally heard before Deputy Commissioner W. C. Delbridge in April 1970. The evidence reveals that on 9 October 1968 the plaintiff, Fred Wallace, age 66, was employed as a carpenter for the defendant, The Music Shop, II, Inc. (Music Shop). While in the course of his employment, the plaintiff, on 9 October 1968, accidentally injured his back, resulting in temporary total disability from the date of the injury until 3 July 1969, and a fifteen percent permanent partial disability since 3 July 1969. Music Shop had employed the plaintiff in September 1968 to remodel its place of business, which was expected to take a little over four weeks to complete. Mr. Wallace was paid at the rate of $2.50 per hour or $100 per week, and up to the date of the injury he had been paid a total of $450.

On cross-examination, the plaintiff testified that in 1967 he had retired from employment with Colonial Stores. After retirement he worked at a number of jobs as a carpenter, and earned the following during the year 1968: S. M. S., Inc., $630; Coastal Builders and Realty, $500; Pearson Building Rental, $7.50; and

Music Shop, $450, for a total of $1,587.50. The plaintiff was also receiving Social Security retirement benefits, and could earn a total of $1680 without any diminution of those benefits. The following appears in the cross-examination testimony of Mr. Wallace:

"Q. So, after your retirement in November of 1967 when you started drawing your Social Security benefits, you didn't intend to earn over $1,680.00.

"A. I earn all year all I could make.

"Q. Which was $1,680.00?

"A. No, sir, I worked right on. I drawed Social Security up until that time. If I made $3,000.00, I'd have to quit drawing Social Security."

From an opinion and award of Deputy Commissioner Delbridge compensating the plaintiff on the basis of $32.30 as his average weekly wage, the plaintiff appealed to the Full Commission.

After reviewing the evidence and hearing the contentions of the parties, the Full Commission, on 17 December 1970, filed an opinion and award which contained the following pertinent finding of fact:

"5. Plaintiff worked for defendant employer at a wage of $2.50 per hour for a 40-hour week and was paid $100.00 per week. He so worked for defendant employer for approximately four and a half weeks and received approximately $450.00 as his wage. Plaintiff's average weekly wage with defendant employer was $100.00. An average weekly wage computed on the basis of the actual wage received by plaintiff in this case is fair and just to both sides."

The defendants excepted to the method of computation as set forth in the quoted finding of fact and from the opinion and award of the Full Commission based thereon appealed to this Court.

White, Allen, Hooten and Hines by F. Fred Cheek, Jr., for plaintiff appellee.

Taylor, Allen, Warren and Kerr by John H. Kerr III for defendant appellants.

HEDRICK, Judge.

The question presented by the defendants' exceptions is whether the Industrial Commission correctly calculated the employee's average weekly wage. G.S. 97-2(5) sets forth five methods of computation which are as follows:

> "(1) 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. (2) Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. (3) Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community. (4) But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.
>
> * * *
>
> "(5) In case of disabling injury to a volunteer fireman under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman was earning in the employment wherein he principally earned his livelihood as of the date of injury." (Numbering ours.)

Obviously, the first and fifth methods prescribed in the statute for computing the average weekly wage of an injured employee are not applicable in this case. The defendant concedes that there is no factual basis for the application of the third method.

Defendant contends that the fact that the plaintiff at the time of his injury was drawing Social Security retirement benefits and his earnings could not exceed $1680 annually, and that he was only employed intermittently, are "exceptional reasons" which make utilization of the second prescribed method unfair and unjust to the employer. We do not agree.

The fourth prescribed method may not be used unless there has been a finding that use of the second method would produce results unfair and unjust to either the employee or employer. *Liles v. Electric Co.*, 244 N.C. 653, 94 S.E. 2d 790 (1956). Thus, since the Commission in the instant case made a finding that its use of the second method produced results that were "fair and just to both sides," our review is narrowed to a determination of whether the Commission's finding and conclusion in this regard is supported by the evidence.

In *Liles v. Electric Co., supra,* Bobbitt, J., now C.J., speaking for the Court, stated:

> "The words 'fair and just' may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just, within the meaning of G.S. 97-2(e), consist of such 'average weekly wages' as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury."

In *Barnhardt v. Cab Co.*, 266 N.C. 419, 146 S.E. 2d 479 (1966), the North Carolina Supreme Court held that it would be unfair to the employer and his insurance carrier to compute the average weekly wage of an injured employee by combining his earnings from the employment where he was injured with his earnings from other employment. The Court reasoned that it would be unfair to the employer and his insurance carrier to burden them with a liability out of proportion to employer's payroll and the insurance premium computed thereon. Sharp, J.,

speaking for the Court, said: "It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee."

It is our opinion that the reasoning of the Court in Barnhardt in determining what was *unfair* to the employer can be used in the instant case to determine what *is fair* to the employer. By computing the plaintiff's average weekly wage from his earnings from the employment in which he was injured, the employer's liability is in direct proportion to his payroll and the insurance premiums based thereon. This, we believe, is fair and just.

To compute the plaintiff's average weekly wage in the instant case from a consideration of the fact that he had an artificial maximum of $1680 placed on his earnings because he was retired and drawing Social Security benefits, would not only produce results unfair to the employee but would ignore the well established principle that an injured employee's average weekly wage must be computed from his *actual* earnings in the employment in which he is injured rather than his earning capacity. *Liles v. Electric Co., supra; Barnhardt v. Cab Co., supra; Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E. 2d 447 (1966); *Lovette v. Manufacturing Co.*, 262 N.C. 288, 136 S.E. 2d 685 (1964). We hold that the evidence supports the Commission's finding and conclusion that its use of the second prescribed method set out in the statute in computing the plaintiff's average weekly wage produced results "fair and just to both sides." The Commission's findings and conclusions adequately support the award. The opinion and award of the North Carolina Industrial Commission dated 17 December 1970 is affirmed.

Affirmed.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES MARION AYERS

No. 7117SC283

(Filed 26 May 1971)

1. **Burglary and Unlawful Breakings § 10— possession of burglarly tools — articles found in defendant's car — relevancy**

In trial of defendant for possession of morphine and possession of burglarly tools, evidence relating to cameras, watches, movie projectors and a pistol found upon search of defendant's car was admissible as relevant to the charge of possession of burglarly tools, notwithstanding defendant was acquitted of that charge.

2. **Criminal Law § 162— general objection — evidence competent for some purposes**

Where evidence is competent for some purposes, but not for all, an exception to the admission of such evidence for general purposes will not be sustained unless appellant, at the time of the admission of the evidence, asks that its purpose be restricted.

3. **Criminal Law § 84; Searches and Seizures § 1— search of automobile without warrant — probable cause — reliable informant**

Highway patrolman had probable cause to believe that defendant's automobile was carrying contraband, and thus lawfully searched the automobile without a warrant, where he had been informed by two Danville, Virginia, police officers that defendant's car contained alcoholic beverages, narcotics and a pistol, and such information was given to the Danville officers by an informant who was known to be reliable.

4. **Criminal Law §§ 76, 87— leading questions on voir dire — Miranda warnings**

Trial judge did not abuse his discretion in allowing the solicitor to ask an S.B.I. agent leading questions on *voir dire* to validate a *Miranda* warning.

5. **Narcotics § 4.5— instructions — actual and constructive possession**

In a prosecution for possession of morphine, the trial judge did not abuse his discretion when, after receiving a request from the jury for additional instructions as to the word "wilfully," he also instructed on actual and constructive possession.

APPEAL by defendant from *Beal, Special Judge,* October 1970 Session of ROCKINGHAM County Superior Court.

Defendant was charged in two bills of indictment with possession of morphine and with possession of burglary tools.

Evidence for the State tended to show that defendant, along with a companion, was apprehended by Officer James A. Parker of the State Highway Patrol, accompanied by Sergeant Cecil H.

Moore of the Reidsville Police Department, following receipt by Officer Parker of information from two Danville, Virginia, police officers to the effect that the defendant and his companion were planning to rob a bank and had narcotics, alcoholic beverages, and a pistol in the car. Officer Parker, followed by Sergeant Moore, gave chase and pulled defendant's automobile to the side of the road. Defendant's clothes were disheveled and Officer Parker asked defendant if he had been drinking. Defendant answered in the negative and denied having any alcoholic beverages in the car. At Officer Parker's request, defendant consented to a search of his car. In the course of the search, Officer Parker discovered a pouch with twelve hypodermic needles and a spoon. Defendant was then warned that he "had the right to remain silent and the right to hire a lawyer." Without objection Parker testified that defendant then said he used all the money he could steal to buy drugs. A more extensive search of the car turned up a suitcase full of tools, a pistol, several cameras, watches, and movie projectors, and a brown paper bag with a substance in it later identified by the State Bureau of Investigation as morphine. A State Bureau of Investigation agent was called to the scene and defendant was placed under arrest for possession of morphine. Defendant offered no evidence on his own behalf.

Defendant was found not guilty of possession of burglary tools, but was found guilty of possession of morphine. From a sentence of five years defendant appeals to this Court.

Attorney General Robert Morgan by Staff Attorney Burley B. Mitchell, Jr., for the State.

Vernon E. Cardwell and Darrell F. Holmes, Jr., for defendant appellant.

CAMPBELL, Judge.

[1, 2] Defendant's first assignment of error is directed at the admission into evidence of testimony concerning items found in the car that were not related to the charge of possession of morphine. Defendant contends that the evidence offered concerning cameras, watches and movie projectors found in the trunk of the car was offered only to prejudice the defendant and bore no relationship to the crimes charged. We do not agree. Defendant was charged with possession of morphine and with possession of burglary tools. While he was acquitted of the latter

charge and it is not now before this Court, the evidence concerning the items found in the car was properly admissible in evidence as relevant to the charge of possession of burglary tools. Every circumstance calculated to throw light upon the supposed crime is admissible and the weight of such evidence is for the jury. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965). Although defendant would have been entitled to an instruction limiting the introduction of such evidence, he did not request such an instruction. Where evidence is competent for some purposes, but not for all, an exception to the admission of such evidence for general purposes will not be sustained unless appellant, at the time of the admission of the evidence, asks that its purpose be restricted. *State v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863 (1948); *State v. Walker,* 226 N.C. 458, 38 S.E. 2d 531 (1946).

[1] Defendant's second, third, and fourth assignments of error all relate to evidence concerning the pistol that was found in the car. This evidence also relates to the charge of possession of burglary tools and was competent for that purpose. As no request to limit the admission of the testimony concerning the pistol for that purpose was made, these assignments of error are overruled.

Defendant next assigns as error the denial of his motion to suppress the evidence obtained through the search of his automobile. The search of the automobile was made without a search warrant but, under the facts of this case, we hold that no warrant was necessary. A suppression hearing had been held to determine the admissibility of the evidence. There, Officer Parker of the State Highway Patrol and Sergeant Moore of the Reidsville Police Department testified, and the judge found as a fact that the defendant freely and knowingly consented to the search of the automobile by Officer Parker.

[3] But the consent of the defendant was not a prerequisite to a valid search. The search would have been valid and the evidence obtained as a result of the search admissible even if the defendant had not consented. Officer Parker stopped defendant's car after being told by two Danville, Virginia, police officers that defendant's car contained alcoholic beverages, narcotics, and a pistol. This information was given to the Danville officers by an informant who was known to be reliable. Thus, Officer Parker had probable cause to believe the automobile was

carrying contraband. The Supreme Court of the United States has ruled that a search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway. *Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

[4] Defendant also assigns as error the action of the trial judge in allowing the solicitor to ask certain leading questions of R. K. Bulla, the State Bureau of Investigation agent who assisted Officer Parker. Defendant contends that it was error to allow the solicitor to ask leading questions to validate a *Miranda* warning. This occurred during a *voir dire* examination. The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, in the absence of abuse of discretion. *State v. Patton,* 5 N.C. App. 164, 167 S.E. 2d 821 (1969); *State v. Fowler,* 1 N.C. App. 438, 161 S.E. 2d 753 (1968). No abuse of discretion was shown in the record.

[5] Defendant next assigns as error the giving of additional instructions by the trial judge after a request from the jury. Defendant contends that the trial judge erred when, after receiving a request for additional instructions as to the word "wilfully," he also instructed on actual and constructive possession. We find no merit in this contention. It is within the discretion of the trial judge as to how much of a charge to give the jury. As the entire charge was not set out in the record, we are unable to determine the extent to which the jury had already been charged on actual and constructive possession. From the record, we find no abuse of discretion.

We have carefully reviewed defendant's other assignments of error and find them to be without merit. Defendant had a fair trial, free from prejudicial error.

No error.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. CLAUDE FRANK MOFFITT

No. 7118SC200

(Filed 26 May 1971)

1. **Criminal Law § 91— denial of continuance — change in defense counsel day before trial**

Trial court did not err in the denial of defendant's motion for continuance made on the ground that the public defender who was first assigned as defense counsel was involved in another court trial and was unable to represent defendant on the day his case was calendared for trial, where another attorney from the public defender's staff assumed responsibility for the case on the day before it was tried, the attorney adequately represented defendant in his trial and appeal, and the attorney had opportunity to confer with defendant before trial and conferred with the public defender who made available to him the results of the prior investigation and preparation.

2. **Criminal Law § 91— motion for continuance**

A motion for continuance is addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable in the absence of an abuse of discretion.

3. **Constitutional Law § 30— speedy trial — six months between arrest and trial**

Delay of six months between defendant's arrest and trial, during a portion of which time defendant was confined in jail in another county awaiting trial on other charges, was not so unreasonable as to create a reasonable possibility of prejudice, and was not deliberately and unnecessarily occasioned by the State.

4. **Forgery § 2— indictment — instrument capable of effecting fraud**

Indictment for forgery and uttering which alleges that the forged instrument was a bank check and sets out its contents in full sufficiently shows the nature of the instrument and that it was capable of effecting a fraud.

5. **Criminal Law § 66— out-of-court identification — necessity for voir dire**

When a defendant objects to evidence of an out-of-court photographic or corporal identification, a *voir dire* should be conducted and all relevant facts should be elicited and all factual questions determined.

6. **Criminal Law § 66— photographic identification**

Photographic identification procedure was not impermissibly suggestive where witness selected defendant's photograph from an album containing at least 50 photographs.

7. **Criminal Law § 66— photographic identification — voir dire — failure to make findings**

Defendant was not prejudiced by failure of the trial court on *voir dire* to make findings, conclusions, and a record determination

on the question of whether the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification, where the evidence presented on *voir dire* was uncontradicted and in no way points to a possibly illegal procedure, the court's ruling that evidence of the photographic identification was competent being tantamount in this case to a finding that the identification procedure was legal.

APPEAL by defendant from *Crissman, Judge,* 30 October 1970 Session of Superior Court held in GUILFORD County.

Defendant was tried and convicted under a bill of indictment charging him with forgery and with uttering a forged instrument. Judgment was entered imposing active consecutive prison sentences of five years and defendant appealed.

Attorney General Morgan by Trial Attorney Cole for the State.

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District by R. D. Douglas III for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error the court's refusal to grant his motion for a continuance and also the court's refusal to allow his motion to quash the bill of indictment on the ground he was not afforded his constitutional right to a speedy trial. These assignments of error are overruled.

[1] Defendant's motion for a continuance was grounded upon the fact the public defender who was first assigned as defense counsel was involved in another court trial and unable to represent defendant on the day this case was calendared for trial. It affirmatively appears, however, that another attorney from the public defender's staff assumed responsibility for this case on the day before it was tried, and that he adequately represented defendant throughout the trial and on this appeal. Counsel admits that he had opportunity to confer with defendant before trial, and that he also conferred with the public defender who made available to him the results of the prior investigation and preparation. Counsel is unable to point out any specific manner in which a continuance would have aided him in the presentation of defendant's defense.

[2] A motion for a continuance is addressed to the sound discretion of the trial judge, and his ruling thereon is not review-

able in the absence of an abuse of discretion. *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593. No abuse of discretion has been shown.

[3] Approximately six months elapsed between defendant's arrest and his trial. The record suggests that during a portion of this time defendant was confined in jail in another county awaiting trial on other charges. Suffice to say defendant has failed to show that the delay of six months was so unreasonable as to create a reasonable possibility of prejudice, or that the delay was deliberately and unnecessarily occasioned by the State. See *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274.

[4] Defendant attacks the sufficiency of the indictment, contending that it fails to allege that the instrument was apparently capable of effecting a fraud. The indictment alleges that the instrument was a bank check and sets out its contents in full. This sufficiently shows the nature of the instrument and that it was capable of effecting a fraud.

Finally, defendant contends that the court erred in permitting testimony relating to an out-of-court photographic identification. We find no objection in the record to the in-court identification of defendant by the same witness who testified that he had made an out-of-court photographic identification. Thus no question is presented on this appeal as to whether the in-court identification was tainted by an unlawful out-of-court photographic identification. The question raised is simply whether the evidence of the out-of-court photographic identification was properly admitted into evidence over objection.

[5] When a defendant objects to evidence of an out-of-court photographic or corporal identification, a *voir dire* should be conducted and all relevant facts should be elicited and all factual questions determined. *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583.

[6] Here, the court conducted a *voir dire* hearing for the purpose of eliciting the relevant facts surrounding the identification procedure. Defendant did not testify or offer evidence. The evidence offered by the State was uncontradicted and tended to show that the witness selected defendant's photograph from at least fifty photographs contained in an album. There is nothing in the *voir dire* evidence which in any way suggests that the "photographic identification procedure" was "so impermissibly

suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons v. United States,* 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 1253, 88 S. Ct. 967, 971.

Defendant complains that the court, after hearing the evidence on *voir dire,* failed to make specific findings and conclusions.

Before evidence of an out-of-court identification is received over objection, the trial court has the duty to: (1) conduct a *voir dire* hearing for the purpose of eliciting all relevant facts surrounding the identification procedure, (2) evaluate the evidence presented on *voir dire* and make a determination of the crucial questions involved. *State v. Moore, supra; State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744. Where the facts are in dispute this will necessarily involve factual findings and conclusions of law.

[7] We agree that the trial judge would have been well advised to make findings, conclusions and a record determination on the question of whether the photographic identification procedure in this case was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. However, since the evidence presented on *voir dire* was uncontradicted and in no way points to a possibly illegal procedure, we fail to see where defendant has been prejudiced.

In *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741, we find: "While it is better practice for a judge on *voir dire* to make finding of fact and enter it in the record, a failure to do so is not fatal." In that case it was held that the ruling that the evidence in question was competent was of necessity bottomed on the finding that the search in question was legal. See also *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

It is our opinion, and we so hold, that under the circumstances of this case the court's ruling that the evidence in question was competent was tantamount to a finding that the photographic identification procedure was legal.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. DOVER ANDREWS

No. 7125SC255

(Filed 26 May 1971)

1. **Larency § 4— larceny of timber — indictment**

Indictment alleging that defendant entered the lands of the United States and cut and carried away timber, the property of a lumber company, does not charge the offense of felonious larceny of timber under G.S. 14-80, since the statute requires that the indictment allege that the property taken was the property of the owner of the land.

2. **Criminal Law § 13— jurisdiction — valid indictment**

It is an essential of jurisdiction that a criminal offense be sufficiently charged in a warrant or indictment.

APPEAL from *McLean, Judge,* 23 November 1970 Session of Superior Court of BURKE County.

Defendant was charged under G.S. 14-80 with felonious larceny of timber. He entered a plea of not guilty, was convicted of the lesser included offense of misdemeanor larceny of timber, and appealed from the judgment entered on the verdict.

Attorney General Morgan, by Trial Attorney Chalmers, for the State.

Simpson and Martin, by Gene Baker, for defendant appellant.

MORRIS, Judge.

The indictment alleges that the defendant "unlawfully, wilfully, and feloniously, not being the present owner or *bona fide* claimant thereof, entered upon lands of the United States Government in Burke County, North Carolina, there being poplar, oak and white pine timber trees growing or being thereon, the same being the property of Andrew Gennett, Nat Gennett, and others, a partnership doing business as Gennett Lumber Company, and did then and there unlawfully, wilfully and feloniously steal, take, and carry away the property of Andrew Gennett and Nat Gennett and others, a partnership doing business as Gennett Lumber Company, consisting of poplar, oak and white pine timber wood, which the said Andrew Gennett, Nat Gennett and others, a partnership, doing business as Gennett Lumber Company, had purchased from the United States Forest Service, and

being the owner of said wood timber of the value in excess of $17,000 Dollars, then and there being located upon said land, with the felonious intent to permanently deprive Andrew Gennett, Nat Gennett, and others, a partnership, doing business as Gennett Lumber Company, of their possession of said wood timber, and with the felonious intent to convert said wood timber to his own use, the same without the consent or authorization of Andrew Gennett, Nat Gennett and others, a partnership, doing business as Gennett Lumber Company, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The statute under which defendant was charged is G.S. 14-80 "Larceny of wood and other property from land," which provides:

> "If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or any other kind of property whatsoever, growing or being thereon, *the same being the property of the owner of the premises,* or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor." (Emphasis ours.)

The undisputed evidence in this case was that The United States of America, acting through the Forest Service, United States Department of Agriculture, (Forest Service) and Gennett Lumber Company (Gennett) entered into a contract under which the Forest Service agreed to permit Gennett to cut and Gennett agreed to cut the timber included in the contract, and Forest Service agreed to sell and Gennett agreed to purchase and remove such cut timber subject to the provisions of the contract. One of the provisions was:

> "All right, title, and interest in or to any timber included in this contract shall remain in the United States until it has been paid for, cut and scaled; and the right, title and interest in or to any timber which has been paid for, cut and scaled but not removed from the sale area by the purchaser within the period of this contract or any adjustment or extension thereof shall revest in the United States."

The sale area was comprised of 2105 acres, more or less, within the Pisgah National Forest, was located in Compartment #130, and was made up of some 14 units. The units involved in this charge were units 3, 5 and 6. Gennett had done no cutting at all on units 3 and 6 which contained a total of approximately 487,208 feet of timber. They had partially completed cutting unit 5 and had left, when they stopped cutting in that area, some 60,000 feet of white pine. The contract required that the purchase price be paid to the United States for each unit before any cutting was done. The purchase price for the timber in unit 5 had been paid, but no part of the purchase price of units 3 and 6 had been paid.

Defendant admitted cutting and selling the timber but contended he had done so under authority and permission granted by Gennett's agent and supervisor. Gennett admitted contracting with defendant to clean out the units and cut the yellow pine after Gennett had completed a unit, but denied giving any authority or permission to cut any timber other than yellow pine in the cleaning out process.

The undisputed evidence of the State shows that the property taken was the property of the United States under the terms of the contract. The indictment charged defendant with entering upon the lands of the United States and cutting and carrying away timber belonging to Gennett Lumber Company. Had the indictment properly charged an offense under G.S. 14-80, this fatal variance in the charge and proof would have entitled defendant to a dismissal upon his motion. *State v. Cooke, et als.,* 246 N.C. 518, 98 S.E. 2d 885 (1957).

[1] However, we do not order a new trial because in our view of the matter, judgment must be arrested. We are of the opinion that the indictment does not charge defendant with the commission of an offense under G.S. 14-80. The statute requires that the person indicted must not be "the present owner or *bona fide* claimant" of the lands entered, and that the property carried off must be "the property of the owner of the premises, or under his control, keeping or care." The particularly peculiar wording of the statute clearly requires that the indictment allege that the property taken was the property of the owner of the land. *State v. Boyce,* 109 N.C. 739, 14 S.E. 98 (1891), see concurring opinion of Justice Shepherd. Here the indictment alleges that defendant, not the owner or *bona fide* claimant thereof, entered

the lands of the United States and cut and carried away timber, the property of Gennett Lumber Company. The statute was enacted in 1866, immediately after the Civil War, to suppress aimless wanderers from entering land and doing great damage. Prior to the enactment of this statute, landowners had little or no protection against the willful and unlawful taking from their land property which was not, either by common law or previous statute, the subject of larceny. *State v. Vosburg,* 111 N.C. 718, 16 S.E. 392 (1892).

No latitude of construction is permitted in the interpretation of a penal statute. This statute is highly penal in character. We are not at liberty to extend its import by implication or equitable construction to include an offense not clearly described. *State v. Jones,* 7 N.C. App. 166, 171 S.E. 2d 468 (1969); *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329 (1967).

[2] Defendant did not move in arrest of judgment. However, it is elementary that an essential of jurisdiction is that a criminal offense shall be sufficiently charged in the warrant or indictment. *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770 (1968). This defect appears on the face of the record proper. We, therefore, *ex mero motu* arrest the judgment, and the State, if it so desires, may proceed against the defendant on a legally sufficient instrument. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1969) and cases there cited; *State v. Stokes, supra.*

Judgment arrested.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES LEAK

No. 7118SC258

(Filed 26 May 1971)

1. Arrest and Bail § 6— resisting arrest — sufficiency of evidence

Evidence that defendant had been taken into custody under a warrant and carried before a magistrate and that defendant began struggling with police officers while he was being carried from the magistrate's office to the jail, *held* sufficient to support a jury finding of defendant's guilt of resisting arrest.

2. **Arrest and Bail § 6— when an arrest terminates**

An arrest does not necessarily terminate the instant a person is taken into custody; arrest also includes bringing the person personally within the custody and control of the law.

3. **Assault and Battery § 15— instructions on apparent necessity**

Defendant in an assault case was not prejudiced by the trial court's failure to charge on apparent necessity in one part of its instructions on self-defense, where the court immediately thereafter gave an instruction on apparent necessity.

4. **Criminal Law § 168— review on appeal — construction of the charge**

The charge must be construed contextually.

APPEAL by defendant from *Crissman, Judge,* at the 17 November 1970 Session of GUILFORD Superior Court.

Three warrants were issued against defendant in the district court charging him as follows: (1) resisting arrest by Police Officer B. F. Collins, in violation of G.S. 14-223; (2) assault on public Officer Palmer, in violation of G.S. 14-33(b) (6); and (3) assault on Police Officer Collins in violation of G.S. 14-33(b) (6). From convictions in district court, defendant appealed to superior court where he was tried *de novo.* A jury found him guilty in all three cases, and from judgment imposing prison sentences, he appealed.

Attorney General Robert Morgan by William Lewis Sauls, Staff Attorney, for the State.

Robert D. Douglas III for defendant appellant.

BRITT, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion for nonsuit interposed in the resisting arrest case.

Pertinent evidence, viewed in the light most favorable to the state, tended to show: Defendant's grandfather with whom he lived caused a warrant to be issued against defendant charging him with malicious injury to real property. Officer Collins had possession of the warrant for purpose of arresting the defendant. While patrolling on a High Point street, Officer Collins saw defendant and drove his patrol car close to defendant. Mr. Collins advised defendant that he had a warrant for his arrest and asked defendant to go with him to the police station.

After some complaining, defendant entered the patrol car and accompanied Officer Collins to a magistrate's office at the police station where defendant was booked and advised that his bond was $100. Defendant tried to get the magistrate to waive the bond but the magistrate refused to do so. Officer Collins and another officer then started escorting the defendant to the jail and defendant asked that he be allowed to make a telephone call. Officer Collins told him that there was a telephone in the jail and that defendant would be allowed to make a telephone call in the jail. Defendant observed a telephone in an assembly room near the magistrate's office and insisted on using that telephone. Officer Collins told him that he could not use that telephone; defendant then struck Officer Collins in the face with his fist and proceeded to fight Officer Collins and the other officer. They finally subdued defendant, carried him to the jail and delivered him to Officer Palmer, the assistant jailer. A short while thereafter, defendant committed the charged assault on Officer Palmer.

Defendant contends that at the time he was in the magistrate's office his arrest had been consummated, that the acts alleged to have occurred between the magistrate's office and the jail were not in connection with his arrest, therefore, he was not guilty of resisting arrest. We do not agree with this contention.

In *Hadley v. Tinnin,* 170 N.C. 84, 86 S.E. 1017 (1915), our Supreme Court defined "arrest" as follows:

> "The term 'arrest' has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by the process."

In 6 C.J.S., Arrest, § 1, we find the following:

> "In criminal procedure an arrest consists in the taking into custody of another person under real or assumed authority for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offense."

[2] We hold that an "arrest" does not necessarily terminate the instant a person is taken into custody; arrest also includes "bringing the person personally within the custody and control of the law." The arrest of defendant in the instant case did not terminate until he was delivered to the jailer and properly confined. The assignment of error is overruled.

[3] Defendant next assigns as error the trial court's instructions to the jury relative to defendant's plea of self-defense on the assault charges. By his testimony defendant presented evidence tending to show that he did not commit assaults upon Officers Collins and Palmer but that these officers committed unprovoked assaults upon him; that his testimony raised the doctrine of self-defense. He contends that the trial court failed to charge that a person may act in self-defense when necessary or *apparently* necessary to protect himself from death or bodily harm.

[4] It is well settled that the appellate courts must consider a trial judge's charge contextually and that an excerpt from the charge will not be held prejudicial even though erroneous if the charge considered as a whole is correct. 1 Strong, N. C. Index 2d, Appeal and Error, § 50. It is true that the portion of the charge complained of did not include *apparent* necessity; however, immediately thereafter the trial court charged: "The force cannot be excessive. This means that the defendant had the right to use only such force as REASONABLY APPEARED TO HIM TO BE NECESSARY UNDER THE CIRCUMSTANCES to protect himself from bodily injury or offensive physical contact." (Emphasis added.)

We hold that the defendant was not prejudiced by the portion of the charge complained of, therefore, the assignment of error pertaining thereto is overruled.

Finally, defendant assigns as error the failure of the court to adequately define "resisting arrest." Defendant's argument under this assignment is similar to his argument under his first assignment of error. We do not agree but hold that the court's instructions to the jury, considered contextually, were free from prejudicial error and the assignment of error is overruled.

Defendant received a fair trial, free from prejudicial error, and the sentences imposed were within the limits prescribed by statute.

No error.

Judges CAMPBELL and GRAHAM concur.

HORACE C. WHEELESS v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 718DC232

(Filed 26 May 1971)

1. **Insurance §§ 69, 108; Limitation of Actions § 4— claim under uninsured motorist clause — accrual of action**

A cause of action for the recovery of property damages under the uninsured motorist clause of an automobile liability policy accrues when the damages are sustained, and not when the insurer refuses an injured party's demand for payment.

2. **Insurance § 69— recovery under uninsured motorist clause — accrual of insurer's obligation to pay**

An insurer becomes obligated to pay under an uninsured motorist clause when the insured sustains damages under circumstances entitling him to recover from the owner or operator of an uninsured automobile.

3. **Limitation of Actions § 1— construction of statute — unavailability of facts relating to cause of action**

The unavailability of information concerning a fact which must be proved in order for a plaintiff to recover does not interrupt or delay the operation of the statute of limitations.

4. **Insurance § 69— action under uninsured motorist clause — statute of limitations**

Action to recover property damage under uninsured motorist clause was barred by plaintiff's failure to institute the action within three years from the date that damage was sustained. G.S. 1-52(1).

APPEAL by defendant from *Nowell, District Judge,* 16 November 1970 Session of District Court held in WAYNE County.

Plaintiff seeks recovery for property damage under the uninsured motorist clause of an automobile liability insurance policy issued by defendant. The collision giving rise to plaintiff's claim occurred 14 May 1966. This action was instituted 19 March 1970.

Defendant pleaded the three year statute of limitations, G.S. 1-52, in bar of the action and moved for judgment on the pleadings. The motion was denied and defendant appealed.

Braswell, Strickland, Merritt & Rouse by Roland C. Braswell for plaintiff appellee.

Smith, Anderson, Dorsett, Blount and Ragsdale by John L. Jernigan for defendant appellant.

GRAHAM, Judge.

Rule 4, Rules of Practice in the Court of Appeals of North Carolina, was amended 20 January 1971 and now provides:

> "From the ruling on an interlocutory motion, unless provided for elsewhere. Any interested party may enter an exception to the ruling on the motion and present the question thus raised to this Court on the final appeal; provided, that when any interested party conceives that he will suffer substantial harm from the ruling on the motion, unless the ruling is reviewed by this Court prior to the trial of the cause on its merits, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order ruling on the motion."

The above rule, as amended, was not in effect at the time defendant appealed in this case. For this reason, and also because of the nature of the question involved, we have elected to treat defendant's appeal as a petition for *certiorari,* allow it, and pass on the merits of the question raised.

[1] The sole question presented is: When did the statute of limitations begin running with respect to plaintiff's claim under the uninsured motorist provisions of the insurance policy issued by defendant? If, as defendant contends, the cause of action accrued at the time damages were sustained, the suit is barred by the three year statute of limitations provided for contract actions. G.S. 1-52(1). Plaintiff contends that the cause of action did not accrue, and consequently the statute of limitations did not start running, until demand for payment under the policy was made and refused by defendant. The record does not show when this event occurred, but presumably plaintiff could show that it was within the three year period preceding the institution of this suit:

" 'Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. . . . When the statute of limitations begins to run it continues until stopped by appropriate judicial process.' *Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570; *Peal v. Martin,* 207 N.C. 106, 176 S.E. 282; *Washington v. Bonner,* 203 N.C. 250, 165 S.E. 683; 5 Strong's N. C. Index 2d, Limitation of Actions § 4." *Insurance Co. v. Insurance Co.,* 277 N.C. 216, 176 S.E. 2d 751.

The uninsured motorist clause of the policy provides in pertinent part:

> " 'To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile. . . .
>
> For the purpose of this endorsement, determination as to whether the insured or such legal representative is legally entitled to recover such damages, and if so, the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree and the insured so demands, by arbitration; but if the insured elects not to arbitrate, the liability of the company shall be determined only in an action against the company and no prior judgment against any person or organization alleged to be legally responsible for such damages shall be conclusive on the issue of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company. In any action against the company, the company may require the insured to join such person or organization as a party defendant.' "

Justice Branch, speaking for the Supreme Court in *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102, set forth elements of proof necessary to effect recovery under an uninsured motorist endorsement:

> "The insured, in order to be entitled to the benefits of the endorsement, must show (1) he is legally entitled to recover damages, (2) from the owner or operator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the ownership, maintenance, or use of the uninsured automobile."

In the cases of *Wright v. Casualty Co.* and *Wright v. Insurance Co.*, 270 N.C. 577, 155 S.E. 2d 100, it was expressly held that the institution of suit by an insured against an uninsured motorist is not a condition precedent to an insurer's liability under an uninsured motorist clause in an insurance contract.

[2] We find nothing in the uninsured motorist clause, the applicable statutes, or previously decided cases which suggests

that an insured must negotiate with an insurer, make demand for payment, or submit his claim to arbitration before having standing to institute suit for recovery. Suit may be instituted when the insurer becomes obligated to pay. An insurer becomes obligated to pay under an uninsured motorist clause of a policy at the time the insured sustains damages under circumstances entitling him to recover from the owner or operator of an uninsured automobile.

[3] Plaintiff calls attention to the fact delays are often involved in determining whether a vehicle was an uninsured vehicle within the meaning of a policy of insurance and the applicable statutes. However, the unavailability of information concerning a fact which must be proved in order for a plaintiff to recover does not interrupt or delay the operation of the statute of limitations. "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action." *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508.

[4] We hold that plaintiff was at liberty to sue on the claim now asserted at the time his damages were sustained. The complaint shows on its face that the suit was not brought within three years of that time as required by statute. Plaintiff has shown no disability which prevented the institution of suit within that period. Therefore, defendant's motion for judgment on the pleadings should have been allowed.

Reversed.

Judges CAMPBELL and BRITT concur.

IN RE: KATHY LEE HARRELL, JAMES A. HARRELL, JR. AND LAURIE DEAN HARRELL, MINORS

No. 712DC223

(Filed 26 May 1971)

1. Divorce and Alimony § 24— modification of custody order — changed circumstances

As used in G.S. 50-13.7, "changed circumstances" means such a change as affects the welfare of the child.

2. **Divorce and Alimony § 24; Infants § 9— child custody — wishes of child**

While the wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the custody contest is between parents, the child's wishes are not controlling.

3. **Divorce and Alimony § 24— modification of custody order — changed circumstances — wishes of child**

The evidence supported the court's finding that there had been no showing of changed circumstances which would warrant a change of the custody of a minor child from the father to the mother, notwithstanding the child wished to reside with his mother and had twice run away from his father's home to visit his mother.

APPEAL by movant from an order of *Ward, District Judge,* entered at the 6 November 1970 Session of the District Court of BEAUFORT County, denying a motion in the cause to modify the custody order of Hubbard, Judge, dated 19 October 1966.

Facts pertinent to this appeal are as follows: On 26 October 1961, a *habeas corpus* proceeding to determine the custody of Kathy Lee Harrell, James A. Harrell, Jr., and Laurie Dean Harrell was filed in the Superior Court of Beaufort County. At that time the children were 7, 4 and 3 years of age, respectively. On 9 December 1961, Judge Paul entered an order dividing the custody of the three children between the maternal and paternal grandparents. On 7 September 1963, Judge Peel entered an order modifying the prior orders of the court and awarding the custody of the children to the father, James A. Harrell, Sr. On 2 January 1964, Judge Peel entered an order continuing the order entered 7 September 1963. On 19 October 1966, Judge Hubbard, upon petition of the mother, modified the order of Judge Peel dated 2 January 1964 by changing the custody of Kathy Lee Harrell from the father to the mother but continuing the custody of James A. Harrell, Jr., and Laurie Dean Harrell in the father.

On 23 October 1970, Ruby Paul Tankard, mother of the children, filed a motion in the cause in the District Court to have the order of Judge Hubbard dated 19 October 1966 modified by awarding the custody of James A. Harrell, Jr., and Laurie Dean Harrell to the mother. On 6 November 1970, District Judge Ward, after hearing evidence, made findings of fact and entered an order denying the motion in the cause to change the

custody of James A. Harrell, Jr., and Laurie Dean Harrell. To the portion of the order regarding the custody of James A. Harrell, Jr., the movant excepted and appealed.

Frazier T. Woolard for movant appellant.

Wilkinson & Vosburgh by James R. Vosburgh for respondent appellee.

HEDRICK, Judge.

The exceptions in the record present the question of whether the findings of fact are supported by the evidence, and whether the facts found support the order continuing custody of James A. Harrell, Jr., in the father under the terms and conditions of the order entered by Judge Hubbard dated 19 October 1966.

The pertinent part of Judge Hubbard's order which petitioner seeks to have modified reads as follows:

> "The court having heard the evidence of both parties and having had a conference with the parties and their counsel finds that the present interests of said minors will best be served by awarding their custody and control as set forth below in this order:
>
> "It is ORDERED, ADJUDGED AND DECREED as follows:
>
> * * *
>
> "2. That for the present time custody of James A. Harrell, Jr. and Laurie Dean Harrell shall remain with the father, James A. Harrell, subject to visitations as set forth herein."

G.S. 50-13.7(a) reads as follows:

> "An order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."

Judge Ward's finding "that there was not a sufficient change of circumstances shown which would justify a change in the custody order previously entered by Judge Hubbard in this cause," is conclusive and binding upon this court if supported by competent evidence. *In Re Bowen,* 7 N.C. App. 236, 172 S.E. 2d 62 (1970); *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967).

In *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967), Justice Branch stated:

> "When plaintiff moved that the original order be vacated and either modified or eliminated, he assumed the burden of showing that circumstances had changed between the time of the order and the time of the hearing upon his motion."

[1] "Changed circumstances" as used in the statute, G.S. 50-13.7, means such a change as affects the welfare of the child. *Crosby v. Crosby, supra; Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371; *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153.

[2, 3] The evidence offered at the hearing before Judge Ward consisted of the oral testimony of the three children, the movant and her husband, and the father of the children, together with copies of the many orders entered by the three judges who had heard this case from time to time since 26 October 1961. The testimony related principally to a showing that the son, James A. Harrell, Jr., wished to leave his father's home to reside with his mother and to the fact that he had demonstrated his wishes by running away on two occasions from his father's home in Washington, N. C., to visit his mother in Bath, N. C. There was no evidence as to what the boy's wishes were at the time of the entry of the order of Judge Hubbard. There was no evidence of a change of circumstances affecting the welfare of the boy between the time of the entry of the order of Judge Hubbard and the hearing before Judge Ward. There was no evidence that either parent's ability or fitness to provide a home for the boy had changed since the entry of the order dated 19 October 1966. We are aware that 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 his wishes are not controlling. *Elmore v. Elmore,* 4 N.C. App. 192, 166 S.E. 2d 506 (1969). Judge Ward was aware of the wishes of the child, and he was fully cognizant of what actions the boy might take to satisfy his wishes, yet he did not feel that the custody order should be modified. The parties were all before Judge Ward, and he had an opportunity to observe their demeanor as well as consider the evidence.

In our opinion, the evidence in this record would not support a finding of "changed circumstances" affecting the welfare

of James A. Harrell, Jr., that would permit a modification of Judge Hubbard's order by changing the custody of James A. Harrell, Jr., from the father to the mother. We hold that Judge Ward's findings of fact and conclusions of law are supported by the evidence, and the order entered thereon is affirmed.

Affirmed.

Judges BROCK and MORRIS concur.

EDWARD LEE BOONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF FRANCES D. BOONE, DECEASED, AND WIFE, JOSEPHINE BRIGHT BOONE v. SHIRLEY LOVICK BROWN AND HUSBAND, ROBERT BROWN, AND THEODORE LOVICK AND WIFE, JUNE S. LOVICK

No. 718SC65

(Filed 26 May 1971)

Husband and Wife § 4— conveyances between husband and wife — failure to comply with statutes — invalidity of deed

A wife's deed which purported to convey to the husband a life estate in a house and lot *held* void where (1) the wife was not privately examined; (2) the certifying officer made no findings or conclusions as to whether the deed was unreasonable and injurious to the wife; and (3) the certifying officer was a notary public and as such was not one of the officials authorized by law to make the acknowledgment. G.S. 52-6; G.S. 10-4(a)(1). The statute which validates certain contracts between husband and wife does not apply to this case. G.S. 52-8.

APPEAL by petitioners from *Peel, Judge,* 14 September 1970 Civil Session of Superior Court held in LENOIR County.

This is a Special Proceeding to sell a house and lot in Kinston, N. C., on petition for partition. Respondents pleaded sole seizin. By agreement the cause was heard by the court upon stipulations as to the facts, which may be summarized as follows:

Frances D. Boone, now deceased, was formerly sole owner of the property. She was the wife of the petitioner, Edward Lee Boone, and was the mother by a previous marriage of the respondents, Shirley Lovick Brown and Theodore Lovick. On 9 February 1956 she signed a deed which, after reserving a life estate to herself, and purporting to convey a life estate to her husband, purported to convey the remainder interest in the prop-

erty in equal shares to her husband and her two children. The certificate of acknowledgment on this deed was as follows:

"North Carolina
Lenoir County

Personally appeared before me this day Frances D. Boone, signer of the foregoing deed, and acknowledged the due execution thereof for the purposes therein expressed.

Witness my hand, and Notarial seal this the 19 day of February, 1956.

/s/ Nell P. Stansell (SEAL)
Notary Public

My commission expires:
6/5/57"

The deed was recorded in the Lenoir County Registry on 23 February 1956. Frances D. Boone died on 20 February 1966 leaving a last will dated 10 June 1954 by which she devised the property in equal shares to her two children, the respondents. The will was duly admitted to probate.

Petitioner contends he owns a life estate and that he and the respondents, Shirley Lovick Brown and Theodore Lovick, are tenants in common of the remainder, each owning a one-third undivided interest in the property. Respondents deny petitioner owns any interest in the property and contend they are the sole owners.

On the stipulated facts, the court concluded as a matter of law that the purported deed dated 9 February 1956 from Frances D. Boone as grantor was void and that the respondents, Shirley Lovick Brown and Theodore Lovick, are sole owners of the property as tenants in common. From judgment in accord with these conclusions, petitioner appealed.

Wallace, Langley & Barwick by F. E. Wallace, Jr., for petitioner appellant.

White, Allen, Hooten & Hines by John R. Hooten, for respondent appellees.

PARKER, Judge.

A deed by which a wife undertakes to convey an interest in her real estate to her husband during their coverture is a con-

tract between them to which the provisions of G.S. 52-6 apply. *Butler v. Butler,* 169 N.C. 584, 86 S.E. 507. Our Supreme Court has uniformly held that unless the requirements of that statute are complied with, such a deed is void. *Combs v. Combs,* 273 N.C. 462, 160 S.E. 2d 308; *Walston v. College,* 258 N.C. 130, 128 S.E. 2d 134; *Brinson v. Kirby,* 251 N.C. 73, 110 S.E. 2d 482; *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165; *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624; *Fisher v. Fisher,* 217 N.C. 70, 6 S.E. 2d 812; *Caldwell v. Blount,* 193 N.C. 560, 137 S.E. 578; *Best v. Utley,* 189 N.C. 356, 127 S.E. 337; *Singleton v. Cherry,* 168 N.C. 402, 84 S.E. 698; *Sims v. Ray,* 96 N.C. 87, 2 S.E. 443.

In the acknowledgment of the deed under which the husband petitioner claims in the present case, the statute was not complied with. No private examination of the wife was made as required by G.S. 52-6(a); the certifying officer did not incorporate in her certificate a statement of her conclusions and findings of fact as to whether or not the deed was unreasonable or injurious to the wife as required by G.S. 52-6(b); and the certifying official who took the wife's acknowledgment was a notary public and as such was not one of the officials authorized by G.S. 52-6(c) to make the required certificate. (In this last connection, see also G.S. 10-4(a)(1), which provides that a notary public of this State may take and certify the acknowledgment of any instrument *"except a contract between a husband and wife governed by the provisions of G.S. 52-6.")* While G.S. 52-6 has been several times amended, all three of the above requirements were in effect in 1956 at the time the deed here in question was executed. Since the statute was not complied with, the deed was void.

G.S. 52-8 is not applicable to this case. That statute purports to validate contracts between husband and wife coming within the provisions of G.S. 52-6 executed between 1 January 1930 and 20 June 1963 which do not comply with the requirement of a private examination of the wife. However, by its terms that statute applies only to contracts which are "in all other respects regular." As above noted, in this case not only was the private examination of the wife not taken, but there was no finding by the certifying officer of the officer's conclusions and findings of fact as to whether or not the deed was unreasonable or injurious to the wife as required by G.S. 52-6(b) and the certifying officer was not one of those authorized by G.S.

52-6(c) to make the required certificate. Therefore, it is not necessary for us to consider in the present case whether G.S. 52-8, if applicable, would be constitutional. (In this connection, see *Mansour v. Rabil,* 277 N.C. 364, 177 S.E. 2d 849; and *Godwin v. Trust Co.,* 259 N.C. 520, 131 S.E. 2d 456.)

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

BOBBY RAY SHEPPARD v. BARRUS CONSTRUCTION COMPANY

No. 718SC276

(Filed 26 May 1971)

Limitation of Actions § 12— institution of second action within one year after voluntary nonsuit — failure to pay costs

Plaintiff's action for personal injuries was barred by the three-year statute of limitations, where (1) the plaintiff, through a next friend, instituted the action on 31 August 1965; (2) the action was terminated by voluntary nonsuit on 5 August 1969; (3) plaintiff instituted a second action on 29 November 1969, which was thereafter dismissed; (4) the present action was instituted on 14 May 1970; and (5) *there is no evidence that the costs were paid in either of the previous actions, or that either of them was brought in forma pauperis.* [former] G.S. 1-52.

APPEAL by plaintiff from *Peel, Judge,* at the 23 November 1970 Civil Session of LENOIR Superior Court.

Plaintiff instituted this action on 14 May 1970 to recover for personal injuries allegedly received by him on 16 March 1963 as the result of negligence on the part of defendant. In its answer, defendant pleaded the three-year statute of limitations in bar of plaintiff's right to recover and moved for summary judgment on the pleadings.

Following a hearing, the trial court entered judgment summarized in pertinent part as follows: The court found and concluded that plaintiff, by a next friend, instituted action on this claim on 31 August 1965 which action was terminated in August 1969 by judgment of voluntary nonsuit; that in November

1969 plaintiff, while still a minor, attempted to institute a second action on the claim but it was dismissed on motion of defendant; that thereafter, having become 21 years of age, plaintiff instituted the present action but it alleges new matter not alleged in the original action thereby constituting this a new cause of action; that, more than three years having elapsed since the plaintiff's original cause of action accrued, the defendant's plea of the three-year statute of limitations is valid, and plaintiff's action should therefore be dismissed. From judgment dismissing the action, plaintiff appealed.

Turner and Harrison by Fred W. Harrison for plaintiff appellant.

White, Allen, Hooten and Hines by John R. Hooten for defendant appellee.

BRITT, Judge.

The three-year statute of limitations (G.S. 1-52) began to run against plaintiff's claim on 31 August 1965 when a next friend was appointed for the special purpose of instituting an action on the claim. *Rowland v. Beauchamp,* 253 N.C. 231, 116 S.E. 2d 720 (1960). Once the statute of limitations begins to run against an action, it continues to run. *Rowland v. Beauchamp, supra.* Unless saved by some statute or rule, plaintiff's claim is barred by the statute of limitations.

The question then arises, was plaintiff's claim saved by G.S. 1-25 (formerly C.S. 415)? While this statute was repealed by the 1967 General Assembly when the Rules of Civil Procedure were enacted, repeal of the statute being effective on 1 January 1970, the effective date of the Rules of Civil Procedure, the statute and not the rules (particularly Rule 41) appears to be applicable to the instant case. The statute provided as follows:

> If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, *if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis.* (Emphasis added.)

We think the answer to the question stated is found in the case of *Osborne v. Railroad,* 217 N.C. 263, 7 S.E. 2d 500 (1940). Pertinent facts in that case are as follows: Plaintiff allegedly received personal injuries on 14 July 1934. Within three years thereafter, he instituted an action but on 17 August 1937 caused a judgment of voluntary nonsuit to be entered. On 6 October 1937, he instituted a new action and defendant pleaded the three-year statute of limitations. The transcript of record filed in the Supreme Court is silent as to whether the cost on the original action was paid before the commencement of the second action, as well as whether the original action was brought *in forma pauperis.* The plaintiff appealed from a judgment of nonsuit and in a *per curiam* opinion, the Supreme Court said:

> "This appeal presents no new question of law. Even though plaintiff may have instituted the original action within three years from the time of the accrual of his cause of action against defendant, and this action within one year from the date of judgment of nonsuit in original action, the record as constituted on this appeal fails to show facts which would entitle him to maintain this action under the provisions of C.S. 415 (Numerous citations.)"

In the case at hand, a next friend was appointed by plaintiff and the original action was instituted on 31 August 1965. A judgment of voluntary nonsuit was entered on 5 August 1969. Although a second action was instituted on 29 November 1969 and thereafter dimissed, and the present action was instituted on 14 May 1970, there is nothing in the record before us to show that the costs were paid in either of the previous actions, or that either of them was brought *in forma pauperis.*

We deem it unnecessary to determine if the present action alleges new matter not alleged in the original action. Suffice to say, for the reasons stated, the judgment of the superior court dismissing the action as being barred by the three-year statute of limitations is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

HERMAN MUSSELWHITE v. EAST COAST HOTEL COMPANY, INC.

No. 715SC236

(Filed 26 May 1971)

Negligence §§ 5.1, 53— injury to invitee on motel premises — invitee referred to as "employee" — harmless error

Plaintiff, a TV repairman, was not prejudiced by trial court's instructions which mistakenly referred to him as an employee of the defendant, rather than as an invitee, where the trial court's instructions adequately set forth the duties owed by the owner of business premises to an invitee.

APPEAL by plaintiff from *Cowper, Judge,* October 1970, Civil Session of NEW HANOVER County Superior Court.

Plaintiff instituted this action to recover for injuries sustained on defendant's premises, allegedly caused by defendant's negligence in failing to provide a safe place to work. Plaintiff's evidence tended to show that he was in the television business in Wilmington and had been servicing the television sets at defendant's hotel, the Blockade Runner Motor Hotel, since it opened. On the occasion when plaintiff was injured, he had been called to the hotel to check out the television units. This necessitated checking out the electrical wiring in the distribution room on the fifth floor. This room was kept locked, but plaintiff had a key to it. As he approached the distribution room, he stepped on a rug with a rubber backing and slipped, injuring his elbow and left leg. There was water on the floor and under the rug and as plaintiff stepped on the rug, the rug slipped out from under him. The water came from a nearby ice storage box that had overflowed and was not visible because of the white vinyl tile on the floor and the rug.

There was testimony to the effect that there had been water on the floor in this location on previous occasions due to the fact that the drain in the ice storage box occasionally stopped up and caused an overflow. This ice storage box and the door to the distribution room were located in an alcove. The ice box was furnished for the convenience of hotel guests. Guests often dropped ice on the floor when obtaining ice from the box. The defendant was aware of this fact and the housekeeping department usually cleaned it up. Plaintiff himself testified that, while he had not seen water on the floor, he had seen ice on the floor on prior occasions.

The case was submitted to the jury on the issues of negligence, contributory negligence and damages. The jury answered the first issue in favor of defendant and did not answer the remaining two issues. From a judgment that plaintiff recover nothing of defendant, plaintiff appeals to this Court.

Goldberg & Anderson by Aaron Goldberg for plaintiff appellant.

Poisson, Barnhill & Jackson by M. V. Barnhill, Jr., for defendant appellee.

CAMPBELL, Judge.

Plaintiff makes five assignments of error. We will discuss them in inverse order. The fifth assignment of error was to the failure of the court to set the verdict aside as being contrary to the weight of the evidence. This was a matter addressed to the discretion of the trial court. No abuse of discretion is shown, and we find none. This assignment is denied.

The fourth assignment was to the failure of the trial judge to instruct the jury that plaintiff was on the premises as an invitee, and as such, the defendant owed him a duty as an invitee. The trial judge referred to the plaintiff as an employee and instructed the jury with respect to the rights of an employee. Plaintiff contends that this was prejudicial as it would carry the connotation to the jury that the plaintiff was entitled to Workmen's Compensation benefits. We do not think so. We believe the plaintiff is unduly alarmed in this regard, and at any rate, the plaintiff should have called this to the attention of the trial judge at the time. This the plaintiff failed to do.

With regard to the duty owed, the trial judge instructed the jury:

> "Now, I further instruct you that it is the duty of an employer to warn an employee concerning dangers which are known to him or which in the exercise of reasonable care should be known to him and are unknown to the employee or undiscoverable by him in the exercise of due care and concerning dangers which by the reason of inexperience the employee does not appreciate. Also there is a duty on the part of an employer to furnish a safe place within which to work."

This instruction was in substantial compliance with the duty an employer owes to an employee as set forth in *Clark v. Roberts,* 263 N.C. 336, 139 S.E. 2d 593 (1965), quoting *Watson v. Construction Company,* 197 N.C. 586, 150 S.E. 20 (1929), where the court stated:

> "'[I]t is conceded to be the duty of an employer to warn his employees concerning dangers which are known to him, or which in the exercise of reasonable care should be known to him, and are unknown to his employees or are undiscoverable by them in the exercise of due care, and concerning dangers which, by reason of youth, inexperience or incompetency the employees do not appreciate. . . .'"

In addition to the standards imposed by the *Clark* case, *supra,* the trial judge also imposed a duty upon the employer to furnish a safe place in which to work.

Conceding for the purposes of argument that plaintiff was actually an invitee and not an employee, the charge as given by the trial judge, while couched in terms of an employer-employee relationship, adequately set forth the duties owed by the owner of the premises to an invitee. The owner of the premises is under a duty to an invitee "to exercise ordinary care to keep the premises which plaintiff was to use in a reasonably safe condition, so as not to expose [him] unnecessarily to danger, and to give warning of hidden conditions and dangers of which it had knowledge, express or implied. . . ." *Wrenn v. Convalescent Home,* 270 N.C. 447, 154 S.E. 2d 483 (1967); see also 6 Strong, N. C. Index 2d, Negligence, § 53, p. 108 (1968).

As the trial judge correctly stated the principles of law to be applied to the case, plaintiff is not prejudiced by being described as an employee rather than an invitee.

The other three assignments of error relate to the issue of damages. Since the jury returned a verdict in favor of the defendant finding no negligence and therefore did not reach the issue of damages, we deem it unnecessary to discuss those assignments of error since such a discussion would be purely academic in this case.

The judgment of the trial court is

Affirmed.

Judges BRITT and GRAHAM concur.

WILLIAM E. ANDERSON, ADMINISTRATOR OF THE ESTATE OF ALBERT LEE BRACKETT, DECEASED v. RALPH M. CRAWFORD AND HOWELL W. CRAWFORD, T/D/B/A CRAWFORD FUNERAL HOME

No. 7128SC267

(Filed 26 May 1971)

Automobiles § 83— pedestrian struck by ambulance — contributory negligence

The evidence established that a pedestrian's negligence was a proximate cause of injuries he received when he was struck by defendant's ambulance while crossing a four-lane highway at a point that was neither at an intersection nor within a marked crosswalk.

APPEAL by plaintiff from *Ervin, J.*, November 1970 Civil Term of Superior Court held in BUNCOMBE County.

This action was instituted to recover damages for injuries sustained by Albert Lee Brackett, plaintiff's 76 year-old intestate, when struck by defendants' ambulance on Patton Avenue, a four-lane highway in Asheville. Issues of negligence, contributory negligence, last clear chance and damages were raised by the pleadings. There is no allegation that the subsequent death of plaintiff's intestate was caused by the accident. At the conclusion of plaintiff's evidence defendants moved for a directed verdict on the grounds that the evidence failed to disclose negligence of the plaintiff, did establish contributory negligence of plaintiff's intestate and that there was no evidence upon which the doctrine of last clear chance could be applied. At the conclusion of all the evidence the motion was renewed. From a judgment allowing the motion and dismissing the action, plaintiff appealed.

Wade Hall for plaintiff appellant.

Williams, Morris and Golding by James N. Golding for defendant appellees.

VAUGHN, Judge.

The only question presented by this appeal is whether the court erred in allowing defendants' motion for a directed verdict. The evidence tends to show the following. Patton Avenue is 48 feet wide with two lanes for westbound traffic and two lanes for eastbound traffic. Defendants' ambulance was in the inside lane proceeding in an easterly direction. The posted speed

limit was 35 miles per hour. Plaintiff's intestate, at a point that was neither at an intersection nor within a marked crosswalk, stepped from the curb on the south side of Patton Avenue and proceeded at a fast walk directly across the avenue. A detective with the Asheville Police Department was operating his vehicle in the outside or southern lane proceeding in an easterly direction about 25 or 30 yards behind the ambulance. His testimony, as a witness for plaintiff, was, in part, as follows:

". . . The ambulance was going at a slow speed, I would say approximately in the neighborhood of 30 miles an hour. . . .

". . . I did not actually see Mr. Brackett step off the curb. When I first observed him I would say he was approximately three feet stepping out into the road. At that time the ambulance would have been just a little west of Bear Creek Road at the time I first observed Mr. Brackett. The ambulance and Mr. Brackett were a short distance away from each other when I first observed him. I observed that the ambulance was trying to slow or stop before the actual impact occurred. Yes, I described the ambulance as taking some evasive action, namely, trying to cut the ambulance away from the pedestrian or Mr. Brackett, cut the ambulance to the left toward the double yellow line and into the westbound inside westbound lane. I would estimate the ambulance to be going 5 to 10 miles per hour at the point of impact."

. . . .

"The ambulance was steering away from Mr. Brackett, was trying to steer somewhere other than where he was located. I actually saw the impact. I saw the right front of the ambulance and Mr. Brackett come in contact somewhere in the headlight area on the front fender and just to the left of it. It could have been just behind the headlight on the right side. . . ."

. . . .

"I would say the main part of Mr. Brackett's body was just across the double yellow line, his head was just to the north of the double yellow line and the rest of his body was in the southerly direction towards the south curb, in the inside eastbound lane. I would say he was approximately 3 feet in front of the ambulance lying on the pavement.

The front of the ambulance was at an angle and he was right directly at a point about 3 foot in front of the ambulance lying across the double yellow line. The ambulance had gotten over into the inside westbound lane. The ambulance was just about stopped at the time of the impact. . . ."

Plaintiff introduced the deposition of defendant Ralph M. Crawford, operator of the ambulance, which in part contained testimony substantially as follows. The patient's wife was in the rear of the ambulance with the patient and an ambulance assistant. The patient's sister-in-law was in the front seat with the defendant. He was driving at about 30 or 35 miles per hour and had the red blinker light on. He observed plaintiff's intestate standing on the curb with two other men. When the ambulance was about 75 feet away, the plaintiff's intestate stepped off the curb and proceeded across the street, increasing his gait after a couple of steps. Defendant sounded his siren, applied his brakes and cut to his left. If he had applied his brakes any harder the vehicle would have overturned. Plaintiff's intestate hit the right door of the ambulance leaving a small dent.

There was evidence that the patient being transported was ill with cancer and could not be touched with hands but had to be moved by sheets. There was also evidence that the cot on which the patient was lying was anchored to the ambulance, but that the patient was not secured to the cot.

All of the evidence tends to show that at the time plaintiff's intestate stepped from the curb, the ambulance was being operated in a careful and prudent manner. There is no evidence that the defendant operator was thereafter negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming plaintiff's intestate. Indeed, the evidence affirmatively establishes the contrary and that the negligence of plaintiff's intestate was a proximate cause of his injuries. The applicable principles of law arising on the evidence in this case are well established and it is not deemed necessary to recapitulate them here. Defendants' motion for a directed verdict was properly allowed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

FRED W. HARRISON v. GLENS FALLS INSURANCE COMPANY

No. 718DC319

(Filed 26 May 1971)

Insurance § 140— windstorm policy — ice and snow as contributing causes — instructions

In this action upon a windstorm policy which excluded coverage for loss caused directly or indirectly by ice, snow or sleet, whether driven by wind or not, to recover for damage caused to plaintiff's house by a falling tree limb, the trial court erred in failing to instruct the jury that it should return a verdict for defendant insurer if it found that ice and snow were contributing causes of the damage.

APPEAL by defendant from *Wooten, District Judge,* 14 December 1970 Session, GREENE District Court.

Plaintiff instituted this action to recover for damage done to a house owned by him, and insured by defendant, by a falling tree limb which, allegedly, fell due to a windstorm. Defendant filed an answer in which it denied the material allegations of the complaint, and alleged that the tree limb was caused to fall by an accumulation of ice, snow or sleet, and not by the wind. The insurance policy contains the following provision: " 'This company shall not be liable for loss caused directly or indirectly by frost or cold weather, or ice (other than hail), snow or sleet, whether driven by wind or not.' "

Plaintiff's evidence tended to show: the damage occurred about 7:15 on the morning of 11 January 1968; during the night of 10 January and early morning of 11 January, snow and sleet fell for a period of about seven hours, from 10:00 p.m. until 5:00 a.m.; plaintiff left his place of employment about 6:00 a.m. on 11 January and arrived at home about 7:00 a.m.; ice had accumulated on trees, power lines, roads, and on the ground to a depth of 1-1½ inches; the wind began to blow about 5:00 a.m., when the precipitation ceased; and was still blowing when the damage occurred; the wind reached speeds of 25-30 mph; shortly after returning home about 7:00 a.m., plaintiff was in his residence, located a short distance from the damaged house, when he heard "a calamity, a great fuss"; his investigation revealed that an oak limb, which measured 20-24 inches in diameter at the point where it joined the tree, had fallen upon the house; damage in the amount of $2,500 was done to the roof, chimney, and porch.

The defendant presented no evidence. The jury returned a verdict of $2,500 in favor of plaintiff. From a judgment thereupon entered, defendant appealed to this Court.

Turner & Harrison, by Fred W. Harrison, for plaintiff-appellee.

Freeman & Edwards, by H. Jack Edwards, for defendant-appellant.

BROCK, Judge.

Defendant assigns as error that the Court failed to instruct the jury that it should return a verdict for defendant if it found that the ice and snow were contributing causes of the damage because these perils were excluded from coverage under the policy. We agree.

Miller v. Insurance Association, 198 N.C. 572, 152 S.E. 684, was an action on a policy of windstorm insurance, which did not expressly exclude coverage for damage by snow, ice, etc. The plaintiff's building collapsed under the weight of snow which was deposited upon its roof by a windstorm. The Supreme Court held that it was error to charge that the windstorm must have caused the damage, unaided by the snow, in order for plaintiff to recover. The Court approved the general rule that if the cause designated in the policy is the dominant and efficient cause of the loss the right of the insured to recover will not be defeated by the fact that there were contributing causes. The Court went on to say that "[o]f course the principle enunciated in these cases has no application if liability for the contributing cause is expressly excluded by the terms of the policy."

In *Wood v. Insurance Co.,* 245 N.C. 383, 96 S.E. 2d 28, plaintiff sought to recover upon a policy of windstorm insurance for damage done to his building by hurricane Hazel. The policy expressly excluded coverage for loss caused by, among others, high water and overflow. Upon the evidence the jury could have found that torrential rains so weakened the foundation of the building as to render it unable to withstand the wind. In upholding a judgment for plaintiff, the Supreme Court said: "If plaintiff's loss was caused by the windstorm, the fact that the rains may have created a condition which would permit the destruction by the windstorm would not relieve defendant from liability. The policy does not exclude from its terms rains, no matter how

heavy. *It is the high water or overflow which would excuse defendant.*" [Emphasis added.] Plaintiff attempts to rely upon the language of *Anderson v. Connecticut Fire Ins. Co.*, 43 N.W. 2d 807 (Minn.), as quoted by our Supreme Court in *Wood, supra,* and particularly the following language: "It is immaterial that the damage following from the efficient and proximate cause may have been indirectly and incidentally enhanced by another cause expressly excluded from coverage." In *Anderson,* there was expert testimony as well as other evidence showing that the snow, which was the excluded peril, could have had no appreciable effect upon the damage, and that the structure in question was heavily and visibly damaged by the wind before the snow had fallen. Thus, the snow merely "enhanced" the damage, rather than being a contributing cause. *Anderson* is distinguishable from the case *sub judice.*

It would serve no purpose to reproduce the portion of the charge to which defendant excepts. Suffice it to say that the charge did not adequately impart to the jury the law as announced in *Miller* and *Wood, supra.*

It is not necessary to discuss defendant's remaining assignments of error.

New trial.

Judges MORRIS and HEDRICK concur.

ASKEW'S, INC., A CORPORATION, PLAINTIFF v. LEROY T. CHERRY AND BUILDING ENTERPRISES, INC., DEFENDANTS AND THIRD PARTY PLAINTIFFS, AND RED CARPET INN OF NEW BERN, INC., THIRD PARTY DEFENDANTS

No. 713DC140

(Filed 26 May 1971)

1. Rules of Civil Procedure § 56— summary judgment

If a party moving for summary judgment presents, by affidavits or otherwise, materials which would require a directed verdict in his favor if presented at trial, he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him or comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact.

2. **Contracts § 12— unambiguous contract**

Where the language of a contract is plain and unambiguous, the construction is a matter of law for the courts.

3. **Compromise and Settlement § 1— settlement agreement — summary judgment**

Summary judgment was properly entered against a construction company in its third party action seeking to recover over against a motel corporation any amount obtained by a material supplier in its action against the construction company, where a settlement agreement entered into by the motel corporation and the construction company clearly shows that, in consideration of an agreement by the construction company to withdraw from a motel construction project and to release the motel corporation of all claims arising out of the project, the motel corporation agreed to pay the construction company its audited cost on the project, plus 5% thereof, less amounts already paid under the construction contract, the answer and affidavit introduced by the motel corporation show it has complied with the settlement agreement, there was no promise in the agreement that the amount to be paid, when determined by audit, would equal the amount the construction company owed its creditors, and the construction company has come forward with nothing to show that the audit was inaccurate and has not denied that it received the amount which the audit reflected it was owed under the agreement.

APPEAL by third party plaintiffs Leroy T. Cherry and Building Enterprises, Inc., from *Roberts, District Judge,* 14 October 1970 Session of CRAVEN County District Court.

Plaintiff, Askew's, Inc. (Askew), filed complaint 3 June 1970 seeking recovery of $914.73 allegedly owed on open account by Building Enterprises, Inc. (Building) and its President, Leroy T. Cherry (Cherry). Building and Cherry answered, denied any indebtedness, and alleged accord and satisfaction as an affirmative defense. They also filed a third party action against Red Carpet Inn of New Bern, Inc. (Red Carpet) seeking to recover over against Red Carpet any amount obtained by Askew in its action. The third party complaint alleged in part:

> "That Red Carpet and third party plaintiffs, hereinafter referred to as 'Cherry,' entered into an agreement relating to the construction of a certain building in the City of New Bern, Craven County, North Carolina, and, as a result thereof, certain indebtedness was created by various material suppliers, including the original plaintiff in this cause. That Red Carpet and Cherry terminated their relationship and Red Carpet agreed to pay all indebtedness due said material suppliers, including said plaintiff."

Red Carpet filed answer and pleaded a "settlement agreement" executed 2 September 1969 by Red Carpet, Building, Cherry and certain individuals as a bar to the third party claim. The agreement establishes the following: Cherry and other individual parties to the agreement were investors in a project for the construction of a motel. In order to obtain financing, a corporation (Red Carpet) was formed, and Red Carpet contracted with Building for the construction of the motel. A dispute arose among the parties with respect to the continued participation of Leroy T. Cherry in the project and the continued construction of the motel by Building.

Under the agreement, the parties undertook to settle their differences by agreeing: (1) Cherry would surrender his stock in Red Carpet and all of his interest in the motel project. (2) Building would terminate construction on the motel and withdraw from the building site. (3) Red Carpet would pay Cherry the sum of $500. (4) Red Carpet would pay Building an amount to be determined by audit, which amount would equal the gross cost which Building had incurred on the motel project through 28 August 1969, plus 5% of the audited gross costs, and less amounts previously paid under the construction contract. Checks in payment were to be made payable to Building and "those parties listed on Exhibit B as are shown by the Audit to be entitled to payment. . . ." Any balance due was to be paid by check to Building. The agreement also provided:

> "8. Leroy T. Cherry by the execution of this Agreement does hereby release and forever discharge Red Carpet . . . from any and all actions, causes of action, claims and demands which have accrued prior to the date of this Agreement, whether now known or not, against any one or more of the said persons, individually or in any fiduciary capacity, jointly or severally.
>
> 9. Building, by execution of this Agreement by its President, Leroy T. Cherry, does hereby release and forever discharge Red Carpet . . . from any and all actions, causes of action, claims and demands which have accrued prior to the date of this Agreement, whether now known or not, against said parties jointly or severally, as individuals or as fiduciaries."

Red Carpet's verified answer alleged that an audit was performed in accordance with the settlement agreement; that

$69,361.30 was determined due and payable by Building to subcontractors on the project, and that $61,988.78 was determined as the amount owed by Red Carpet to Building under the terms of the settlement agreement. Further, that a check payable to Askew and Building, in the amount of $7,301.69 was issued to the joint payees and endorsed by both and that the check bears the legend: "This check is in full settlement of account as shown herewith, acceptance by endorsement constitutes receipt in full."

Red Carpet moved for summary judgment and offered in support of its motion its verified answer and an affidavit of Henry C. Lomax, attorney. The affidavit states that: Cherry has been paid the $500 owed him under the settlement agreement; an audit was conducted in accordance with the agreement and forwarded to Cherry; on 7 October 1969, checks totaling $61,988.78, the amount due Building under the audit, were sent to Building; the checks were made payable to Building and various creditors on a pro rata basis of the amount due Building; the claims asserted by Askew accrued prior to the date of the settlement agreement.

Building and Cherry made no denial of the facts contained in Red Carpet's answer and affidavit, but alleged in an affidavit by Cherry that the settlement agreement required Red Carpet to pay all debts of Building incidental to the motel project.

The trial court found that "there is no genuine issue as to any material fact" and allowed Red Carpet's motion for summary judgment. Building and Cherry appealed.

Wheatly & Mason by C. R. Wheatly, Jr., for third party plaintiff appellants.

Ward, Tucker, Ward & Smith by David L. Ward, Jr., for third party defendant appellee.

GRAHAM, Judge.

[1] If a party moving for summary judgment presents, by affidavits or otherwise, materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact. *Pridgen v. Hughes*, 9 N.C.

App. 635, 177 S.E. 2d 425; 6 Moore's Federal Practice 2d, § 56.11(3), p. 2171.

The answer and affidavit introduced by Red Carpet show that it has complied with the settlement agreement wherein it was released of all claims arising out of the motel project by Cherry and Building. The only attempted showing to the contrary by appellants was the affidavit in which Cherry contended that the settlement agreement required Red Carpet to pay all debts incurred by Building in connection with the motel project.

[2] Where the language of a contract is plain and unambiguous the construction is a matter of law for the courts. 2 Strong, N. C. Index 2d, Contracts, § 12, p. 311.

[3] The settlement agreement in question is clear and unambiguous. Under the agreement, Building was to be paid an amount equal to its audited cost on the project, plus 5% thereof, and less amounts already paid under the construction contract. In agreeing that payment was to be made by issuing and delivering checks payable to Building and its creditors, the parties were simply undertaking to protect Building's creditors to the extent of the money owed Building by Red Carpet. The method of payment had nothing to do with the amount owed.

We find no promise in the agreement that the amount owed by Red Carpet to Building, when determined by an audit, would equal the amount of Building's obligation to its creditors. Building and Cherry have come forward with nothing to show that the audit was inaccurate. Furthermore, they do not deny that they have received payments which the audit reflected were owed them under the agreement. We therefore find, as did the trial judge, that there is no genuine issue as to any material fact in this case.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JOHN TENORE

No. 714SC55

(Filed 26 May 1971)

Obscenity— topless dancing — quashal of warrant — reversal by Court of Appeals

The Court of Appeals reverses the quashal of a warrant charging that a tavern owner permitted a female dancer to expose her breasts on his premises, the trial judge having quashed the warrant on the grounds that (1) the section of the ordinance prohibiting such exposure violates both the federal and the State Constitutions; (2) the ordinance is vague and ambiguous; and (3) the warrant failed to state a proper cause of action.

Judge PARKER dissents.

APPEAL by the State from *Copeland, S.J.*, 21 September 1970 Special Criminal Session of Superior Court held in ONSLOW County.

Defendant was charged with the violation of Section 1-B of an Onslow County ordinance, entitled "An Ordinance Making it a Misdemeanor to Permit Recreations, Amusements, Exhibitions and Entertainment Detrimental to the Public Good." Defendant was found guilty in the district court and appealed to the superior court. When the case was called for trial in the superior court, the defendant's motion to quash was allowed. The State appealed.

Attorney General Robert Morgan by Assistant Attorney General Mrs. Christine Y. Denson for the State.

Turner and Harrison by J. Harvey Turner for defendant appellee.

VAUGHN, Judge.

The Onslow County ordinance is as follows:

AN ORDINANCE MAKING IT A MISDEMEANOR TO DO OR PERMIT RECREATIONS, AMUSEMENTS, EXHIBITIONS AND ENTERTAINMENT DETRIMENTAL TO THE PUBLIC GOOD

PREAMBLE: That whereas, it is the opinion of the governing body of Onslow County and in the interest of public morals, welfare and public good of the citizens of Onslow County, and especially for the benefit of our youth and young peo-

ple residing in Onslow County, to prohibit certain recreations, amusements, exhibitions and entertainment;

BE IT ORDAINED by the Board of Commissioners of Onslow County:

SECTION 1. Presentation of an obscene or nude play, dance, exhibition or other performance or exhibition of private parts of a person creating a lewd, lascivious, or lustful atmosphere.

(A) DEFINITION OF TERMS.

As used in this section:

(1) "Nude" or "Nudity"—means the showing of the human male or female genitals, public [sic] area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the complete nipple area including the areola.

(2) "Private Parts"—As used herein, private parts shall include not only male and female genitals but shall also include the breasts of a physically developed female.

(3) "Obscene" or "Obscenity"—A thing is obscene if considered as a whole; its predominant appeal is the prurient interest, i.e.,

(a) A shameful or morbid interest in nudity, sex or excretion and it goes substantially beyond customary limits of candor in description or presentation of such matters; and

(b) Is patently offensive to prevailing standards in the adult community as a whole; and

(c) Is utterly without redeeming social importance.

(B) PRESENTATION OF OBSCENE OR NUDE PLAY, DANCE, EXHIBITION, OR OTHER PERFORMANCE:

Any person who in any place willfully exposes or shows any obscene or nude play, dance, exhibition or other performance in the presence of one or more persons of the opposite sex or who aids or abets in any such act or who

procures another to so perform or takes part in such exhibition or performance where such obscene or nude play, dance, exhibition or other performance is conducted in any public place, street, highway or other public or private place the public is invited; or any person who as owner, manager, lessee, director, promoter, or agent permits the premises over which he has control to be used for any such purposes of obscenity and nudity, shall be guilty of a misdemeanor.

(C) INDECENT PUBLIC EXPOSURE:

Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place, street, or highway shall be guilty of a misdemeanor.

SECTION 2. Separate Violations.

Each violation of this Ordinance shall constitute a separate offense.

SECTION 3. Penalty.

Any person found guilty of violation of this Ordinance shall be punishable by a fine not to exceed $50.00 or imprisonment not to exceed thirty (30) days.

SECTION 4. Severability.

If any section or provision of this Ordinance shall be held invalidation [sic] shall not affect the remaining or other sections or provisions to the end that provisions of this Ordinance are severable.

SECTION 5. Effective date of Ordinance.

This Ordinance shall become effective at the end of twenty (20) days following date of Publication of this Ordinance in compliance with N. C. G.S. 153-9(55).

The defendant was charged in a warrant as follows:

"The undersigned, W. C. Jarman, being duly sworn, complains and says that at and in the county named above and on or about the 21st day of May, 1970, the defendant named above did unlawfully, wilfully, in that John Tenore as owner, manager, director and promoter did permit on

the premises of the Tempo Lounge, over which he has control, a nude and obscene dance, exhibition, or and performance of one Virginia P. Lewis, a female person, in the presence of one or more male persons wherein she showed her breasts with less than a fully opaque covering of portions thereof below the top of the complete nipple area including the areola, said Tempo Lounge being a public or private place to which the public is invited.

"The offense charged here was committed against the peace and dignity of the State and in violation of law Section 1-B, An Ordinance making it a misdemeanor to permit recreations, amusements, exhibitions and entertainment detrimental to the public good (Onslow County)."

The record discloses that the trial judge based his allowance of the motion to quash on the following:

1. That Section 1-B upon which warrant is based is in violation of the United States Constitution and the Constitution of North Carolina.

2. The ordinance is vague and ambiguous.

3. The warrant fails to state a proper cause of action.

We hold that the trial court erred in allowing the motion to quash.

Reversed.

Chief Judge MALLARD concurs.

Judge PARKER dissents.

STATE OF NORTH CAROLINA v. JESSE DAVID COX

No. 7129SC333

(Filed 26 May 1971)

1. Criminal Law § 115— lesser degree of crime — instructions

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 was committed.

2. **Assault and Battery § 16— assault with a deadly weapon — instructions on simple assault**

In a prosecution for assault with a deadly weapon with intent to kill, the trial judge was not required to submit an issue of defendant's guilt of simple assault, where defendant himself admitted that he cut the prosecuting witness with a knife, and where the evidence tended to show that the knife blade was three inches long.

3. **Assault and Battery §§ 8, 9— defense of home and family — self-defense — instructions**

In a prosecution for assault with a deadly weapon, the evidence did not warrant an instruction on defendant's right to defend his home and family, although it required an instruction on defendant's right to act in his own self-defense.

4. **Assault and Battery § 5— deadly weapon per se — pocket knife**

A pocket knife which has a blade three inches long and a cutting edge two and three-quarters inches long is a deadly weapon *per se*. G.S. 14-32(b).

5. **Assault and Battery § 5— determination of deadly weapon per se — jury question**

Defendant cannot complain that it was left for the jury to decide whether a knife with a three-inch blade was a deadly weapon *per se*.

APPEAL by defendant from *Seay, Judge,* 12 October 1970 Session of Superior Court held in HENDERSON County.

Defendant was charged in a bill of indictment, proper in form, with the felony of assaulting W. C. Hill with a deadly weapon with intent to kill, inflicting serious injury upon the person of W. C. Hill. Upon his plea of not guilty defendant was tried by jury.

The evidence tended to show the following: W. C. Hill, defendant's father-in-law, went to defendant's home with defendant's wife and children. After a few words were exchanged between defendant and defendant's wife, a fight broke out between defendant and his father-in-law, W. C. Hill. This fight was terminated, and defendant went to a neighbor's house. While defendant was at the neighbor's house, W. C. Hill left defendant's house and got into an automobile. Defendant returned with his neighbor, and the neighbor engaged in an altercation with W. C. Hill. There is some evidence that defendant stood by during this time with a gun.

The State offered evidence which tended to show that defendant reached into the car and cut W. C. Hill. Defendant

offered evidence which tended to show that he cut W. C. Hill when Hill "started out of the car with a bottle to hit me."

The evidence tends to show that the knife with which defendant cut W. C. Hill was a pocket knife with a blade approximately three inches long.

The jury found defendant guilty of assault with a deadly weapon *per se* inflicting serious injury. Defendant appealed.

Attorney General Morgan, by Assistant Attorney General Briley, for the State.

W. R. Sheppard for defendant.

BROCK, Judge.

[1, 2] Defendant assigns as error that the trial judge failed to submit to the jury the issue of simple assault. Defendant admitted that he cut the prosecuting witness, and the evidence tends to show that the blade of the knife was approximately three inches long. Defendant's contention was that he acted in self-defense when he cut W. C. Hill. The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Barber,* 9 N.C. App. 210, 175 S.E. 2d 611. This assignment of error is overruled.

[3] Defendant assigns as error that the trial judge failed to instruct the jury on defendant's right to defend his home and his family. There is no evidence to justify such instructions. Defendant's own testimony was: "I was standing beside the car talking to my wife when he started out of the car with a bottle to hit me when I cut him." This evidence requires an instruction on defendant's right to act in his own self-defense, and such an instruction was given. This assignment of error is overruled.

Defendant assigns as error that the trial judge submitted to the jury the issue of defendant's guilt of assault with a deadly weapon *per se* inflicting serious injury. G.S. 14-32(b). It is defendant's argument that a knife with a three-inch blade is not a deadly weapon *per se.* At defendant's request we

ordered the knife (which was received in evidence at trial as State's Exhibit #1) forwarded as an exhibit to this Court.

[4] The offense defined in G.S. 14-32(b) is a lesser included offense of the offense defined in G.S. 14-32(a); and, where there is evidence from which the jury could find that the offense defined in G.S. 14-32(b) had been committed, it is not only proper but is necessary for the trial court to submit the issue. The blade of the knife in evidence in this case is three inches long and the cutting edge thereof is two and three-quarters inches long. When used as a weapon in an assault such a knife, under the case law of this State, constitutes a deadly weapon *per se*. *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665. The trial judge was correct in submitting an issue of defendant's guilt under G.S. 14-32(b) to the jury.

[5] The trial judge submitted three issues to the jury: (1) guilty or not guilty of assault with a deadly weapon with intent to kill inflicting serious injury (G.S. 14-32(a)); (2) guilty or not guilty of assault with a deadly weapon *per se* inflicting serious injury (G.S. 14-32(b)); (3) guilty or not guilty of assault with a deadly weapon (G.S. 14-33(b)(1)). On each of the three issues the trial judge left it to the jury to determine whether the knife was a deadly weapon. As we have already stated, under the case law of this State, a knife with a three-inch blade constitutes a deadly weapon *per se* when used as a weapon in an assault. *State v. Parker, supra.* The defendant is in no position to complain that the trial judge placed the burden upon the State to satisfy the jury beyond a reasonable doubt that the knife was a deadly weapon *per se*.

The remaining assignments of error have been considered and found to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

PERFORMANCE MOTORS, INC. v. ALVA JANE RIGGS ALLEN

No. 714SC219

(Filed 26 May 1971)

Uniform Commercial Code § 20— breach of warranty — damages — instructions

In instructing the jury on damages arising out of a breach of warranty, the trial court erred in refusing to give instructions that complied with the applicable statute. G.S. 25-2-714(2).

APPEAL by plaintiff from *Parker, Judge,* October 1970 Term, JONES County Superior Court.

Plaintiff instituted this action seeking to recover the unpaid balance of a promissory note, executed by defendant as part consideration for the purchase of a mobile home and secured by a security interest in the mobile home. Plaintiff alleged that defendant had made two monthly payments and has failed, neglected and refused to make any more monthly payments as they became due.

Defendant counterclaimed, alleging breach of warranty in that the mobile home was unfit and unserviceable for use as a home. Defendant alleged that, as a result of the breach of the implied warranty of fitness, she elected to rescind the contract prior to the institution of the present action, and sought the return of her down payment on the purchase price.

Plaintiff repossessed the mobile home through claim and delivery proceedings and sold it at public auction, receiving $9,115.00 for the home. This was applied to the $10,000.00 that plaintiff alleged was still owing and plaintiff stipulated that if defendant owes it anything on the mobile home, she would not owe more than $855.00. Defendant stipulated that in no event was she entitled to more than $4,514.23, that being the amount of her down payment and two monthly payments plus expenses incurred in connecting the sewer lines and the electricity.

The case was submitted to the jury on issues as follows:

"1. What amount, if any, is the defendant indebted to the plaintiff?

2. Did the plaintiff breach the contract as alleged in the answer?

3. If so, what amount, if any, is the plaintiff indebted to the defendant?"

The jury returned a verdict in favor of defendant, finding that defendant was not indebted to plaintiff, that plaintiff did breach the contract and that plaintiff is indebted to defendant in the amount of $4,000.00 plus interest. From a judgment entered in accordance with the verdict, plaintiff appeals to this Court.

Darris W. Koonce for plaintiff appellant.

Brock & Gerrans by Donald P. Brock for defendant appellee.

CAMPBELL, Judge.

Plaintiff's Assignment of Error No. 4 is to the refusal of the trial judge to give a requested special instruction on the issue of damages. Plaintiff requested the court to charge on the issue of damages as follows:

> "Ordinarily, the measure of damages for breach of warranty in the sale of personal property is the difference between the market value of the goods at the time and place of delivery, as delivered, and such value if the goods had complied with the warranty. Special damages may be recovered provided they were within the contemplation of the parties at the time the contract was executed, and are properly pleaded. Where the purchaser does not allege the reasonable value of the chattel as warranted and its reasonable value as delivered, the damages are restricted to special damages pleaded and proved."

The trial judge refused to give this special instruction and instead charged the jury on the damage issue as follows:

> "Now, the court instructs you that the measure of damage on this issue, if you come to consider this issue, is as follows: Ordinarily the measure of damage to the contract is the amount of loss which a party to a contract would naturally and probably suffer from its nonperformance and which would in the minds of the parties at the time of its making reasonably and proximately flow from the breach of contract. . . . "

Some several pages later in the charge the trial judge instructed the jury on the measure of damages again as follows:

> "Now, the court instructs you that the measure of damage there is the amount which the parties to a contract or the party, the defendant, would naturally and probably suffer by reason of the non-performance of the contract and which would reasonably and proximately flow from the breach of the contract, that being the measure of damage, that is, ladies and gentlemen, the defendant says and contends that you should reach this issue and you should answer this issue while the plaintiff says you should not reach this issue, but if you do, you should answer this issue in some amount much less than asked by the defendant."

The evidence on behalf of the defendant tended to show numerous defects in the mobile home, particularly with regard to the installation thereof on her property; but there was no evidence that the defendant ever attempted to rescind the contract. In fact, the evidence discloses that the defendant occupied the mobile home for some eight months and until the plaintiff repossessed it by claim and delivery proceedings.

We are of the opinion that it was error for the trial judge to refuse the plaintiff's request for instructions. The charge as given by the trial judge does not comply with the requirements of G.S. 25-2-714(2), which states:

> "(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

The instruction requested by the plaintiff incorporated the statutory elements. The charge as given by the trial judge did not comply with the law on the measure of damages and, in fact, did not give the jury any guidance.

Plaintiff assigned other errors in the trial, but as a new trial is necessary, we will refrain from discussing those assignments as they may not occur again.

New trial.

Judges BRITT and GRAHAM concur.

ANNIE L. NAYLOR v. LESTUS LEE NAYLOR

No. 714SC225

(Filed 26 May 1971)

Automobiles § 94— intoxicated driver — contributory negligence of passenger

Evidence of plaintiff automobile passenger did not establish that she was contributorily negligent as a matter of law in riding with an intoxicated driver, that being a question for the jury, where plaintiff testified that she did not see the driver consume any alcoholic beverage, did not smell any alcohol on his person, and was not aware that he had been drinking.

APPEAL by plaintiff from *Parker, Judge,* 19 November 1970 Civil Session, SAMPSON Superior Court.

This is a civil action in which plaintiff seeks to recover damages for personal injury sustained by her while riding as a passenger in an automobile owned and operated by defendant.

In his answer, defendant pleaded contributory negligence on the part of plaintiff, alleging specifically that plaintiff voluntarily rode with defendant when she knew that he had consumed a considerable quantity of intoxicants.

Defendant's negligence is not seriously challenged. The evidence showed that defendant's automobile made a right turn at a "T" intersection, that his turn was "too wide," and he collided head-on with another vehicle.

Plaintiff presented State Highway Patrolman Laughinghouse, the investigating officer, as a witness. Among other things, he testified that immediately after the collision he talked with the defendant, smelled intoxicants on his breath, and otherwise observed defendant; that in his opinion defendant was under the influence of intoxicants to an appreciable degree; that in criminal court, defendant pleaded guilty to driving under the influence of intoxicants and failing to drive his vehicle on the right half of the highway.

Plaintiff testified that she had been riding with defendant off and on since 5:30 p.m. that day, the collision occurring around 10:00 p.m. During that time she did not see defendant consume any alcoholic beverage, did not smell any alcohol on his person, and was not aware that he had been drinking.

After plaintiff rested her case, defendant moved for a directed verdict under Rule 50(a) upon the ground that plaintiff's own evidence showed her contributory negligence as a matter of law in that she rode with defendant while he was intoxicated. The motion was allowed and plaintiff appealed from judgment predicated thereon.

Bryan, Jones, Johnson, Hunter & Greene and Stewart and Hayes by Gerald Hayes for plaintiff appellant.

Chambliss, Paderick & Warrick by Joseph B. Chambliss for defendant appellee.

BRITT, Judge.

Plaintiff's sole assignment of error is that the trial court erred in directing a verdict for defendant at the close of plaintiff's evidence; she contends that her evidence did not show her to be contributorily negligent as a matter of law. We agree with this contention.

On appeal from the granting of a motion for directed verdict under Rule 50(a) of the Rules of Civil Procedure, we must determine the sufficiency of plaintiff's evidence guided by the same principles applicable in determining the sufficiency of evidence to withstand the former motion for nonsuit under G.S. 1-183. *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365 (1970). In *Dinkins v. Carlton,* 255 N.C. 137, 120 S.E. 2d 543 (1961) in the third headnote to the opinion, we find the following:

> Whether a passenger is guilty of contributory negligence in voluntarily embarking on a trip with a driver whom he knows to be reckless, or in failing to abandon the trip after discovery that the driver was operating the vehicle in a reckless manner or while intoxicated, or in failing to remonstrate with the driver, is usually a question for the jury under the rule of the ordinary prudent man, and the conduct of the passenger in these respects will not ordinarily be held for contributory negligence as a matter of law.

In considering a motion for a directed verdict in favor of defendant, the evidence must be viewed in the light most favorable to plaintiff and a directed verdict is proper only

when contributory negligence is so clearly established that no other conclusion can reasonably be reached. *Beam v. Parham,* 263 N.C. 417, 139 S.E. 2d 712 (1965); *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33 (1957); *Jackson v. Jackson,* 4 N.C. App. 153, 166 S.E. 2d 541 (1969). Discrepancies and contradictions in the evidence are to be resolved by the jury and not by the court. *Dinkins v. Carlton, supra; Jackson v. Jackson, supra.*

When the testimony given at trial in the instant case is viewed in the light most favorable to plaintiff one must conclude that plaintiff had not seen defendant drinking, did not smell alcohol on defendant, and by observing defendant's actions did not recognize that he was intoxicated; therefore, it was error for the court to hold that plaintiff in riding with defendant was contributorily negligent as a matter of law.

The judgment appealed from is

Reversed.

Judges CAMPBELL and GRAHAM concur.

J. T. TAYLOR, JR. AND WIFE, DORA W. TAYLOR, PETITIONERS v. JOE ASKEW AND WIFE, THELMA ASKEW, DAVID BOWEN AND WIFE, MAXINE BOWEN, B. B. BOWEN, C. G. RESPESS AND WIFE, MYRTLE RESPESS, H. L. RESPESS AND WIFE, ELOISE RESPESS, BEULAH RESPESS, WIDOW, DEMPSEY BOWEN AND WIFE, ALMA A. BOWEN AND HERMAN BOWEN AND WIFE, GLADYS BOWEN, RESPONDENTS

No. 712SC302

(Filed 26 May 1971)

1. **Highways and Cartways § 15— cartway proceeding — final order of clerk — appeal**

Clerk's order dismissing a cartway proceeding on the ground that the petitioners had adequate means of ingress and egress *is held* a final order from which the petitioners may appeal. G.S. 136-68.

2. **Highways and Cartways § 15— cartway proceeding — review in superior court — remand to clerk for hearing de novo**

On appeal from the clerk's order dismissing a cartway proceeding on the ground that the petitioners had adequate means of ingress and egress, the superior court erred in remanding the case to the clerk for

a hearing *de novo* and for the joinder of additional parties without first ruling on the merits of the petitioners' appeal.

APPEAL by petitioners from *Hubbard, Judge,* 2 November 1970 Session of Superior Court held in BEAUFORT County.

Petitioners instituted this special proceeding, pursuant to G.S. 136-68 and G.S. 136-69, to establish a cartway from petitioners' tract of land in Beaufort County to N. C. Highway 32, over lands of the respondents. The Clerk of Court found that the petitioners had adequate means of ingress and egress by virtue of a right of way granted them by the Albemarle Drainage District, which connects petitioners' lands with various public roads and, ultimately, with Highway 32, although over a more circuitous route than that desired by petitioners. From the order of the Clerk dismissing the proceeding, petitioners appealed to the Superior Court. The Court heard evidence presented by petitioners and respondents, and entered judgment striking the previous order of the Clerk, remanding the cause to the Clerk with directions that the Albemarle Drainage District, Beaufort County #5, and certain named individuals, be made parties, and directing that the Clerk hear the matter upon pleadings to be filed *de novo.* Petitioners appealed to this Court.

Wilkinson & Vosburgh, by John A. Wilkinson, for respondents-appellees.

McMullan, Knott & Carter, by Lee E. Knott, Jr., for Petitioners-Appellants.

BROCK, Judge.

Petitioners assign as error the action of the Court in failing to determine the issue of whether petitioners had adequate means of ingress and egress, and in remanding the cause to the Clerk to have additional parties joined and hear the matter *de novo.*

[1, 2] G.S. 136-68 provides that "[f]rom any final order or judgment in said special proceeding, any interested party may appeal to the superior court for trial *de novo.* . . . " The order of the Clerk that petitioners' action be dismissed was certainly a "final order" within the meaning of the statute. *Dailey v.*

Bay, 215 N.C. 652, 3 S.E. 2d 14. It had been stipulated by the parties that the only issue to be tried was whether petitioners have "an adequate means of ingress and egress to and from their property." This issue having been determined adversely to the petitioners by the Clerk, they had a right to have that determination reviewed by the Judge, without further delay. No end was to be served by directing the Clerk to reconsider the issue upon which he had already ruled. "Upon the docketing of the appeal upon the civil issue docket the Superior Court acquired full jurisdiction thereof and it is its duty to determine the issues of fact and questions of law involved. If it is finally adjudged that plaintiff is entitled to a cartway across the lands of the defendants as prayed, then, and only then, may the judge in his discretion remand the cause to the clerk for the procedural action necessary under the statute for the execution of the judgment rendered." *Dailey v. Bay, supra,* at 654.

[2] In addition to ordering that the clerk rehear the entire matter *de novo,* the order of Judge Hubbard directed the addition of parties respondent, including the Albemarle Drainage District. It was stipulated that the original respondents own lands lying between and adjoining the petitioners' property and Highway #32. Also the parties had stipulated that there was no question of misjoinder or nonjoinder of parties. If Judge Hubbard nevertheless felt that additional parties respondent were necessary before a determination of the appeal he should have entered such orders as necsessary to bring them in. It was not proper to remand the matter to the clerk without first passing upon the merits of petitioners' appeal. The issue to be determined by the judge on appeal is whether petitioners are entitled to a cartway over some lands. It does not involve the actual location of the road or whose land shall be burdened thereby; these being questions to be initially determined by the jury of view. *Candler v. Sluder,* 259 N.C. 62, 130 S.E. 2d 1. If the clerk's ruling is upheld by the judge the proceeding should be dismissed. If the judge determines that the petitioners are entitled to a cartway he should so order and remand the matter to the clerk for the appointment of a jury of view and for further proceedings as prescribed by the statute.

The order of Judge Hubbard is vacated and the cause is remanded to the Superior Court of Beaufort County for such

findings of fact and conclusions of law by the judge as may be proper, and for further proceedings consistent therewith.

Order vacated and cause remanded.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT MUSE

No. 711SC94

(Filed 26 May 1971)

Criminal Law § 75— involuntary statement by defendant — officer's promise of help

Statement made by defendant in jail was rendered involuntary by S.B.I. agent's offer to "let it be known" if defendant gave him any information in solving cases.

APPEAL by defendant from *Rouse, J.*, 22 September 1970 Session of Superior Court held in CAMDEN County.

The defendant was charged in a bill of indictment with breaking and entering a building occupied by City Motor Parts, Inc. of Elizabeth City, with larceny of personal property located therein, and with receiving stolen goods, knowing them to be stolen. The bill of indictment was returned in Pasquotank County; on motion of the defendant for a change of venue, the case was transferred to the Superior Court of Camden County for trial. The defendant was tried only upon the charge of receiving stolen goods. He pleaded not guilty. From a verdict of guilty, defendant appeals.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

Worth and Beaman by Grafton G. Beaman for defendant appellant.

VAUGHN, Judge.

Appellant contends that the court erred in its findings entered after *voir dire* as to whether his confession was voluntary, and in allowing into evidence incriminating statements

amounting to a confession. The evidence shows that S.B.I. Officer O. L. Wise stated that he visited the defendant in his jail cell and had a conversation with him. At that point, counsel for defendant entered an objection, and a *voir dire* was conducted. Officer Wise's testimony on *voir dire* is, in substance, as follows: Officer Wise made several visits to defendant's jail cell between 12 June 1969 and 15 July 1969. Each visit to the defendant's cell was a result of defendant's request to see him. The defendant stated on several of these visits that he did not understand why his bond was so high; that he had a family and could not support his family by being in jail, and he could not employ counsel unless he could get out of jail and go to work. He asked the officer to help him do something to get his bond lowered. The officer tried to contact a judge but was unable to do so and so advised the defendant. The defendant indicated he might have some information that would be of interest and value to the officer. The officer told the defendant that if he could help the officer in solving any crimes he would appreciate it. "He still wanted me to help assist in getting the bond lowered." The officer told the defendant that he was a police officer and could not make any promises. The officer did however, tell the defendant that if he gave him any information in solving any case that "I would let it be known." Officer Wise said that he did not caution defendant of his constitutional rights because he did not go to the jail to interrogate defendant, but went there at defendant's request. Officer Wise said all of defendant's statements were voluntarily made, without any prompting from him. The defendant did not offer any evidence on *voir dire*. Judge Rouse found facts in substance as follows: At no time were the discussions with the defendant initiated by Officer Wise. Mr. Wise did not request the defendant to make a statement with respect to the alleged breaking and entering of City Motor Parts, Inc. and larceny of tools therefrom. The information and statements of the defendant were volunteered. This was not a custodial interrogation wherein the questioning was initiated by a law enforcement officer. There is nothing to indicate any lack of intelligence of the defendant. Judge Rouse concluded that the statements were voluntarily and understandingly made, and admissible as evidence in this case. The jury returned and the officer related the statements made to him by defendant with reference to the tools.

This court must decide as a matter of law whether the circumstances of this case rendered the confession inadmissible. *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68. In doing so, we will again bring forward the following from *State v. Roberts,* 12 N.C. 259:

> "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

The defendant was in custody and without counsel. He had reason to believe that the officer would act as an intercessor with the court in an effort to get his bond reduced. In fact the officer did attempt to contact a judge and the defendant was so advised. The defendant told the officer he had information that would be of value and was told that such information would be appreciated. Although the officer told the defendant that he knew he could not make any promise, he also told him, "If he gave me any information in solving any cases that I would *let it be known.*" "[A] confession obtained by the slightest emotions of hope or fear ought to be rejected." *State v. Roberts, supra.* The total circumstances surrounding the defendant's statement to the officer compel us to hold as a matter of law that it was prompted by an "emotion of hope" and thus was involuntary. *State v. Fuqua, supra; State v. Woodruff,* 259 N.C. 333, 130 S.E. 2d 641; *State v. Gibson,* 2 N.C. App. 187, 162 S.E. 2d 627. Its admission in evidence was error. Since there must be a new trial, we do not discuss the other assignments of error brought forward by the defendant.

New trial.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. HERMAN DICKENS

No. 717SC337

(Filed 26 May 1971)

1. **Criminal Law § 166— abandonment of assignments of error**

Assignments of error not brought forward and argued in the brief are deemed abandoned.

2. **Criminal Law § 162— failure to instruct jury to disregard testimony**

Where trial court sustained defendant's objection to testimony by a deputy sheriff as to what an X-ray showed, but defendant made no motion to strike the testimony and did not request the court to instruct the jury not to consider it, defendant cannot for the first time on appeal object to the failure of the trial court to instruct the jury to disregard the testimony.

3. **Criminal Law § 169— failure to instruct jury to disregard testimony — absence of prejudice**

In this prosecution for felonious assault, defendant was not prejudiced by failure of the court to instruct the jury to disregard testimony by a deputy sheriff that he saw an X-ray "that showed where the bullet stopped," where defendant admitted shooting the prosecutrix, and the prosecutrix testified without objection to the severity and treatment of the injury she sustained.

4. **Criminal Law § 88; Witnesses § 8— argumentative cross-examination**

The trial court did not abuse its discretion in the disallowance of argumentative cross-examination of a State's witness.

5. **Criminal Law § 163— grouping of exceptions under single assignment — broadside assignments**

While it is proper to group two or more exceptions under a single assignment of error when they relate to a single question of law, the grouping of several exceptions relating to different questions of law under a single assignment of error constitutes a broadside assignment and is ineffective.

APPEAL by defendant from *Cohoon, Judge,* 12 November 1970 Session, Superior Court of EDGECOMBE County.

Defendant was charged with feloniously assaulting Reatha Mae Jones with a deadly weapon with intent to kill and inflicting serious injury not resulting in death. The jury returned a verdict of guilty of assault with a firearm inflicting serious injury. Judgment was entered imposing a prison term of five years. Defendant appealed. He was represented at trial by court-appointed counsel. He is represented on appeal by court-appointed counsel. The State of North Carolina has furnished

him a transcript of his trial and has caused the record on appeal and brief to be printed at no cost to him.

Attorney General Morgan, by Assistant Attorney General Rosser, for the State.

Howard A. Knox, Jr., for defendant appellant.

MORRIS, Judge.

[1] Appellant does not bring forward and argue assignments of error Nos. 1, 3, 5 and 9. Those not brought forward and argued are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina; *Gibson v. Montford*, 9 N.C. App. 251, 175 S.E. 2d 776 (1970).

[2, 3] By assignment of error No. 2, defendant argues that the court erred in failing to exclude testimony of Deputy Sheriff E. H. Sawyer, Jr., to the effect that he "saw the X-ray that showed where the bullet stopped." The court sustained defendant's objection as to what it showed and overruled it as to seeing the X-ray. Defendant argues that the court should have instructed the jury to disregard the testimony. The record does not reveal the question posed by the solicitor, nor whether objection was made thereto. We can only assume that the answer to a part of which defendant has excepted was partially responsive and partially unresponsive. Defendant interposed no motion to strike that part of the answer stating what the X-ray showed, nor did he request the court to instruct the jury not to consider it. His objection now to the court's failure to instruct the jury comes too late. *State v. Knight*, 247 N.C. 754, 102 S.E. 2d 259 (1958). In any event the evidence was not prejudicial. Defendant admitted shooting the prosecuting witness, and she testified, without objection, to the severity of the injury sustained, the length of time she remained in the hospital, and the treatment she received. This assignment of error is without merit.

[4] Defendant next argues that he was denied the right to cross-examine a witness for the State. The alleged error occurred during the State's rebuttal evidence. Ray Pittman was recalled and examined by the solicitor and testified that he had not seen a pistol of the prosecuting witness. On cross-examination he testified:

"These people could be mistaken when they say they saw a gun in Reatha's hand. I didn't see one. I know she didn't have a pocketbook and she didn't have one in her hand.

Q. So when Linwood Bandy said she had a gun, he was wrong, wasn't he?

OBJECTION: SUSTAINED."

It is obvious that the cross-examination was becoming argumentative. The court had the discretion and the duty to keep the cross-examination within reasonable bounds, and the exercise of that discretion was not error. *State v. Bumper,* 275 N.C. 670, 170 S.E. 2d 457 (1969). This assignment of error is overruled.

[5] Defendant's remaining assignments of error are directed to the court's charge to the jury. The purported assignments of error are not in compliance with our rules. While it is perfectly proper to group two or more exceptions under a single assignment of error where all the exceptions so grouped relate to a single question of law, the grouping of several exceptions relating to different questions of law under a single assignment of error constitutes a broadside assignment of error, therefore, ineffective. *Nye v. University Development Co.,* 10 N.C. App. 676, 179 S.E. 2d 795 (1971). The purported assignments of error to the charge do not quote the portion to which appellant objects nor do they contain a statement of what defendant contends the court should have charged. *Daly v. Weeks,* 10 N.C. App. 116, 178 S.E. 2d 30 (1970). Nevertheless, we have carefully examined the charge of the court and are of the opinion that when read contextually, it sufficiently declared and explained the law arising on the evidence as to all the substantial features of the case and is free from prejudicial error.

No error.

Judges BROCK and HEDRICK concur.

GEO. T. DAVIS AND WIFE, ALMA LEE C. DAVIS v. CARL M. CAHOON AND WIFE, CELIA G. CAHOON

No. 712SC227

(Filed 26 May 1971)

1. **Evidence § 40— opinion testimony — jury qualified to draw conclusions**

In this action for damages from the flooding of plaintiffs' lands and to enjoin such flooding, the trial court properly refused to allow male plaintiff to state his opinion as to how long his fields would have remained flooded had defendants not been operating their pumps, and as to why his lands stayed flooded for the period of time he had previously stated, since the witness had previously related, or could have related, all of the facts on which his conclusions were based, and the jury was as well qualified as the witness to draw inferences and conclusions from the facts.

2. **Appeal and Error § 49— damage issue not reached by jury — exclusion of evidence**

Where the jury did not reach the issue of damages, plaintiffs were not prejudiced by the exclusion of testimony by the male plaintiff as to his estimate of what his lands would have produced except for defendants' pumping operations, or by alleged misstatement of plaintiffs' contentions with respect to the portion of their crop loss that was caused by defendants' actions.

APPEAL by plaintiffs from *Hubbard, Judge,* 26 October 1970 Civil Session of Superior Court held in HYDE County.

Plaintiffs instituted this action for damages and to enjoin defendants from flooding plaintiffs' land. The issue answered by the jury was as follows: "Did the defendants by their pumping operations cause water to back up or stand on the plaintiffs' lands, as alleged in the Complaint?" The jury answered the issue "No." From the judgment entered thereon, plaintiffs appeal.

George T. Davis for plaintiff appellants.

Wilkinson and Vosburgh by John A. Wilkinson for defendant appellees.

VAUGHN, Judge.

Knowledge of the factual background of the case may be gained by reference to *Davis v. Cahoon,* 5 N.C. App. 46, 168 S.E. 2d 70, where this Court held that the evidence was sufficient to go to the jury and reversed a judgment of involuntary

nonsuit. The opinion in the earlier appeal also contains a pertinent discussion and application of the rules relating to the reciprocal rights and duties of landowners with respect to flow of waters. We will not, therefore, restate the facts or principles of law except as may be necessary to dispose of the assignments of error brought forward on this appeal.

[1] The canal which plaintiffs contend defendants obstructed serves as a common drainway for surface waters from lands of plaintiffs, defendants and others. The canal extends from U. S. Highway No. 264 to a tributary of the Pamlico Sound. The lands of plaintiffs are approximately one mile from the lands of defendants. The owners of the land bordering on the canal and lying between the lands of plaintiffs and defendants are not parties to this lawsuit. Defendants expedited the drainage water from their tract to the canal by means of a pump. Plaintiffs offered evidence which they contend tended to show that defendants' pumping wrongfully obstructed the natural flow of water in the canal, and, on the occasions alleged, caused water to back up and stand on plaintiffs' land for a longer period than it would have in the absence of such wrongful obstruction. Plaintiff George T. Davis testified that after a period of heavy rains in June of 1965 water stood on his land for at least a week and possibly longer. He was asked to state his opinion as to how long his fields would have remained flooded had the defendants not been operating their pump. Defendants' objection was sustained. If the answer had been allowed in evidence it would have been "three to four days." He was asked to state his opinion as to why his lands stayed flooded for the period of time that he had previously stated. Defendants' objection was sustained. The record discloses that the answer would have been "pumping operations being conducted by the defendants on their land designated in the pleadings as Tract No. 6." Objections to similar questions as to conditions of May 1966 were also sustained. Plaintiffs contend that the court erred in sustaining defendants' objections to the foregoing questions. We do not agree. The testimony was inadmissible for several reasons. It suffices here to say that the witness had previously related, or could have related, all of the facts on which his conclusions, of necessity, were based. No reason appears why the jury could not thus have had an adequate understanding of such facts. The jury was, therefore, as well qualified as the witness to draw inferences and conclusions from the facts. D.

Stansbury, The North Carolina Law of Evidence, § 124 (2d ed. 1963).

[2] Upon objection the court did not allow plaintiff George T. Davis to answer several questions seeking to elicit his estimate as to what his lands would have produced except for the pumping operations of the defendants. We note that Mr. Davis was allowed to estimate the percentage of loss to his crops which was caused by water damage. In this connection plaintiffs contend that the judge misstated their contentions with respect to what portion of this loss was caused by the defendants and the percentage of loss that they would have sustained had the pump not been operating. Although we do not agree with plaintiffs' contentions as to the exclusion of the evidence as to plaintiffs' estimates or the judge's instructions as to plaintiffs' contentions, it is not necessary to discuss them because the jury did not reach the issue of damages and plaintiffs were not prejudiced thereby.

On the first appeal of this case, the Court held that plaintiffs had offered sufficient evidence to get their case before the jury. The jury, after hearing the evidence of plaintiffs and defendants, has resolved the controversy adversely to plaintiffs. Although we have not discussed all of the numerous assignments of error brought forward and ably argued by plaintiffs, we have carefully considered each of them. We find no error which would warrant a new trial.

No error.

Chief Judge MALLARD and Judge PARKER concur.

ANN P. WILSON v. LAWRENCE C. WILSON

No. 715DC289

(Filed 26 May 1971)

Divorce and Alimony § 22— child custody and support — prior divorce action — venue

Custody and support of minor children had not been determined in a divorce action, and the mother could therefore maintain an independent action in another court to obtain increased child support, where the divorce judgment recited that all issues except the divorce,

including custody of the children, had been disposed of by separation agreement, but the divorce judgment was silent as to support of the children and did not refer to any such provision in the separation agreement.

APPEAL from *Burnett, Judge,* 7 December 1970 Session, District Court of NEW HANOVER County.

Plaintiff appellant instituted this action on November of 1970 in the District Court of New Hanover County to obtain increased support from the defendant appellee for the two children of the marriage between plaintiff and defendant. Defendant filed a "Special Appearance and Motion to Dismiss" on 17 November 1970, contending that the proper venue, under G.S. 50-13.1 through 50-13.8, was in the Wake County Superior Court where in an action brought by the present plaintiff against defendant, plaintiff had been granted an absolute divorce from defendant. Judge Burnett, after hearing arguments and studying the record from the Wake County Superior Court, granted the motion of defendant and dismissed plaintiff's cause of action.

James L. Nelson for plaintiff appellant.

Defendant appellee did not file a brief.

MORRIS, Judge.

Pertinent portions of the judgment entered by Judge Copeland in the action in Wake County Superior Court follow:

"And it further appearing to the court that the parties have disposed of all matters at issue by a separation agreement and the sole matter that remains to be determined in this action is the divorce of the parties;".

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between the plaintiff and defendant be, and they are hereby dissolved, and the plaintiff is granted an absolute divorce from the defendant; that the plaintiff shall have the custody of the minor children in accordance with the amended separation agreement heretofore mentioned; that the costs of this action is taxed against the plaintiff."

G.S. 50-13.5(f) provides:

"An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, *until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause of such action. . . .*" (Emphasis ours.)

This Court has said in *In re Holt,* 1 N.C. App. 108, 160 S.E. 2d 90 (1968), that "where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. . . . Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains *in fieri* until the children have become emancipated." (Citations omitted.)

The record before us does not disclose the contents of the pleadings in the Wake County action. The judgment recites that complaint was filed and in due time answer was filed "raising certain issues." We do not know what those issues were. The judgment further recites that all issues except the divorce had been settled by the parties and disposed of by separation agreement including the custody of the children of the parties, the agreement providing that custody of the children be in the wife, plaintiff in that action, and plaintiff in this action. The judgment is completely silent as to support of the children and does not even refer to any such provision in the separation agreement. Nor was the consent portion of the judgment signed by either of the parties or counsel for either. The judgment refers to a separation agreement and an amended separation agreement, but contains nothing by which any separation agreement could be identified as to date or content. Certainly, the separation agreements referred to are not incorporated in the divorce judgment.

It appears clear to us that the custody and support of the children had not been brought to issue or determined in the

previous action between the parties, within the meaning of the statute.

Defendant's motion, therefore, should have been denied and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM TROLLINGER, JR.

No. 7118SC217

(Filed 26 May 1971)

1. **Robbery § 4; Indictment and Warrant § 17— prosecution for robbery of credit cards — variance**

   There is a fatal variance between indictments alleging that defendant with force and arms obtained credit cards from the control of a named person and evidence disclosing that defendant took the cards from a garbage can. G.S. Ch. 14, Art. 19B.

2. **Criminal Law § 107— motion for nonsuit — fatal variance between pleading and proof**

   A fatal variance between the indictment and the proof is properly raised by a motion for judgment as of nonsuit.

APPEAL by defendant from *Crissman, Judge,* 16 November 1970, Criminal Session, High Point Division, GUILFORD County Superior Court.

Defendant was charged in four bills of indictment with a violation of the Credit Card Crime Act, as contained in Article 19B of Chapter 14 of the Criminal Laws. Evidence for the State tended to show that the four credit cards, two belonging to Norman A. Easter and two belonging to Jack K. Beeson, were discovered when defendant was brought to the Alamance County jail after being convicted and sentenced on another charge. Pursuant to the jailer's instructions, defendant emptied his pockets and placed everything on a table. The cards were included in the contents of his pockets. Both Jack Beeson and Norman Easter testified that they had never seen defendant before, but that their credit cards had been taken by one Lester T. Summerlin during a hold-up of the Columbia Food Market

in High Point. Summerlin himself testified that he threw the cards in a garbage can and entered a pool room. He denied telling defendant that the cards were in the garbage can. A detective sergeant of the High Point Police Department testified that Summerlin informed him that he threw the cards in a trash can and then went inside the pool room and told the defendant about them.

Defendant did not offer any evidence. From a verdict of guilty in each case and a sentence in each case of 18 to 24 months, suspended for five years upon certain conditions, defendant appeals to this Court.

Attorney General Robert Morgan by Assistant Attorney General Eugene Hafer and Staff Attorney Donald A. Davis for the State.

Bencini, Wyatt, Early & Harris by A. Doyle Early, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] The first bill of indictment that defendant was charged under read as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That WILLIAM TOLLINGER, [*sic*] JR., ALIAS 'MINNESOTA FATS' late of the County of Guilford on the 11th day of March 1970 with force and arms, at and in the County aforesaid, did unlawfully, wilfully, and feloniously obtain a credit card from the control of Norman A. Easter, the person named on the face of such credit card and to whom the credit card had been issued. This obtaining was done without the consent of the above named cardholder to whom such credit card had been issued for Humble Oil & Refining Company and which said card was in effect at the time of such obtaining, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Each of the other three bills of indictment contained similar language, substituting only the name of the person named on the credit card and the company that issued the credit card. Of the four credit cards involved, two were issued in the name of Norman A. Easter and two in the name of Jack K. Beeson.

The evidence presented by the State showed that defendant did not obtain any of the credit cards from the control of either Norman A. Easter or Jack K. Beeson, but instead took them from a garbage can after either finding them there or being told that they were there. The cards were, in fact, obtained by Summerlin in the course of an armed robbery from Norman A. Easter and Jack K. Beeson.

[1, 2] The defendant contends that there was a fatal variance between the proof and the charge in the bills of indictment. We agree with this contention. A fatal variance between the indictment and the proof is properly raised by a motion for judgment as of nonsuit. 2 Strong, N. C. Index 2d, Criminal Law, § 107, p. 660. Article 19B of Chapter 14 of the Criminal Law provides for credit card crimes. There are many provisions in this Article, and it is entirely possible that the defendant violated one of these provisions. The evidence in this case, however, makes out a fatal variance from the charge contained in the bills of indictment. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. McDowell,* 1 N.C. App. 361, 161 S.E. 2d 769 (1968) *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266 (1969). Compare with *State v. Muskelly,* 6 N.C. App. 174, 169 S.E. 2d 530 (1969).

In this case the motion of defendant for nonsuit should have been granted.

Reversed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. DONALD DAVID STEVENS

No. 7118SC274

(Filed 26 May 1971)

Criminal Law § 143— activation of suspended sentence — findings of fact

Where, upon a hearing *de novo* in the superior court on appeal from an order of the district court activating a suspended sentence, the superior court fails to make specific findings as to what condition of suspension defendant had violated, the order revoking the suspension will be vacated and the cause remanded for specific findings relating thereto.

State v. Stevens

APPEAL by defendant from *Collier, Judge,* 26 October 1970 Session of GUILFORD Superior Court.

Defendant was charged with unlawfully and wilfully neglecting and refusing to provide adequate support for his two children, in violation of G.S. 14-322.

On 2 January 1970, defendant appeared in district court and entered a plea of guilty. The district court imposed a prison term of six months suspended upon the conditions that: (1) beginning 30 January 1970 defendant pay $60 per week for the use of his children, and (2) that he pay costs of the action.

On 14 April 1970, the prosecuting witness, wife of defendant, filed a bill of particulars alleging specific instances wherein defendant had not complied with the first of the above stated conditions and prayed that defendant be arrested and jailed for noncompliance with the order of the court. A *capias* was served on defendant and after a hearing, the district court concluded that: (1) defendant should be excused for failing to pay a stated part of the sum he was in arrears because of his temporary inability to work; and (2) prayer for judgment be continued until 7 December 1970 subject to the conditions that defendant make up the remaining payments in arrears and pay court costs.

On 23 July 1970, another *capias* was issued and on the following day defendant was arrested. On 14 September 1970, the district court, after making specific findings of defendant's violations of the conditions of the suspended sentences, adjudged that defendant had breached valid conditions of the suspended sentence and ordered that he be imprisoned for six months. Defendant appealed to superior court where hearing *de novo* was had on 26 October 1970. The court heard testimony and entered judgment in pertinent part as follows:

> "In open court, the defendant appeared for trial upon the charge or charges of Appeal from finding of fact (Non Support of 2 children).
>
> "The Court finds as a fact that the defendant did wilfully violate the terms and conditions of the suspended sentence, and orders the sentence into effect, which is a violation of G.S. 14-322 and of the grade of misdemeanor.

"It is ADJUDGED that the defendant be imprisoned for the term of six (6) months in the common jail of Guilford County to be assigned to work under the supervision of the State Department of Correction."

Defendant appeals from the judgment of the superior court.

Attorney General Robert Morgan by Staff Attorney Richard N. League for the State.

Cahoon & Swisher by Robert S. Cahoon for defendant appellant.

BRITT, Judge.

Defendant's sole contention is that the superior court did not make sufficient findings of fact to activate the prison sentence imposed in district court. We agree with the contention.

We think this appeal is controlled by the opinion of this court in *State v. Langley,* 3 N.C. App. 189, 164 S.E. 2d 529 (1968), and the opinion of the Supreme Court in *State v. Davis,* 243 N.C. 754, 92 S.E. 2d 177 (1956). Although *Langley* involved suspension of probation, we think the principle is the same and the pertinent holding of the court in *Langley* is stated in the seventh headnote to the opinion as follows: "Where, in a proceeding to revoke a judgment of probation, the trial court fails to make specific findings as to what condition of probation defendant had violated, the order revoking the probation judgment will be vacated and the cause remanded for a specific finding relating thereto."

The pertinent holding of the Supreme Court in *Davis* appears to be set forth in the second headnote of the opinion as follows:

Where, upon hearing *de novo* on appeal to the Superior Court from an order activating a suspended sentence, the Superior Court fails to find wherein the defendant had violated the conditions of suspension, defendant is entitled to have the cause remanded for a specific finding in regard thereto, since only by such finding may defendant test the validity of the condition for violation of which the suspended execution was activated.

For the reasons stated, the judgment appealed from is vacated and this cause is remanded for further hearing consistent with this opinion.

Remanded.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. FLOYD WILSON THURGOOD

No. 7112SC332

(Filed 26 May 1971)

1. **Criminal Law § 84; Searches and Seizures § 2— consent to search**

The evidence on *voir dire*, although conflicting, supports the ruling by the trial court that defendant consented to a search in which heroin was found in his shirt pocket.

2. **Criminal Law § 161— appeal as exception to judgment**

An appeal is an exception to the judgment and presents the face of the record proper for review.

3. **Criminal Law § 157— record proper**

The record proper consists of the bill of indictment or warrant, the plea, the verdict and the judgment entered.

4. **Criminal Law § 25— plea of nolo contendere**

The plea of *nolo contendere* may not be interposed as a matter of right, but may be accepted by the court only as a matter of grace.

5. **Criminal Law § 25— acceptance of plea of nolo contendere**

No formal acceptance of a plea of *nolo contendere* by the court is required, and the entry of judgment based thereon constitutes an acceptance of the plea.

6. **Criminal Law § 25— plea of nolo contendere — judgment**

While a plea of *nolo contendere* empowers the judge to impose punishment as upon a plea of guilty, it does not authorize the judge to enter a verdict of guilty and will not support a recital in the judgment that the defendant has been "found guilty."

APPEAL by defendant from *Bailey, Judge,* 11 January 1971 Session of Superior Court held in CUMBERLAND County.

The defendant Floyd Wilson Thurgood was charged in a bill of indictment, proper in form, with the possession of a narcotic drug; to wit, heroin, in violation of G.S. 90-88.

The record reveals that the defendant, an indigent, represented by the Public Defender, pleaded not guilty to the bill of indictment, and after a jury had been impaneled, he moved to suppress any evidence seized as a result of the search of his person. On *voir dire* the court heard evidence which tended to show that police officers of the Fayetteville Police Department and officers of the State Bureau of Investigation went to premises occupied by the defendant and others for the purpose of searching for heroin. Police Officer W. A. Newsom told the defendant that he "wanted to search him and Thurgood replied 'OK, go ahead.' " Officer Newsom found a package containing heroin in the defendant's shirt pocket. The defendant denied that he gave the officer permission to search his person. After the hearing, the court found and adjudicated that the defendant consented to the search of his person, and held that the evidence seized was admissible.

After the court denied the defendant's motion to suppress the evidence, he withdrew his plea of not guilty and entered a plea of *nolo contendere*. The court then "entered a verdict of guilty" of possession of heroin.

The judgment entered by the court, in pertinent part, recites:

> "In open court, the defendant appeared for trial upon the charge or charges of possession of heroin and was represented by his attorney William Geimer and thereupon entered a plea of 'NOLO CONTENDERE' to possession of heroin.
>
> "Having been found guilty of the offense of possession of heroin which is a violation of the law and of the grade of felony
>
> "It is ADJUDGED that the defendant be imprisoned for the term of not less than thirty (30) months nor more than sixty (60) months in the North Carolina Department of Correction."

The defendant appealed to this Court.

Attorney General Robert Morgan and Trial Attorney Lester V. Chalmers for the State.

Public Defender William S. Geimer for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends that the court committed prejudicial error in denying his motion to suppress the evidence gained as a result of the search of his person. We do not agree. The evidence, although conflicting, supports the ruling of the court.

[2, 3] An appeal is an exception to the judgment, and presents the face of the record proper for review. *State v. Gwyn,* 7 N.C. App. 397, 172 S.E. 2d 105 (1970). The record proper consists of the bill of indictment or warrant, the defendant's plea, the verdict, and the judgment entered. *State v. Gwyn, supra.*

The bill of indictment in the instant case properly charged the defendant with the violation of G.S. 90-88.

[4-6] The record discloses that after the defendant had changed his plea of not guilty to *nolo contendere* the court entered a verdict of "guilty." The plea of *nolo contendere* may not be interposed as a matter of right, but may be accepted by the court only as a matter of grace. *State v. Norman,* 276 N.C. 75, 170 S.E. 2d 923 (1969). No formal record of the acceptance of the plea by the court is required, and the entry of judgment based thereon constitutes an acceptance of the plea. *State v. Hicks,* 269 N.C. 762, 153 S.E. 2d 488 (1967). A plea of *nolo contendere* empowers the judge to impose punishment as upon a plea of guilty, *State v. Norman, supra,* but it does not authorize or empower the judge to enter a *verdict* of guilty, *State v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525 (1952), nor will such an entry support a recital in the judgment that the defendant had been "found guilty."

In the instant case, the defendant's plea of *nolo contendere* to the bill of indictment will support the prison sentence imposed. We find and hold that the defendant had a fair trial free from prejudicial error; however, for the reasons stated herein, the judgment is vacated, and the case is remanded to the superior court for the entry of proper judgment in accordance with the defendant's plea.

Vacated and remanded.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM DAVID FIELDS

No. 7127SC318

(Filed 26 May 1971)

1. **Criminal Law § 134— validity of judgment — reference to offense**

Judgment sentencing defendant to seven-to-ten years' imprisonment was not rendered invalid because it failed to state that the defendant pleaded guilty to a felony.

2. **Criminal Law § 134— requisites of valid judgment**

It is not essential to the validity of a judgment that it refer to the crime of which defendant was convicted.

3. **Constitutional Law § 36; Criminal Law § 145.1 — cruel and unusual punishment — activation of probationary sentence**

It was not cruel and unusual punishment for the trial court to activate defendant's probationary sentence of seven-to-ten years' imprisonment on the ground that defendant had failed to pay the costs of court and to remain gainfully employed, where defendant was given every opportunity to pay off the costs.

4. **Criminal Law § 145— costs in a criminal case**

Payment of the costs constitutes no part of the punishment in a criminal case, but the Legislature has required that every person convicted of an offense, or who confesses himself guilty of an offense, shall pay the costs of the prosecution. G.S. 6-45.

APPEAL by defendant from *Thornburg, Judge,* 15 January 1971 Session, Superior Court of GASTON County.

Defendant was charged in a valid indictment with felonious breaking and entering and larceny. He entered a plea of guilty, was sentenced to not less than seven nor more than ten years. The sentence was suspended and defendant placed on probation under judgment entered 3 February 1970. On 15 January 1971, judgment was entered revoking probation and ordering his suspended sentence activated. Defendant appeals from judgment activating the suspended sentence.

Attorney General Morgan, by Trial Attorney Magner, for the State.

William G. Holland for defendant appellant.

MORRIS, Judge.

[1, 2] Defendant, on this appeal from the judgment entered 15 January 1971, argues that the sentence imposed by the judg-

ment entered 3 February 1970 is excessive. He contends that in order for the defendant to be sentenced to not less than seven nor more than ten years, the judgment would have to state that the offense to which defendant pleaded guilty is a felony. This position is untenable and defendant offers no authority for his position. The indictment was proper in form and content and charged defendant with the commission of a felony. To this charge, defendant pleaded guilty. It is not essential to the validity of a judgment that it refer to the crime of which defendant was convicted. *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738 (1953). The judgment is supported by the indictment and the plea of guilty thereto. *State v. Oliver,* 213 N.C. 386, 196 S.E. 325 (1938).

[3] Defendant's only other assignment of error is that the court erred in entering the judgment because it is cruel and unusual punishment for the court to put the probationary sentence of not less than seven nor more than ten years into effect simply because the defendant who is an indigent person failed to pay the costs of court and failed to remain gainfully employed.

Probation or suspension of a sentence upon conditions to be performed comes to one convicted of a crime as a matter of grace and not as a matter of right. Defendant does not contend that the evidence was insufficient to support the court's findings. Indeed there was sufficient evidence upon which the court could have based findings of other violations. Certainly, defendant cannot seriously contend that the failure to remain gainfully employed in violation of one of the conditions of probation is not sufficient violation to cause the sentence to be activated. *State v. Cross,* 5 N.C. App. 215, 167 S.E. 2d 862 (1969).

[4] While the payment of costs constitutes no part of the punishment in a criminal case, *State v. Jennings,* 254 N.C. 760, 120 S.E. 2d 65 (1961), the Legislature has required that every person convicted of an offense, or who confesses himself guilty of an offense, shall pay the costs of the prosecution, G.S. 6-45. This case bears no similarity to *Tate v. Short,* 28 L. Ed. 2d 130, 91 S. Ct. 668 (1971), where the United States Supreme Court held that Tate's imprisonment solely because of his inability to pay fines was unconstitutional. There the offenses of which he was convicted were punishable by fines only. Here defendant

had failed and refused to pay the costs of the prosecution. The evidence shows that judgment was entered on 3 February 1970 and defendant was given until 15 May 1970 within which to pay the court costs. He failed to do so. Thereafter the court and defendant's probation officer attempted to work out a modification and schedule of repayment of the costs. This was never completed, because defendant could not be located, having changed his place of residence without the written consent of the probation officer.

Defendant was given every opportunity to avoid the activation of the sentence. He has no just cause to complain now when, by his own actions and his own failure to cooperate, he has made it necessary for the court to enter judgment revoking probation and activating his sentence.

Affirmed.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES LEE HALL

No. 714SC237

(Filed 26 May 1971)

Criminal Law § 114— instructions — expression of opinion

The following instruction constituted an expression of opinion on the evidence and was prejudicial error: "This is not a question of sympathy or prejudice. It is merely a question of facts and *the only question you are to consider is:* Was the defendant at the time and place in question under the influence of intoxicating beverages." G.S. 1-180.

APPEAL by defendant from *Parker, Judge,* 14 September 1970 Session of Superior Court held in ONSLOW County.

In the District Court of Onslow County the defendant was convicted of operating a motor vehicle upon the public highways of the State while under the influence of intoxicants. He was sentenced to a term of six (6) months, suspended for one (1) year upon the payment of $100.00 and court costs. He appealed to the superior court, where he was again convicted. From judg-

ment imposing a sentence of six (6) months in jail, the defendant appealed.

Attorney General Robert Morgan by Staff Attorney Charles A. Lloyd for the State.

Reginald Frazier and Chambers, Stein, Ferguson and Lanning by James E. Ferguson II and Adam Stein for defendant appellant.

VAUGHN, Judge.

The following instructions were included in the charge to the jury:

> ". . . This is not a question of sympathy or prejudice. It is merely a question of facts and *the only question* you are to consider is: Was the defendant at the time and place in question under the influence of intoxicating beverages." [Emphasis ours.]

Later in the charge the judge instructed the jury as follows:

> "Now, Ladies and Gentlemen of the Jury, the Court instructs you that upon this evidence you may return a verdict of guilty or not guilty bearing in mind the only question that you are to consider and *the only question that you are to decide* is whether or not at the time the defendant was arrested or attempted to be arrested by Officer Pearce, he had drunk a sufficient quantity of alcoholic beverage to cause him to lose the normal control of either his physical faculties or his mental faculties or both to an appreciable extent." [Emphasis ours.]

Though undoubtedly rooted in a momentary oversight by the trial judge, the prejudicial error in these instructions is patent. The following well-established principles are stated in *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99:

> "The crime with which defendant Swaringen was charged consists of two essential elements: (1) driving a motor vehicle on the public highways, and (2) operation of such vehicle while under the influence of intoxicating liquors. *S. v. Hairr,* 244 N.C. 506, 94, S.E. 2d 472.

"The criminal charge directed at defendant Thomas consists of these two elements plus the asserted fact that he aided and abetted in such operation.

"Defendants' pleas of not guilty put in issue each essential element of the crimes charged. *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537; *S. v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549; *S. v. Brown,* 225 N.C. 22, 33 S.E. 2d 121; *S. v. Yow,* 227 N.C. 585, 42 S.E. 2d 661.

"The State had the burden of establishing beyond a reasonable doubt each element of the crime. Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. G.S. 1-180.

"The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error. *S. v. Cuthrell,* 235 N.C. 173, 69 S.E. 2d 233; *S. v. Love,* 229 N.C. 99, 47 S.E. 2d 712; *S. v. Snead,* 228 N.C. 37, 44 S.E. 2d 359; *S. v. Minton,* 228 N.C. 15, 44 S.E. 2d 346; *Ward v. Mfg. Co.,* 123 N.C. 248.

"The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. *S. v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173; *Miller v. RR.,* 240 N.C. 617, 83 S.E. 2d 533; *S. v. Shinn,* 234 N.C. 397, 67 S.E. 2d 270; *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568.

"Nor does the manner in which counsel examines the witnesses or argues the case to the jury justify the court in assuming the existence of an essential fact. *S. v. Ellison,* 226 N.C. 628, 39 S.E. 2d 824. There must be a judicial admission before the existence of an essential element of a crime can be stated as a fact. *S. v. Hairr, supra.*"

Even if we could hold, in the light of defendant's testimony, that the quoted portions of the charge were not so prejudicial in this particular case as to require a new trial, other errors in the charge do make this necessary.

In recapitulating the testimony and, more grievously, in stating what was said to be the State's contentions, the judge violated the prohibition against expressing an opinion on the evidence and merits of the case. G.S. 1-180. Such expressions of opinion entitle the defendant to a new trial. *State v. Maready,*

269 N.C. 750, 153 S.E. 2d 483; *State v. Stroud* and *State v. Mason* and *State v. Willis,* 10 N.C. App. 30, 177 S.E. 2d 912; *Voorhees v. Guthrie,* 9 N.C. App. 266, 175 S.E. 2d 614; *State v. Watson,* 1 N.C. App. 250, 161 S.E. 2d 159.

New trial.

Chief Judge MALLARD and Judge PARKER concur.

MYRA WISE PEAKE v. MARY W. BABSON

No. 718SC196

(Filed 26 May 1971)

Judgments § 45— plea in bar — prior action

Plaintiff was estopped by prior action from maintaining her present action, where the issues and the parties in the two actions were identical.

APPEAL by plaintiff from *Peel, Judge,* 23 November 1970 Civil Term of Superior Court held in LENOIR County.

On 20 September 1967 Mary W. Babson, the defendant in the present action, instituted an action against Myra Wise Peake, the plaintiff in the present action. The complaint in the prior action contained allegations, in substance, as follows: Plaintiff owns certain real estate which she rented to the defendant. Defendant failed to pay the rent as due and refused to surrender the premises. Defendant claims to be the equitable owner of the premises but defendant has no right, title, interest, or estate, either legal or equitable in and to said premises. Defendant is indebted to plaintiff for rents and for other sums. Plaintiff prayed that judgment be entered declaring her to be the owner of the premises in *fee simple* and declaring that defendant has no interest in the described property, for possession of the property and for judgment for the rents due and unpaid by the defendant. To this complaint the defendant filed an answer in which she admitted that she had not made any monthly rental payments and that the plaintiff had demanded possession of the premises but denied that plaintiff was the owner of the premises. In substance the defendant contended that she was in fact the equitable owner of the premises, contending that the property was placed in plaintiff's name because defendant could

not arrange financing. She contended that although the plaintiff had made the downpayment on the property, caused the deed to be placed in plaintiff's name and arranged for a loan for the balance of the purchase price in plaintiff's name, that in fact the same was done for the benefit of the defendant and that the defendant had made the payments to the lending institutions, had paid the taxes on the property and had maintained the property. Upon motion of the plaintiff, after due notice to the defendant, the answer was stricken for failure to comply with G.S. 1-111. Judgment was subsequently entered declaring that plaintiff was the owner of and entitled to the possession of the premises. In answer to an appropriate issue duly submitted, a jury determined that plaintiff was entitled to recover $1,048.70 of the defendant. There was no appeal from this judgment which was entered on the 6th day of February 1968.

On 8 February 1968 plaintiff Myra Wise Peake instituted this action against Mary W. Babson. Her complaint contains essentially the same allegations as were set out in her answer to the former action, which had been concluded by judgment just two days earlier. In answer to this complaint, the defendant in the present action, among other things, pleaded the judgment in the earlier action as a bar to the plaintiff's right to proceed. From judgment sustaining defendant's plea and dismissing the action, the plaintiff Myra Wise Peake appealed.

Wallace, Langley and Barwick by James D. Llewellyn for plaintiff appellant.

White, Allen, Hooten and Hines by Thomas J. White III for defendant appellee.

VAUGHN, Judge.

It was entirely proper for Judge Peel to consider the defendant's plea in bar prior to a trial on the merits. *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206. Appellant concedes that the prior judgment constituted an adjudication on the merits and that the parties are identical. "A final judgment, which adjudicates upon the merits the issues raised by the pleadings, 'estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in

the exercise of reasonable diligence, could and should have brought forward.'" *Wilson v. Hoyle, supra.* At the former trial plaintiff had the opportunity to assert her whole claim. It was incumbent upon her to do so. Plaintiff has had her day in court, and has had the opportunity to bring forward all matters now asserted. Judge Peel's findings and conclusions are clearly supported by the pleadings in the present action, the judgment roll in the prior action and other matters appearing in this record. Plaintiff is estopped to relitigate the questions presented and determined in the former action. The judgment from which defendant appealed is, therefore affirmed.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. RONALD E. HOPKINS

No. 712SC320

(Filed 26 May 1971)

1. **Evidence § 28— parol testimony contradicting court judgment**

Parol testimony is inadmissible to explain or contradict a judgment of a court of record, the proper procedure being to apply to the court which entered the judgment to have the record amended so as to speak the truth.

2. **Evidence § 28— testimony contradicting court judgment**

In a hearing upon defendant's plea of former jeopardy prior to his trial on a burglary indictment, judgment of the district court showing that probable cause had been found on a charge of first degree burglary could not be explained or contradicted by testimony of the clerk of district court that defendant had entered a plea of guilty of nonfelonious breaking and entering and had been sentenced for that crime, but that the judgment was thereafter changed to show a finding of probable cause as to first degree burglary.

APPEAL by defendant from *Rouse, Judge,* 18 January 1971 Session of Superior Court held in BEAUFORT County.

The facts, sufficient for an understanding of this appeal, are set forth in the opinion.

Attorney General Morgan, by Staff Attorney League, for the State.

Wilkinson & Vosburgh, by James R. Vosburgh, for the defendant.

BROCK, Judge.

The Record on Appeal contains records of the District Court which disclose the following: A warrant was issued on the affidavit of Francis G. Foster charging that defendant (1) assaulted Francis G. Foster by pointing a shotgun at her, (2) assaulted Francis G. Foster, a female, by striking her, and (3) broke and entered, other than by burglarious breaking, the dwelling of Francis G. Foster. The warrant directed that defendant be brought before the District Court on 15 December 1970. On 15 December 1970, on motion allowed by the Court, the third count in the warrant was amended to allege first degree burglary. On 15 December 1970, District Judge Manning found probable cause and ordered appearance bond in the sum of $2,500 on the burglary count. There is no District Court record before us showing pleas or disposition of the first and second counts.

A bill of indictment was returned at the January 1971 Session charging defendant with first degree burglary. When the charge against defendant was called for trial, defendant interposed a plea of former jeopardy and offered the testimony of the assistant clerk of Superior Court who had been assigned to serve as Clerk in the District Court on 15 December 1970. Her testimony tended to show that according to her recollection there were two charges of assault and one charge of nonfelonious breaking and entering, combined in one warrant against defendant; that the three charges were consolidated for trial and judgment; that defendant pleaded guilty to the two assault charges and the nonfelonious breaking and entering charge and a consolidated judgment was entered confining defendant for a term of five months, and defendant was "placed on the prisoner's bench"; that "[t]hereafter the Solicitor in the District Court carried the witnesses involved in that case in conference and had a discussion with them and after the Solicitor returned to the Court the defendant was brought back around in front of the Bar and the Judge announced he was finding probable cause as to first degree burglary;" that she

does not remember whether the Solicitor moved to amend the warrant to charge first degree burglary before defendant was brought back around to the Bar; that the judgment of the court had not been changed at the time the Solicitor conferred with the witnesses; that the judgment was changed, although she does not recall when the change was made.

After hearing defendant's evidence Judge Rouse denied his plea and proceeded to trial. The Solicitor announced that he would not prosecute defendant on the first degree burglary charge, but would prosecute only on the lesser included offense of a nonfelonious breaking and entering. Reserving his exception to the Court's denial of his plea of former jeopardy, defendant entered a plea of guilty to nonfelonious breaking and entering and was sentenced to a term of eighteen to twenty-four months.

[2] Defendant's sole argument on this appeal is that he pleaded guilty to the nonfelonious breaking and entering charge in District Court and was sentenced upon his plea. He argues stressfully that this constitutes former jeopardy and prevents a trial upon the felony indictment. Defendant argues the facts to be exactly as testified by his witness, and that they are not as reflected by the records in the District Court.

[1] In this case defendant introduced parol testimony for the purpose of explaining, and to a great extent contradicting, the judgment entered in the District Court. The State did not object to this testimony, and the trial judge permitted it. However, it is a long established principle of law that parol testimony is inadmissible to explain or contradict a judgment of a court of record. In *Wade v. Odeneal,* 14 N.C. 423, Ruffin, J. (later C.J.) said: "The question is, How this judgment is to be proved. Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. . . . The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established." Denny, J. (later C.J.) further explained the proper procedure in *State v. Tola,* 222 N.C. 406, 23 S.E. 2d 321, as follows: "In lieu of parol testimony to explain a judgment of a court, the proper procedure is an application to the court which entered the judgment to have the record amended so as to speak the truth."

[2] It appears that Judge Rouse resolved the contradictions in the evidence, found against defendant's contentions, and denied defendant's plea of former jeopardy. But he properly should have entered the same ruling upon the grounds that there was no competent evidence upon which he could have sustained the plea.

No error.

Judges MORRIS and HEDRICK concur.

IN THE MATTER OF THE CUSTODY OF MARC DAVID KING, INFANT

No. 713DC153

(Filed 26 May 1971)

Divorce and Alimony § 24— modification of custody order — change of circumstances

Where custody of a child was originally awarded to the father because of the uncertainty of the mother's employment and future residence, the court's modification of its original order to award temporary custody to the mother on the ground of changed circumstances was justified by findings that the mother has since established permanent residence in another state where she is a college instructor, that she has established a good reputation in the community, that she participates in local church and community activities and is well thought of by her neighbors and teaching colleagues, and that she has arranged for a reputable day care nursery to care for her child while she teaches.

APPEAL by David Wesley King, from *Roberts, District Judge,* 5 October 1970 Session of District Court held in PITT County.

This is an appeal by the father of a minor child from an order of the District Judge, entered upon motion of the mother, in a pending custody proceeding, changing a previous custody order and awarding temporary custody of the child to the mother subject to visitation rights granted the father.

Frank M. Wooten, Jr., and William E. Grantmyre for appellant.

Everett & Cheatham, by James T. Cheatham for appellee.

PARKER, Judge.

The child was born on 24 January 1967. The parents of the child separated in February 1968 and were subsequently divorced. In a previous order, dated 22 July 1969, the District Judge found that the child had been in the custody of the father since February 1968; that both parents were fit and suitable persons to have custody and control of their child; but that due to the uncertainty of the employment and future residence of the mother it would be in the best interest of the child that he remain in the custody of the father pending further orders of the court. In the order appealed from, which was dated 9 October 1970, the District Judge again found both parents to be fit and proper persons to have custody of their child. However, in addition the court found that since July 1969, when the previous order was entered, the mother had "established her permanent residence at Greenville, Pennsylvania, where she teaches in the Foreign Language Department of Thiel College and earns approximately $8,000 per year; that she is presently in her second full year of teaching and that she has established a good reputation in the community; that she participates in local church and college activities and is well thought of by her neighbors and teaching colleagues; that she has arranged for a reputable day care nursery to care for her child while she teaches and that she desires very much for her son to live with her in Greenville, Pennsylvania; that by reason of this change of circumstances and the tender age of said child, the welfare of the child, Marc David King, age 3-1/2, would best be served by placing him in the temporary custody of his mother, Mirta Germone, until June 1, 1971 at which time the court will hear further evidence and enter further orders concerning the custody of said child. . . . "

Appellant contends these findings do not show a sufficient change of circumstances to justify the court in modifying its prior custody order, citing *In re Poole,* 8 N.C. App. 25, 173 S.E. 2d 545. We do not agree. While in both orders the court found both parents fit and proper persons to have custody of their child, the mother's situation had markedly changed by the time the second order was entered. These changes had placed her in better position to care for her child under favorable circumstances, and we find no abuse of the court's discretion in modifying its previous order. We note that the order ap-

pealed from grants custody to the mother only until 1 June 1971, at which time she is directed to return the child before the court for its further orders. At that time the court will be able to review the situation in the light of existing circumstances and make such further orders as the welfare of the child may require.

Appellant has excepted to certain of the court's findings of fact as not being supported by the evidence. We have carefully reviewed these exceptions and find that all material findings of fact required to justify the court's order were supported by competent evidence. Appellant's exception to the admission of the testimony of the witness Stary was not based on any timely objection or motion to strike. We have examined all remaining exceptions and find no prejudicial error.

The order appealed from is

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. MARIE ADAMS

No. 7123SC262

(Filed 26 May 1971)

1. Criminal Law § 85— consideration of character evidence

A defendant who testifies and then offers evidence of his good character is entitled to have the jury consider his character evidence both as bearing upon his credibility and as substantive evidence bearing directly upon the issue of his guilt or innocence.

2. Criminal Law § 117— character evidence — instructions

Since character evidence is a subordinate feature of the trial, failure of the trial judge, in absence of a request, to give any instructions relative to the significance of character evidence is not prejudicial error, but when the trial judge undertakes to instruct on this phase of the case, even without request that he do so, his instructions must be complete.

3. Criminal Law § 117— incomplete instructions on character evidence

The trial court committed prejudicial error in instructing the jury that defendant's character evidence could be considered as substantive

evidence without instructing that it could also be considered as bearing upon her credibility.

Judge BRITT concurring.

APPEAL from *Seay, Judge*, Regular December 1970 Criminal Session of Superior Court held in WILKES County.

Defendant was tried upon a bill of indictment charging her with assault with a deadly weapon with intent to kill, inflicting serious injury upon her husband, James Walter Adams. The jury returned a verdict of guilty and from judgment imposed thereon defendant appealed.

Attorney General Morgan by Trial Attorney Richmond for the State.

W. G. Mitchell for defendant appellant.

GRAHAM, Judge.

Defendant testified in her own behalf and also offered several witnesses who testified as to her good character and reputation in the community in which she lived. The court gave the following instructions with regard to this evidence.

> "Now, members of the jury, evidence has been received with regard to the defendant, Marie Adams', general character and reputation. Although good character or good reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character, therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of the defendant's guilt or innocence and give it such weight as to you it should receive in connection with all the other evidence."

Defendant assigns as error the failure of the court to instruct the jury that her character evidence could be considered as bearing on her credibility.

[1-3] Where a defendant testifies and then offers evidence of his good character, he is entitled to have the jury consider his character evidence both as bearing upon his credibility and as substantive evidence bearing directly upon the issue of his

guilt or innocence. Character evidence, however, is a subordinate and not a substantive feature of the trial. Therefore, the failure of the trial judge, in the absence of a request, to give any instructions relative to the significance of character evidence, is not prejudicial error. *State v. Burell,* 252 N.C. 115, 113 S.E. 2d 16, and cases therein cited. However, where the trial judge undertakes to instruct on this phase of a case, even without request that he do so, it is necessary that his instructions be complete. *State v. Wortham,* 240 N.C. 132, 81 S.E. 2d 254; *State v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867. Here defendant testified. It was therefore error for the court to instruct the jury that her character evidence could be considered as substantive evidence without instructing that it could also be considered as bearing upon her credibility. The deficiency of the charge in this respect requires a new trial.

Defendant strenuously contends that the court erred in failing to submit to the jury the issue of self-defense. The evidence contained in the record presents a close question as to whether defendant was entitled to have the jury consider this question. Since the evidence presented at the next trial may differ in substance from the evidence in the record now before us, we refrain from passing on this question. There are other assignments of error which we likewise do not discuss.

New trial.

Judges CAMPBELL and BRITT concur.

Judge BRITT concurring.

I agree that defendant is entitled to a new trial for the reason stated in the opinion by Judge Graham. However, on the evidence presented at the trial, I think defendant was entitled to jury instructions on her plea of self-defense.

STATE OF NORTH CAROLINA v. HARRY LEE BRYANT

No. 718SC300

(Filed 26 May 1971)

1. **Courts § 7; Criminal Law § 18— appeal from district to superior court — trial de novo**

An appeal from a conviction in the district court entitles the defendant to a trial *de novo* in the superior court as a matter of right.

2. **Criminal Law § 18— trial de novo in superior court — dismissal of appeal and remand to district court**

Although defendant failed to appear in superior court when his case was called for trial *de novo*, the superior court judge was without authority to dismiss defendant's appeal and remand the case to the district court for compliance with the judgment of that court. G.S. 7A-290.

APPEAL by defendant from *Cooper, Judge,* December 1970 Special Session of WAYNE County Superior Court.

Defendant, on 3 February 1970, was convicted in the District Court of Wayne County of operating a motor vehicle on the streets and highways of North Carolina while under the influence of intoxicating liquor on 18 January 1970. He was fined $100.00 and costs and ordered not to drive a motor vehicle in the State of North Carolina for a period of one year. Defendant thereupon gave notice of appeal to the Superior Court of Wayne County. The case was calendared for 9 December 1970 and notice was mailed to defendant notifying him of that fact. On 9 December 1970, defendant's case was called for trial and defendant failed to appear. The trial judge then dismissed the appeal and ordered the case remanded to the District Court of Wayne County for compliance with the judgment in that court.

From the order dismissing the appeal and remanding the case to the District Court, defendant appeals to this Court.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and T. Buie Costen for the State.

Sasser, Duke and Brown by John E. Duke and J. Thomas Brown, Jr., for defendant appellant.

CAMPBELL, Judge.

[1, 2] Defendant assigns as error the action of the trial judge in dismissing the appeal and remanding the case to the district court for compliance with the judgment entered there. Defendant contends that, although he did not appear in superior court when his case was called, the trial judge was without authority to dismiss his appeal and remand the case to the district court.

G.S. 7A-290 provides:

> " . . . Any defendant convicted in district court before the judge may appeal to the superior court for trial *de novo.* Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon receiving notice of appeal, the clerk shall transfer the case to the . . . superior court criminal docket. . . . "

" . . . When an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and *is not thereafter available for any purpose.* . . . " (Emphasis added.) *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970). See also *State v. Anderson,* 5 N.C. App. 614, 169 S.E. 2d 38 (1969) and *State v. Goff,* 205 N.C. 545, 172 S.E. 407 (1934).

An appeal from a conviction in an inferior court entitles the defendant to a trial *de novo* in the superior court as a matter of right; and this is true even when an accused pleads guilty in the inferior court. *State v. Sparrow, supra; State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384 (1967). Where the appeal has been docketed in the superior court, the judge presiding, at term, has the authority, upon satisfactory cause shown and with the consent of the defendant, to remand the case to the inferior court for clarifying judgment or other proceedings. This would reinstate the case and revest the inferior court with jurisdiction. *State v. Cox,* 216 N.C. 424, 5 S.E. 2d 125 (1939).

Where, as here, the defendant neither appears in court when his case is called nor consents to dismissal of his appeal, the trial judge is without authority to dismiss the appeal and remand the case to the district court for compliance with the

judgment of that court. The defendant is entitled to a trial as if the case originated in the superior court.

For the reasons stated, the order of the trial judge dismissing the appeal and remanding the case to the district court is reversed and the cause is remanded to the superior court for trial.

Reversed and remanded.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. RICHARD McCLOUD

No. 716SC252

(Filed 26 May 1971)

Escape § 1— felonious escape — failure to instruct jury that defendant was serving time for felony

In a prosecution charging defendant with the felony of escaping from the lawful custody of the Department of Correction while serving time for a felony, the trial court must instruct the jury that they must find beyond a reasonable doubt that defendant was serving a sentence for a felony conviction at the time of his escape; the failure to do so is reversible error. G.S. 148-45.

APPEAL by defendant from *Tillery, Judge,* 15 December 1970 Session of Superior Court held in HALIFAX County.

Defendant was tried on his plea of not guilty upon the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Richard McCloud late of the County of Halifax on the 11 day of Sept. 1970 with force and arms, and in the County aforesaid, while he the said Richard McCloud was then and there lawfully confined in the North Carolina State Prison System in the lawful custody of State Dept. of Correction, Fred Ross, Supt. and while then and there serving a sentence for the crime of safecracking which is a felony under the laws of the State of North Carolina, imposed at the July 16, 1969 session Superior Court, Guilford County, then and there unlawfully, wilfully, and feloniously did attempt to escape and escaped from the

said State Dept. of Correction, Fred Ross, Supt. against the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendant waived his right to counsel in superior court. The jury returned a verdict of guilty. From the sentence imposed, the defendant appealed to the Court of Appeals. The trial judge assigned counsel to represent the defendant on his appeal.

Attorney General Morgan and Staff Attorney Eatman for the State.

Charlie D. Clark, Jr., for defendant appellant.

MALLARD, Chief Judge.

The evidence for the State tended to show that the defendant, at the time of the alleged escape, was in the custody of the Department of Correction. He was serving a sentence of 25 to 40 years for the felony of "safecracking" under a commitment dated 16 July 1969. On 11 September 1970 the defendant escaped from an officer of the Department of Correction who was in charge of a work squad. Dogs were called in to trail the defendant, and he was apprehended the same afternoon.

The defendant excepted to and assigned as error the following portions of the instructions given by the judge to the jury:

"Now in order for the defendant to be convicted of the offense with which he is charged, that is a felonious first escape, it is necessary that the State of North Carolina shall prove two things. First, it is necessary that the State prove beyond a reasonable doubt that the defendant was in lawful custody of lawful authorities of the State of North Carolina at the time referred to in the bill of indictment, which was the 11th day of September, 1970.

In addition to that, the State must also prove beyond a reasonable doubt that on the 11th day of September, 1970, the defendant while in lawful custody escaped.

* * *

In order for . . . so I say to you ladies and gentlemen, if you find from the evidence and beyond a reasonable doubt that on the 11th day of September, 1970 the defendant was

in the lawful custody of the authorities of North Carolina, the Department of Correction to be specific, and if you further find that he fled from that confinement and failed to subject himself to it until the time that he would have been lawfully delivered therefrom by operation of law, if you find each of these elements to exist beyond a reasonable doubt, then it would be your duty to return a verdict of guilty."

G.S. 148-45 makes it a misdemeanor for a prisoner to escape under some circumstances and a felony under other circumstances. The defendant's plea of not guilty put in issue every essential element of the crime charged. The defendant was charged with escaping from the lawful custody of the State Department of Correction *while then and there serving time for a felony.* The trial judge did not instruct the jury that before they could convict the defendant of the *felony* of escape *charged,* they must find beyond a reasonable doubt that at the time of the escape he was serving a sentence imposed upon conviction of a felony. The failure to instruct the jury as to this essential element of the crime charged was prejudicial error which entitles the defendant to a new trial. *State v. Ledford,* 9 N.C. App. 245, 175 S.E. 2d 605 (1970).

New trial.

Judges PARKER and VAUGHN concur.

BILLY T. STRICKLAND AND WIFE, DOROTHY STRICKLAND v. BOBBY B. OVERMAN AND WILLIE R. JONES, D/B/A O & J ELECTRICAL COMPANY

No. 713DC130

(Filed 26 May 1971)

1. Deeds § 20— action to enjoin violation of a restrictive covenant — mobile home — sufficiency of evidence

In an action to enjoin defendants from placing a mobile home on their property in violation of a restrictive covenant, there was sufficient evidence to support the trial court's findings that the defendants' property was affected by the restrictive covenant and that placing a mobile home on the property was a violation of the covenant.

2. Registration § 3— notice to purchaser of land

A purchaser of land is charged with notice of what a title search would disclose.

APPEAL by defendants from *Whedbee, District Judge,* 28 August 1970 Session of District Court held in CARTERET County.

Plaintiff sued to enjoin the defendants from placing a mobile home on defendants' property, in violation of restrictions alleged by the plaintiffs to be applicable to and binding on defendants' property. Defendants answered admitting that they had "placed a prefabricated modular unit upon their property," but denying that they were violating any restrictions applicable to and binding on their property. The parties waived trial by a jury and stipulated that the case be tried before the presiding judge upon the verified pleadings of defendants and plaintiffs, and exhibits of plaintiffs and defendants. Judge Whedbee found facts and made conclusions of law in a judgment filed 28 August 1970. Judge Whedbee found as a fact "[t]hat the defendants have caused to be placed upon the premises purchased by them . . . a mobile home . . . . " Judge Whedbee then concluded as a matter of law "[t]hat the placing of the defendants' mobile home upon the premises . . . is in direct violation of the general plan of subdivision of Atlantic Beach Isles Subdivision, dated May 12, 1959, of record in . . . Carteret County Registry . . . . " The defendants were ordered to remove their mobile home from their premises. From the entry of the judgment defendants appealed.

Thomas S. Bennett for plaintiff appellees.

Comer and Marley by John F. Comer for defendant appellants.

VAUGHN, Judge.

[1] Appellant brings forward numerous assignments of error, all of which are directed to findings of fact and conclusions of law in the judgment. Appellants contend that there is no evidence to support the findings that placement of a mobile home on the premises owned by them violated restrictive covenants and that the restrictive covenants are imposed on lands owned by the defendants.

On 13 May 1959 Atlantic Beach, Inc., the predecessor in title to appellants' grantor filed a "General Plan of Subdivision" which recites that Atlantic Beach, Inc., is the owner of property therein described. The description of the property includes the lands presently owned by the defendants. The various covenants and restrictions now in issue are set out in this "General Plan of Subdivision." One of the restrictions appearing in the general plan is: "8. No trailer, tents or temporary structures shall be erected or allowed on any lot, except by written consent of Atlantic Beach, Inc." The deed to defendant recites, after the metes and bounds description, "[t]his property is conveyed subject to all restrictive covenants of record."

[2] A purchaser of land is charged with notice of what a title search would disclose.

> "The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such an examination would disclose. In consequence, a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Bailey v. Jackson, supra.*" *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661.

By examining the chain of title of their property, the defendants could find the "General Plan of Subdivision." From that general plan they could determine that their property is included in the description of lands comprising the subdivision, and that placing a trailer on the described property violates the restrictions therein.

We have carefully examined the entire record, and we find no prejudicial error. The findings discussed above are supported by competent evidence and the findings of fact support the judgment.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. LEVI BURGESS

Cases No. 70 CR 2497 70 CR 2498

No. 7120SC271

(Filed 26 May 1971)

Criminal Law § 155.5— failure to docket record within 150 days

Appeal is dismissed by the Court of Appeals *ex mero motu* where the record on appeal was not docketed within the maximum 150 days allowed by Rule 5 when the trial judge grants an extension of 60 days, notwithstanding the record was docketed within the time allowed by an order signed by the trial judge granting a second 60-day extension.

APPEAL by defendant from *Thornburg, Special Judge,* 21 September 1970, Criminal Session of STANLY County Superior Court.

Defendant was tried on two bills of indictment with three counts in each. The first bill charged felonious breaking and entering of a store building on 16 May 1970, occupied by Charles Love doing business as Whites Auto Store located in Locust, North Carolina; the second count charged felonious larceny, also on 16 May 1970, from said store; the third count charged the defendant with the felonious receiving of stolen merchandise. The second bill of indictment had three similar counts charging the defendant with the same offenses on the same date, but the premises involved was Pikes Drug, Inc., located in Locust, North Carolina. The State did not prosecute the defendant on the third count in either bill of indictment. The defendant entered a plea of not guilty to all charges. The jury returned a verdict of guilty on all four counts in the two bills of indictment for which he was tried. From judgments imposing prison sentences the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Coble, Morton and Grigg by Ernest H. Morton, Jr., for defendant appellant.

CAMPBELL, Judge.

The judgments appealed from were entered on 23 September 1970. The record on appeal was docketed in this Court

on 1 March 1971. Rule 5 of the Rules of Practice of this Court provides that if the record on appeal is not docketed within 90 days after the day of the judgment appealed from, the case may be dismissed, provided, the trial tribunal may, for good cause shown, extend the time for docketing not exceeding 60 days. Under date of 6 November 1970 the defendant procured an order from the trial judge allowing 60 days additional time within which to docket the appeal, but stated, "that is to say until the 8th day of January, 1971." Actually, this 60-day extension of time would have carried the date to and including 22 February 1971, as 20 February 1971 fell on a Saturday, and the office of the Clerk of this Court was closed on Saturday and Sunday, which would have given a further extension until Monday, 22 February 1971. Thereafter, under date of 5 December 1970, the defendant procured another order from the trial judge extending the time for docketing the record on appeal for 60 days, and this order contained this additional language, "that is to say until the 9th day of March, 1971." This date was incorrect, and as previously set out, the 60-day extension of time allowed by the rules of this Court, would have expired 20 February 1971, and by virtue of that date being on a Saturday automatically extended the time to and including 22 February 1971. Since the defendant did not file the record on appeal in this Court until 1 March 1971 and thus failed to comply with the Rules, the appeal, *ex mero motu,* is dismissed. *State v. Isley,* 8 N.C. App. 599, 174 S.E. 2d 623 (1970); *State v. Stovall,* 7 N.C. App. 73, 171 S.E. 2d 84 (1970); *State v. Justice,* 3 N.C. App. 363, 165 S.E. 2d 47 (1968); *State v. Cook,* (filed this date in this Court).

Nevertheless, we have carefully reviewed the record with particular reference to the various assignments of error brought forward and argued in defendant's brief. We find that the defendant had a fair trial free from prejudicial error.

Appeal dismissed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. ARTHUR LYNCH

No. 716SC305

(Filed 26 May 1971)

1. **Bastards § 1— failure to support illegitimate child — elements of proof**

In order to prove that a defendant refused or neglected to support his illegitimate child, the State must establish (1) that the defendant is the parent of the child in question and (2) that the defendant wilfully neglected or refused to support and maintain the illegitimate child. G.S. 49-2.

2. **Bastards § 7— nonsupport prosecutions — instructions**

Trial court's instruction which precluded the jury from answering in defendant's favor the issue of defendant's wilful failure to support his illegitimate child, *held* prejudicial error in this nonsupport prosecution.

APPEAL by defendant from *Tillery, Judge,* 16 December 1970 Session, HALIFAX Superior Court.

The defendant was charged in a warrant with unlawfully and wilfully neglecting to support and maintain Fred West and Shirley Ann West, two illegitimate children born to defendant and complainant, in violation of G.S. 49-2. Defendant was found guilty in district court and appealed to the superior court.

At trial in superior court at the close of the state's evidence, defendant's motion for nonsuit as to Shirley Ann West was allowed. The jury found defendant guilty as to Fred West and from judgment imposing a six months' prison sentence, suspended upon condition that defendant pay $20 a week for the support of Fred West until his eighteenth birthday, defendant appealed.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Charlie D. Clark, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the trial court's denial of his motion to dismiss as to Fred West. In order for the state to make out a case for a violation of G.S. 49-2, which makes it a misdemeanor for a parent to refuse or neglect to support his illegitimate child, the state must establish two things: (1) that

the defendant is the parent of the child in question, and (2) that the defendant wilfully neglected or refused to support and maintain the illegitimate child. *State v. Green,* 8 N.C. App. 234, 174 S.E. 2d 8 (1970); *State v. Coffey,* 3 N.C. App. 133, 164 S.E. 2d 39 (1968). We hold that the testimony was sufficient to survive defendant's motion, hence the assignment of error is overruled.

[2] Defendant assigns as error the following portion of the trial judge's charge to the jury:

> If you fail to find that he was the father of the child, it would be your duty to answer the first issue "no" and if you answer the first issue "yes" and then you should FAIL to find that he wilfully failed and refused and neglected to support the child after demand was made upon him as I have stated, it would be your duty to answer that second issue "yes." (Emphasis added.)

This part of His Honor's charge is obviously erroneous because the clear construction of the sentence is that if the jury found that defendant was the father of the child, and thus answered the first issue "yes," and then found that defendant did *not* wilfully fail and refuse to support the child it should answer the second issue "yes." By inadvertance or otherwise, the court's statement on the second issue precluded the jury from answering it in favor of defendant. The error was prejudicial, entitling defendant to a new trial.

The record in this case does not indicate that the trial court submitted *written* issues. We strongly commend this practice in cases charging a violation of G.S. 49-2. *State v. McKee,* 269 N.C. 280, 152 S.E. 2d 204 (1967).

New trial.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. ARNOLD TRUMAN WALLER

No. 714SC118

(Filed 26 May 1971)

1. **Criminal Law § 86— impeachment of defendant**

It is proper for the solicitor to cross-examine defendant concerning a previous and unrelated conviction from which he had appealed.

2. **Criminal Law § 138— punishment — appeal from district to superior court — increased sentence**

The fact that the punishment imposed by the superior court on defendant's trial *de novo* exceeded the punishment which had been imposed by the district court in the original trial, *held* not violative of defendant's constitutional rights.

APPEAL by defendant from *Copeland, Judge,* September 1970 Criminal Session of Superior Court held in ONSLOW County.

Defendant was tried in the District Court on his pleas of not guilty to charges of (1) speeding in excess of 80 miles per hour in a 45 mile per hour speed zone and (2) reckless driving. He was found guilty of both offenses and from the judgments entered in the District Court, appealed to the Superior Court. On trial *de novo* in the Superior Court, the jury found defendant guilty in both cases, and from judgments imposing prison sentences, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Richard N. League for the State.

Bailey & Robinson by Edward G. Bailey for defendant appellant.

PARKER, Judge.

[1] Defendant testified at the trial. His first assignment of error is directed to the trial court's action in requiring him to answer a question directed to him by the assistant solicitor during cross-examination. The question concerned his previous conviction of a specific unrelated prior criminal offense from which he had appealed. In this we find no error. It is well settled in this State that "[f]or purposes of impeachment a witness, including the defendant in a criminal case, may be cross-examined with respect to previous convictions of crime." Stansbury, N.C. Evidence 2d, § 112, p. 254. Our Supreme Court has

also held that such a witness may be cross-examined with respect to indictments which have been returned against him. *State v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343; *State v. Howie,* 213 N.C. 782, 197 S.E. 611; *State v. Maslin,* 195 N.C. 537, 143 S.E. 3. In the case last cited the court pointed out that while evidence of a mere accusation of crime should be excluded, an indictment duly returned by the grand jury as a true bill is much more than a bare charge. In the present case, more than a mere indictment returned as a true bill was involved. Defendant had actually been convicted of the offense concerning which he was questioned. There was no error in requiring him to answer the question. The court correctly allowed him to explain that he had appealed his conviction and that his appeal was still pending. *State v. Calloway,* 268 N.C. 359, 150 S.E. 2d 517. Defendant made no request for an instruction that the jury must consider his prior convictions, not as substantive evidence, but only as bearing on his credibility as a witness. If he wished such an instruction, it was incumbent on him to request it. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310.

[2] Appellant's remaining assignment of error brought forward on this appeal is that his constitutional rights were violated in that the punishment imposed by the Superior Court exceeded the punishment which had been imposed by the District Court. The North Carolina Supreme Court has considered this quesstion and passed upon it adversely to appellant's contentions. *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765; *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897.

The sentences imposed in the Superior Court were within statutory limits.

In appellant's trial and the judgments appealed from, we find

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. FLORA ANN COLSON

No. 7115SC298

(Filed 26 May 1971)

Criminal Law § 113— instructions — expression of opinion — application of law to evidence

In this prosecution for assault with a deadly weapon, the trial court did not express an opinion in recapitulating the evidence and did not fail to apply the law of self-defense to the evidence. G.S. 1-180.

APPEAL by defendant from *Canaday, Judge,* at the 7 December 1970 Criminal Session of ORANGE Superior Court.

By indictment proper in form, defendant was charged with unlawfully, wilfully, and feloniously assaulting Darlene Thompson with a deadly weapon, to wit: a pistol, by shooting her with same with the felonious intent to kill and murder the said Darlene Thompson, inflicting serious injuries not resulting in death. The jury returned a verdict of guilty as charged and from judgment imposing prison term of not less than three nor more than five years, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Robert G. Webb for the State.

Manning, Allen & Hudson by Marcus Hudson for defendant appellant.

BRITT, Judge.

The two asignments of error brought forward and argued in defendant's brief relate to the trial court's instructions to the jury.

In her first assignment of error, defendant contends that in recapitulating certain evidence, the court expressed an opinion which was prejudicial to the defendant, in violation of G.S. 1-180. We disagree with this contention. In the first place, we do not think the portion of the charge complained of constituted an expression of opinion. Furthermore, just before the trial judge submitted the case to the jury, he said: "The Court has no opinion, ladies and gentlemen, as to what your verdict should be in this case, and the Court does not intimate an opinion." We perceive no prejudice. The assignment of error is overruled.

In her second assignment of error, defendant contends that the court in its instructions relating to the law of self-defense failed to apply the law to the facts, in violation of G.S. 1-180. We disagree with this contention and conclude that the trial judge adequately applied the law of self-defense to the evidence introduced in the trial. The assignment of error is overruled.

After a careful review of the entire record, we conclude that the defendant received a fair trial, free from prejudicial error, and that the sentence imposed was well within the limits prescribed by statute.

No error.

Judges CAMPBELL and GRAHAM concur.

IN RE: BOBBY LEE JONES (MINOR)

No. 7119DC277

(Filed 26 May 1971)

1. **Constitutional Law § 30; Infants § 10; Courts § 15— juvenile proceedings — constitutional safeguards — notice of charges**

   Although juvenile proceedings in this State are not criminal prosecutions, a juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to the constitutional safeguards of due process and fairness; these safeguards include notice of the charge or charges upon which the petition is based.

2. **Infants § 10— juvenile proceedings — amendment of petition — due process**

   Juvenile's constitutional rights were not violated when the court, on the day of the juvenile's hearing, allowed the petition to be amended in order to identify more specifically the owner of the property allegedly stolen by the juvenile.

APPEAL by respondent from *Warren, District Judge,* 19 February 1971 Session of District Court held in CABARRUS County.

Respondent, a juvenile, was adjudged to be a delinquent child by order entered 19 February 1971. The adjudication followed a hearing held pursuant to G.S. 7A-285, and was based

upon a finding by the court that on 29 January 1971 respondent committed larceny by taking a set of blue lights from a parked vehicle, the same being the property of the City of Concord. Respondent was ordered committed to the North Carolina Board of Juvenile Corrections, to be confined for an indefinite period of time not to exceed his eighteenth birthday. This appeal followed.

Attorney General Morgan by Assistant Attorney General Banks and Staff Attorney Price for the State.

Thomas K. Spence for juvenile appellant.

GRAHAM, Judge.

Appellant contends the court committed error in refusing motion made on his behalf to quash the petition upon which the hearing was conducted and in allowing the petition to be amended. The amendment was made on the day of the hearing but before the hearing commenced.

[1] Juvenile proceedings in this State are not criminal prosecutions and a finding of delinquency in a juvenile proceeding is not synonymous with the conviction of a crime. Nevertheless, a juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to the constitutional safeguards of due process and fairness. *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879; *In re Alexander,* 8 N.C. App. 517, 174 S.E. 2d 664. These safeguards include notice of the charge or charges upon which the petition is based. *In re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527, 87 S.Ct. 1428.

[2] Here the petition sufficiently alleged the offense of larceny. The amendment in no way changed the nature of the offense but simply identified more specifically the owner of the property allegedly stolen. Allowing the amendment under these circumstances was within the sound discretion of the court.

The record fails to show that appellant was denied any constitutional safeguards at any stage of the proceedings.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. BILLY JACK COOK

No. 7121SC183

(Filed 26 May 1971)

Criminal Law § 155.5— docketing of appeal

Court of Appeals *ex mero motu* dismisses defendant's appeal for failure to docket the record on appeal within the time provided by the rules. Court of Appeals Rule No. 5.

APPEAL by defendant from *Crissman, Judge,* 8 September 1970 Criminal Session of FORSYTH Superior Court.

Defendant was tried in superior court on (1) a warrant from the district court charging malicious injury to personal property, and (2) a bill of indictment charging an assault with a deadly weapon with intent to kill. The jury returned a verdict of guilty on the malicious injury to personal property charge and guilty of assault with deadly weapon on the other charge. From judgments imposing prison sentences in both cases, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Millard R. Rich, Jr., for the State.

White, Crumpler and Pfefferkorn by Fred G. Crumpler, Jr., and Michael J. Lewis for defendant appellant.

BRITT, Judge.

The judgments appealed from were entered on 11 September 1970. The record on appeal was docketed in this court on 19 January 1971. Rule 5 of the Rules of Practice of this Court provides that if the record on appeal is not docketed within 90 days after the date of the judgment appealed from, the case may be dismissed; provided, the trial tribunal may, for good cause, extend the time for docketing not exceeding 60 days. No order extending the time for docketing appears in the record before us. For failure to comply with the rules, the appeal, *ex mero motu,* is dismissed. *State v. Isley,* 8 N.C. App. 599, 174 S.E. 2d 623 (1970); *State v. Stovall,* 7 N.C. App. 73, 171 S.E. 2d 84 (1970); *State v. Justice,* 3 N.C. App. 363, 165 S.E. 2d 47 (1968).

Nevertheless, we have carefully reviewed the record, with particular reference to the assignments of error brought forward and argued in defendant's brief, and find that defendant had a fair trial free from prejudicial error.

Appeal dismissed.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. ALAN YOUNG

No. 715SC51

(Filed 26 May 1971)

Larceny § 7— sufficiency of evidence

There was plenary evidence to support defendant's conviction of the felonious larceny of 34 men's suits having a value of $2,285.75.

APPEAL by defendant from *Cowper, Judge,* 8 June 1970 Session of Superior Court held in NEW HANOVER County.

Defendant, an indigent represented by court-appointed counsel, waived a bill of indictment and pleaded not guilty to the charge of felonious larceny set forth in an information signed by the solicitor. The jury found defendant guilty as charged, and from judgment of imprisonment for a term of three years, defendant appealed.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn for the State.

George H. Sperry for defendant appellant.

PARKER, Judge.

Appellant's counsel states that he has carefully reviewed the record, but has been unable to find any prejudicial error therein. We have also examined the record and find no prejudicial error.

Defendant and his counsel signed a written waiver of indictment as G.S. 15-140.1 requires for trial upon an information. The information charged that defendant stole 34 men's suits

of a value of $2,285.75 from Ketteridge Suit Market by breaking and entering. The State presented plenary evidence to support the charge. Police officers found defendant with the stolen suits at 3:00 a.m. in a station wagon parked near the side entrance to the premises which had been broken into and from which the suits had been removed without authority from the owner. Defendant testified, but apparently the jury did not accept his explanation.

In the trial and judgment appealed from we find

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT JOHNSON WASHINGTON

No. 7112SC342

(Filed 26 May 1971)

1. **Criminal Law § 161— appeal as exception to judgment**

An appeal is an exception to the judgment and presents the face of the record proper for review.

2. **Robbery § 6— common law robbery conviction — plea of guilty**

Conviction of common law robbery will not be disturbed where defendant understandingly and voluntarily entered a plea of guilty to a valid indictment, the judgment is proper in form and the sentence is within the statutory limit.

APPEAL by defendant Robert Johnson Washington from *Bailey, Judge,* 4 January 1971 Criminal Session of Superior Court held in CUMBERLAND County.

Attorney General Robert Morgan and Staff Attorney L. Philip Covington for the State.

Public Defender Sol G. Cherry for defendant appellant.

HEDRICK, Judge.

[1] The record reveals that the defendant, an indigent, represented by the Public Defender, understandingly and voluntarily entered a plea of guilty to a bill of indictment, proper in form, charging him with the common law robbery of Cicero M. Kelly

on 18 July 1970. An appeal is an exception to the judgment and presents the face of the record proper for review. *State v. Gwyn*, 7 N.C. App. 397, 172 S.E. 2d 105 (1970).

[2] Therefore, we have carefully examined the record and find that the defendant understandingly and voluntarily pleaded guilty to a valid bill of indictment which will support the judgment entered. The judgment is in proper form, and the sentence imposed is within the limits prescribed by the applicable statute, G.S. 14-2.

We find and hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

HERBERT L. DAVIS v. JOSEPH MARSHALL HALL

No. 713SC224

(Filed 26 May 1971)

APPEAL by defendant from *Blount, Judge*, at the 23 November 1970 Session of CARTERET Superior Court.

This is a civil action in which plaintiff seeks to recover for personal injuries allegedly sustained by him when the rear end of the automobile he was operating was struck by an automobile operated by defendant. At trial, by stipulation of the parties, the issue of negligence was answered in favor of plaintiff; the sole issue submitted to the jury related to the amount, if any, plaintiff was entitled to recover. The jury answered the issue $10,000 and from judgment entered on the verdict, defendant appealed.

Wheatly & Mason by C. R. Wheatly, Jr., for plaintiff appellee.

Harvey Hamilton, Jr., for defendant appellant.

BRITT, Judge.

The only questions presented by defendant in his brief relate to the competency of (1) certain medical testimony and (2) certain testimony relating to loss of earnings by plaintiff, which the court admitted. Suffice to say, we have carefully reviewed the record, with particular reference to the challenged testimony, but find no error sufficiently prejudicial to warrant a new trial.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. CHARLES JEROME FREEMAN

No. 716SC263

(Filed 26 May 1971)

APPEAL by defendant from *Tillery, Judge,* December 1970 Criminal Session of Superior Court held in HALIFAX County.

Defendant was tried upon a bill of indictment, proper in form, charging him with felonious escape while lawfully confined in the State Prison System. The jury returned a verdict of guilty and defendant appeals from judgment imposed upon the verdict.

Attorney General Morgan by Staff Attorney Eatman for the State.

Josey & Vaughan by C. Kitchin Josey for defendant appellant.

GRAHAM, Judge.

Defendant's court appointed counsel has filed a brief in which he candidly concedes that he is unable to find prejudicial error. We have reviewed the record proper and conclude that no prejudicial error appears on the face thereof.

No error.

Judges CAMPBELL and BRITT concur.

PILOT TITLE INSURANCE COMPANY v. THE NORTHWESTERN BANK, FIRST ATLANTIC CORPORATION, HILLWEST, INC., AND PARK ROAD PROFESSIONAL CENTER, INC.

No. 7126SC206

(Filed 23 June 1971)

1. **Declaratory Judgment Act § 1— adequate remedy at law**

It is not necessary for plaintiff to show that an adequate remedy at law is unavailable in order for a court to have jurisdiction under the Declaratory Judgment Act.

2. **Declaratory Judgment Act § 1— jurisdiction — showing that litigation is unavoidable**

While the mere fear or apprehension that a claim may be asserted against a party in the future is not grounds for issuing a declaratory judgment, jurisdiction to issue such judgment lies where the court is convinced that litigation, sooner or later, appears to be unavoidable.

3. **Declaratory Judgment Act § 1— liability on title insurance policy — justiciable controversy**

Plaintiff insurer's action seeking a determination as to whether or not it is liable to defendant bank upon a mortgagee title insurance policy presented a controversy justiciable under the Declaratory Judgment Act.

4. **Declaratory Judgment Act § 2; Injunctions § 1— injunction instead of declaratory relief — waiver of objection by defendants**

If plaintiff insurer is entitled to a declaration of non-liability with respect to a portion of the face amount of a policy of mortgagee title insurance which it issued, defendants cannot complain that the court granted injunctive relief, rather than declaratory relief, upon defendants' representation that the injunction would be less objectionable.

5. **Corporations § 1— alter ego or instrumentality doctrine**

Under the "alter ego" or "instrumentality" doctrine, when a corporation is so dominated by another corporation that the subservient corporation becomes a mere instrument, and is really indistinct from the controlling corporation, the corporate veil of the dominated corporation will be disregarded if to retain it results in injustice.

6. **Corporations § 1— subsidiary as alter ego or instrumentality of parent**

Stock ownership alone does not determine whether one corporation is the alter ego of another; in order for such relationship to exist, the parent corporation must have complete dominion of the finances, policies and practices of the subsidiary in respect to the transaction in question.

7. **Corporations § 1; Insurance § 148— corporation as alter ego of bank — mortgagee title insurance**

The evidence supported the trial court's determination that a corporation to which assets of $859,699.93 were endorsed by a bank in connection with a $900,000 loan to another corporation was the

alter ego and instrumentality of the bank, and that the bank sustained no loss with respect to such $859,699.93 by reason of a defect in the borrower's title to property which served as security for the loan; consequently, the bank is not entitled to collect for such $859,699.93 under a $900,000 mortgagee title insurance policy issued on the security property.

APPEAL by defendants, The Northwestern Bank, First Atlantic Corporation and Park Road Professional Center, Inc., from *Godwin, Judge,* 14 September 1970 Special Non-Jury Session of Superior Court held in MECKLENBURG County.

Plaintiff corporation issued a mortgagee title insurance policy in the amount of $900,000 in favor of defendant Northwestern Bank (Northwestern). The policy insured title to a 60,125 acre tract of land, which was purportedly owned in *fee simple* by Hillwest, Inc. (Hillwest), and which was the subject of a deed of trust given by Hillwest to Northwestern as security for Hillwest's demand note, dated 17 January 1968, in the amount of $900,000.

Soon after the loan was closed the parties learned that Hillwest did not have valid title to the 60,125 acres, which was in fact owned by the United States government or other parties. Northwestern demanded payment under its title insurance policy. Plaintiff refused to pay and on 13 September 1968 instituted this action seeking injunctive relief, or in the alternative, relief pursuant to the Declaratory Judgment Act. (G.S. 1-253 *et seq.)*

By agreement the case was heard by Judge Godwin without a jury. The evidence, which consisted principally of stipulations and depositions of officers of the various defendants, tended to show the following: (1) Hillwest received from Northwestern only a bookkeeping credit for $859,699.93 of the $900,000 loan represented by the demand note of 17 January 1968. (2) This credit was donated, without consideration, to Park Road Professional Center, Inc. (Park Road). (3) As a result of this donation of credit Hillwest became insolvent and remains insolvent. (4) Park Road, at all pertinent times, was under the control of Northwestern. (5) Northwestern caused Park Road to use the bookkeeping credit to purchase certain assets from Northwestern. (6) These assets, consisting of various loan instruments and liens arising out of the financing of a motel project of Paway, Inc., were endorsed to Park Road but never left

the actual possession of Northwestern. (7) The corporate charter of Park Road was suspended 1 March 1967 for nonpayment of franchise taxes and at all pertinent times was in a state of suspension.

Judge Godwin entered findings consistent with the evidence and concluded that Park Road is the alter ego of Northwestern; the transfer of the Paway loan instruments and liens to Park Road did not place them beyond Northwestern's control; and consequently, Northwestern suffered no loss with respect to that portion of the $900,000 loan ($859,699.93) which purportedly served as consideration for the transfer.

Judgment was entered reciting that plaintiff was entitled to either injunctive relief or declaratory relief. It further recited that defendants expressed to the court a preference for injunctive relief, finding it less objectionable. In accordance with this expression of preference, the court ordered that Park Road endorse the assets in question back to Northwestern; that the debt incurred by Hillwest pursuant to its note of 17 January 1968 be reduced by the sum of $859,699.93; and that the claim of Northwestern against plaintiff be reduced by a corresponding amount.

Defendants, except for Hillwest, appealed.

Some understanding of events preceding the loan transaction involving defendants is essential to an understanding of the trial court's findings and conclusions.

The evidence tended to show that the transaction in question arose out of efforts by investors and lenders to salvage a motel project of Paway, Inc. (Paway). The project had terminated during construction when a dispute arose between Paway and its construction contractor, Little Corporation.

Paway had arranged construction financing for its motel through Goodyear Mortgage Corporation, a mortgage banking company which is now owned and controlled by Northwestern. (The name of this company has been changed to First Atlantic Corporation and is subsequently referred to as First Atlantic.) First Atlantic in turn arranged to secure the construction funds from its correspondent, First National Bank of Boston (Bank of Boston). The transaction involved the following: First Atlantic delivered its note for $2,700,000 to Bank of Boston. This note was secured by assigning to Bank of Boston two notes given

First Atlantic by Paway in the respective amounts of $1,800,000 and $500,000. These notes were secured by a deed of trust on the motel property. All of the obligations of Paway were guaranteed in writing by investors in the Paway project, including Steve Pappas (Pappas) and Clifford E. Hemingway (Hemingway).

After work on the motel ceased, Northwestern purchased from Bank of Boston all of the loan instruments held by Bank of Boston in connection with the Paway loan, paying therefor $657,166.60, which was the amount owed by Northwestern's subsidiary First Atlantic for construction advances made under its $2,700,000 note. Northwestern also purchased the stock of Little Corporation. The only asset of Little was a judgment in the amount of $245,489.02 obtained against Paway and certain individuals on 17 October 1967. Thus, at this point, Northwestern owned the Paway notes and the deed of trust constituting a first lien on the motel property, and also, the Little Corporation judgment which constitutes a second lien on the property.

Hemingway and Pappas, investors in Paway, learned that 60,125 acres of mountain land in Swain County was available for purchase at a price of approximately $125,000. They decided to purchase the land and take title in the name of Hillwest, a corporation which Pappas served as president and treasurer and Hemingway served as secretary. With the cooperation of Northwestern, the following plan was devised: A loan of $900,000 would be obtained by Hillwest from Northwestern and secured by a deed of trust on the Swain County land. The purchase price for the land and miscellaneous expenses would be paid from each proceeds to be disbursed to Hillwest at the time the loan was closed. The remaining portion of the loan would be used to purchase from Northwestern the various loan instruments and liens on the Paway motel property. These assets, however, would be assigned, not to Hillwest, but to Park Road. An additional loan from Northwestern would enable the Paway project to be completed. Northwestern, through First Atlantic, which controlled Park Road, would then give Hemingway, Pappas, and other Paway investors, options to purchase the stock of Park Road.

Accordingly, a loan agreement, dated 17 January 1968, was entered between Northwestern, Hillwest and Park Road. The agreement incorporated the essentials of the plan. No official of Park Road participated in any of the loan negotiations; how-

ever, an officer of First Atlantic, acting under the direction of First Atlantic's president, signed the agreement as president of Park Road. The loan was made and the Paway loan instruments and liens were transferred in accordance with the agreement. The option agreement was drafted but was never delivered and accepted and therefore never became effective.

Other pertinent facts are set forth in the opinion.

Ruff, Perry, Bond, Cobb & Wade by James O. Cobb for plaintiff appellee.

Jack T. Hamilton and Fairley, Hamrich, Monteith & Cobb by James D. Monteith for defendant appellants The Northwestern Bank, First Atlantic Corporation, and Park Road Professional Center, Inc.

GRAHAM, Judge.

Appellants contend plaintiff does not have standing to seek injunctive relief, urging the well established principle that injunctive relief will be granted only where there is not a full, adequate and complete remedy at law. *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503; *Cotton Mills Co. v. Duplan Corp.,* 245 N.C. 496, 96 S.E. 2d 267.

Appellants' position is that plaintiff has an adequate remedy at law in that it could assert any matters asserted here as a defense to an action brought by defendant to recover under the policy. Whether this obviously available legal remedy would be so practical and efficient as to constitute it "full, adequate and complete" presents a close question. We are constrained to hold, however, that appellants' selection of injunctive relief in the trial court, in lieu of declaratory relief, forecloses their raising this question here—unless of course, plaintiff has no standing to seek a declaration of its rights pursuant to the Declaratory Judgment Act.

The Uniform Declaratory Judgment Act is to be liberally construed and administered. G.S. 1-264 provides: "This article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered."

[1] For a court to have jurisdiction under the Act it is not necessary for a plaintiff to show that an adequate remedy at law is unavailable. "It is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure." *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E. 56.

[2] It is true that a mere fear or apprehension that a claim may be asserted against a party in the future is not grounds for issuing a declaratory judgment. *Newman Machine Co. v. Newman,* 2 N.C. App. 491, 163 S.E. 2d 279. (Reversed on other grounds, 275 N.C. 189, 166 S.E. 2d 63.) However, jurisdiction lies where the court is convinced that litigation, sooner or later, appears to be unavoidable. 22 Am. Jur. 2d, Declaratory Judgments, § 11, p. 851.

Before this action was instituted Northwestern made formal claim and demand that plaintiff pay the entire amount of its policy. There can be no doubt that litigation was forthcoming. Certainly plaintiff should not be required to await suit, perhaps indefinitely, thereby running the risk that evidence relating to this very complicated and unusual set of facts would be lost. This is especially true since in the meantime plaintiff would have to maintain sufficient reserves to cover Northwestern's claim for $900,000. See *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617.

[3, 4] We hold that plaintiff's action for a declaratory judgment is maintainable. If, as the trial court concluded, plaintiff is entitled to a declaration of non-liability with respect to the $859,699.93 of its policy amount, appellants cannot complain that the court granted injunctive relief, rather than declaratory relief, upon appellants' representation that the former would be less objectionable.

[7] The principal question remaining is whether the trial court correctly held, in effect, that Park Road is at most the alter ego or instrumentality of Northwestern; and that consequently, in endorsing the assets in question to Park Road, Northwestern

did nothing more than endorse them to itself. If these conclusions are sound, it must necessarily follow that Northwestern has sustained no loss with respect to the portion of the loan allocated for the assets; and that plaintiff is not liable under its title insurance policy for this sum.

[5] The "alter ego" or "instrumentality" doctrine states that: "[W]hen a corporation is so dominated by another corporation, that the subservient corporation becomes a mere instrument, and is really indistinct from the controlling corporation, then the corporate veil of the dominated corporation will be disregarded, if to retain it results in injustice." *National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248 (W.D. Mo. 1964), aff'd, 341 F. 2d 1022 (8th Cir. 1965). In accord: *Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570.

The parties stipulated that at all pertinent times Park Road had outstanding one stock certificate for 50,000 shares of common stock and that the certificate, which has been lost or misplaced, is in the name of Jack T. Hamilton, Trustee for First Atlantic. It is undisputed that First Atlantic is owned and controlled by Northwestern and that the acts of First Atlantic, insofar as the matters here involved are concerned, are the acts of Northwestern.

[6] Stock ownership alone, however, is not a determining factor. There must be "[c]ontrol, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own. . . ." *Lowendahl v. Baltimore & O. R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62, 76, aff'd, 272 N.Y. 360, 6 N.E. 2d 56; *Acceptance Corp. v. Spencer, supra.*

In the testimony of officers of First Atlantic, we find evidence of this type of control. The testimony of Thomas D. Pearson, a Vice-President of First Atlantic, indicates that he was "named" President of Park Road for the purpose of executing the loan agreement of 17 January 1968. His testimony also establishes beyond question that he personally knew nothing about the affairs of Park Road and little, if anything, about the loan agreement which he signed. Mr. Pearson stated:

"I was made President around December of 1967 or January 1968 and I have been President of Park Road Professional Center, Inc. ever since that date. I am President of Park Road Professional Center, Inc. at the present time. I do not know whether or not any Federal or North Carolina income tax returns were prepared for Park Road Professional Center for the years 1967 and 1968. . . . I was told by Bill McClain [President of First Atlantic] that I had been elected President of Park Road Professional Center, Inc. . . . I don't think I am a director of Park Road Professional Center, Inc., but I don't know whether I am or not. I am not a stockholder of Park Road Professional Center, Inc.

I did not ask anyone to make me President of Park Road Professional Center, Inc. I do not remember exactly what Mr. McClain said to me when he told me I was President. It was to the effect that Park Road was a company that First Atlantic held and that as an employee of First Atlantic he wanted me to be President of this corporation and I said okay. I have never seen the stock book of Park Road Professional Center, the corporate minute book, the Articles of Incorporation, or any financial statements for Park Road Professional Center, Inc. I have never seen any books or records of Park Road Professional Center, Inc. As President of Park Road Professional Center I signed a Loan Agreement of January 17. I think Mr. McClain asked me to sign it I do not remember how soon it was after he had asked me to be President that he asked me to sign the Loan Agreement, but it was soon after he asked me to be President of Park Road. I don't remember whether it was on the same day that I was told to be President or not. . . . I remember signing the document. I did not read it over in great detail before I signed it. I believe Bill McClain presented the document to me for signature. I do not recall what he said to me when he handed me the document. I would imagine he asked me to sign it but I don't know. I was not shown a copy of the document in advance. I did not participate in any discussions between The Northwestern Bank, Park Road Professional Center, Inc. and Hillwest prior to signing the document. I know nothing about the contents of the Loan Agreement and knew nothing about

negotiations or discussions which resulted in the Loan Agreement until it was presented to me by Mr. McClain for signature. I don't think I have had any discussions with The Northwestern Bank and its representatives or Hillwest, Inc. and its representatives concerning the Loan Agreement after its execution.

. . . The only thing I remember engaging in in any sort on behalf of Park Road Professional Center is the execution of the Loan Agreement labeled 'Plaintiff's Exhibit A.' I do not know who I succeeded as President of Park Road Professional Center, Inc. I do not have the North Carolina Franchise Tax Return for Park Road Professional Center for the years 1967 and 1968 as required pursuant to the Court Order for the examination. I have never seen them and I have never been told by anybody that they existed. I do not know that there are any Franchise Tax returns for 1967 and 1968."

William McClain testified that as President of First Atlantic he negotiated the loan in question with Hillwest on behalf of Northwestern. McClain testified that he did not know how Mr. Pearson came to be elected President of Park Road Professional Center but stated: "I presume he was appointed for the protection of First Atlantic Corporation, although I do not know." McClain admitted that the reason the loan instruments were assigned to Park Road rather than Hillwest was that "if they were assigned to Park Road Professional Center *which we controlled* they would be safe to be used." (Emphasis added.)

The above quoted testimony, as well as other evidence appearing in the record, clearly establishes the necessary element of "control." We think it equally clear that this control was used by the dominant corporation, Northwestern, to commit an unjust act in contravention of plaintiff's legal rights. *Lowendahl v. Baltimore & O. R. Co., supra; Acceptance Corp. v. Spencer, supra.*

The circumstances surrounding the loan to Hillwest point to an unusual and highly questionable transaction. In fairness to the defendants, it should be pointed out that there is no evidence that any of them had knowledge, at the time the loan was closed, that there was a defect in title to the 60,125 acres of mountain land. (Hemingway did testify that shortly after the

deed was recorded someone told him, he thought jokingly, that he had just purchased the Indian Reservation.) Other badges of questionability, however, are clearly present. For instance, no representative of any of the parties ever saw any part of the 60,125-acre tract of land. No formal appraisal was made by Northwestern. Hillwest never made written application for the loan and was not required to furnish Northwestern with a statement of its financial worth. The $900,000 loan was made to Hillwest, a corporation that was obviously without net assets, save for its title to land which it was purchasing with less than 20% of the money being borrowed. The conclusion is inescapable that Northwestern did not rely for its security upon the security afforded by the deed of trust on the mountain land or the execution by Hillwest of the demand note. Rather, it relied upon the fact that through its control of Park Road, control of the Paway loan instruments would be retained.

The matter comes down to a simple question of whether plaintiff may be subjected to liability for a loss that is illusory rather than real. Northwestern has parted with none of the $859,699.93 involved in this action. All that it has done has been to endorse the Paway loan instruments and liens to Park Road, which is at best little more than a corporate phantom. The corporate charter of Park Road was in a state of suspension at all pertinent times. Its only stock certificate is lost. Its purported president has never seen any minute books, tax returns or corporate records—if any exist plaintiff's extensive discovery proceedings did not uncover them. No corporate secretary attested the signature of the purported president of Park Road to the loan agreement. No corporate seal was affixed thereto. No corporate officer, or anyone else verified or signed the answer in this case on behalf of Park Road. The only indicia of title its purported president has is his recollection that First Atlantic's president, William McClain, told him he was president—an event Mr. McClain apparently does not recall.

This much is known—if Park Road exists at all, it exists as a mere puppet and device in the hands of First Atlantic. See *Henderson v. Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39. Its policies and practices are dominated to the point that it has "no separate mind, will or existence of its own and is but a business conduit for its principal." 1 Fletcher, Cyclopedia Corporations, § 43, p. 205 (Perm. Ed. 1963). A court of equity

seeking to do justice among all parties looks at the spirit and not the form of transactions. *Trust Co. v. Spencer,* 193 N.C. 745, 138 S.E. 124. " 'It regards corporate organization objectively and realistically, unencumbered by fictions of corporate identity, and thus, brushing aside form, deals with substance.' " *Mills v. Building & Loan Assn.,* 216 N.C. 664, 6 S.E. 2d 549. Corporate identity offers no bar to equity's pursuit of the "plumb-line" of right dealing and fair accounting. *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832. These principles compel the affirmance of the trial court's judgment.

The trial court held that plaintiff was also entitled to relief on other grounds, *i.e.:* (1) The transfer of assets to Park Road constituted a fraudulent conveyance under G.S. 39-15. (2) The gift of credit was beyond the power of Hillwest to make and Park Road to accept since it was not a gift to a charitable, literary or religious organization such as is set forth in G.S. 55-17(a)(6). (3) Park Road had no power to enter the loan agreement or to retain the assets since its corporate charter was under a state of suspension. Inasmuch as conclusions heretofore discussed entitle plaintiff to the relief granted, we find it unnecessary to inquire into the soundness of these additional grounds.

Affirmed.

Judges CAMPBELL and BRITT concur.

EARLINE H. CLARKE v. CHARLES E. KERCHNER AND WIFE, MARGARET B. KERCHNER AND IRENE TAYLOR

No. 7118SC362

(Filed 23 June 1971)

1. **Evidence § 48— competency of witness to testify as expert**

The competency of a witness to testify as an expert is addressed to the discretion of the trial court, and its determination is ordinarily conclusive on appeal unless an abuse of discretion is shown or unless there be no evidence to support the finding.

2. **Evidence § 48— qualification of expert witness — discretion of court**

Trial court acted within its discretion in refusing to qualify the assistant director of a municipal public works as an expert witness to testify whether a landlord was negligent in the construction and maintenance of a back porch railing.

3. **Evidence § 40— nonexpert witness — answer to hypothetical questions**

A nonexpert witness' answers to hypothetical questions were properly excluded.

4. **Negligence § 47; Landlord and Tenant § 8— duty to visitor on premises — status of visitor**

The duty owed a person on the premises of another depends upon the status enjoyed by the visitor.

5. **Negligence § 59— licensee — social guest**

An invited social guest is a licensee.

6. **Landlord and Tenant § 8— duties of lessor — repair of premises**

A lessor is not under an implied covenant to repair the premises, and in the absence of agreement to the contrary, is not under a duty to keep the premises under repair, or to repair defects existing at the time the lease is executed.

7. **Landlord and Tenant § 8— liability of lessor — injury to lessee's social guest — condition of porch railing**

A lessee's social guest who was injured when the back porch railing of the demised premises gave way failed to offer sufficient evidence that the lessors of the premises, who were not in possession thereof, breached their common law duty to the guest, there being no evidence that the lessors wilfully injured the plaintiff or wantonly or recklessly exposed her to danger.

8. **Landlord and Tenant § 8— violation of municipal housing code**

A landlord's violation of the Greensboro housing code was not negligence *per se*.

APPEAL by plaintiff from *Thornburg, Special Judge,* 7 December 1970 Session of Superior Court held in GUILFORD County.

Plaintiff brought this action seeking damages for personal injuries allegedly received as a result of a fall from a back porch caused by the negligence of defendants. Defendants Charles E. and Margaret B. Kerchner own a house located at 1110 Stephens Street in Greensboro which was rented to defendant Irene Taylor at the time of the accident. Plaintiff alleged that defendants Kerchner were negligent in the construction of the porch railing which pulled loose when plaintiff "backed up lightly" against it. Plaintiff further alleged that defendants Kerchner were negligent in failing to disclose the defect prior to renting the house to defendant Taylor, and in painting and repairing the premises so as to conceal a dangerous condition. Plaintiff also alleged that the Kerchners were negligent in their failure to maintain the house in compliance with several provisions of the Housing Code of the City of Greensboro, a

municipal ordinance. Plaintiff alleged negligence by the defendant Taylor in failing to make the premises on which she lived and to which she invited plaintiff safe for ordinary use, in maintaining a concealed and dangerous condition of which she knew or should have known, and in failing to warn plaintiff of the condition. Plaintiff further alleged that defendant Taylor was negligent in her failure to maintain her house in compliance with provisions of the Greensboro Housing Code. Defendant Taylor and defendants Kerchner answered, denying negligence, and alleging that plaintiff was contributorily negligent in creating a dangerous situation and "forcefully" backing into the porch rail.

At the close of plaintiff's evidence, all the defendants moved for a directed verdict. The motion was allowed on the grounds that the plaintiff had failed to offer evidence of negligence by the defendants which was a proximate cause of plaintiff's injuries.

The evidence, taken in the light most favorable to the plaintiff, tends to show the following. Prior to 31 August 1968, defendant Taylor invited plaintiff to her home for a cookout. Plaintiff arrived around 5 o'clock in the afternoon of 31 August 1968, and entered the house by the front door. After stopping briefly inside the house, plaintiff followed defendant Taylor out the back door onto the back porch. On the back porch, plaintiff paused to talk with defendant Taylor's niece and to wait for some children in the back yard to line up so that plaintiff could photograph them. Defendant Taylor continued walking down the porch steps and into the back yard.

The back screen door out of which plaintiff walked was hinged on plaintiff's left as she faced the back yard. The back porch onto which she walked was approximately four feet long and approximately five feet wide. The roof of the porch is supported by 4 x 4 columns on each end. Each of these columns had 2 x 4 railings stretching horizontally between it and the house. The 2 x 4 railings were attached to the columns on one end, and to an upright wooden member attached to the house at the other end. The 2 x 4 railing which came loose when plaintiff fell was approximately three feet above the floor of the porch, and the floor of the porch is approximately 35 inches from the ground.

As the plaintiff stood talking with defendant Taylor's niece, some of the children who were in the back yard came up on the porch steps to go into the house, and as they did, plaintiff stepped to the side of the porch on which the door was hinged to make room for the children to go into the house through the back screen door. The lady with whom plaintiff was talking also moved to the side of the porch between the opened door and the horizontal rail. Plaintiff was closer to the house than the lady with whom she was talking, but both of them were on the same side of the porch. Plaintiff testified that she "barely touched the railing," and that before she knew anything, she "had done a flip." She said she stepped back behind the door that was being opened, and the lady with whom she was talking also stepped back to get out of the way of the opening door and the children entering the doorway. Plaintiff testified that the end of the railing next to the house gave way first, and then the entire top horizontal railing fell to the ground. Finally, plaintiff said, "After the fall that day the rail fell after I had finished falling after I fell. The entire top railing fell on the ground after I fell."

At the time of her injury, plaintiff was approximately 49 years old and weighed approximately 130 pounds. Plaintiff's doctor testified that as a result of plaintiff's fall, she suffered a separation of the right acromioclavicular joint and fracture of the caronoid process of the scapula with considerable displacement. Plaintiff now has 25 per cent permanent disability of the right shoulder joint and disfigurement.

Plaintiff's injury occurred on Saturday evening. On the following Sunday morning the railing was nailed back in place by the brother of the defendant Taylor who reinforced it with a metal brace at each end. Defendant Taylor's brother, called as plaintiff's witness, testified that he did not recall anything about the number of nails or the size of the nails in the railing prior to his repair. He did say, "You could see that the nails had pulled out." The witness further testified that the railing "had not been eaten up by termites or rotten or anything of that nature."

The real estate rental agent who was in charge of renting the house at the time of the accident, and for some nine years prior to that time was called as a witness for the plaintiff and

testified that he went down to Stephens Street "quite often," but could not state any particular times when he went. He testified that he had never seen any condition of the rails on the back porch that needed work, and that defendant Taylor had never reported to him that any rails were loose on the porch. The agent said the house was painted outside "a short time before, maybe a year or two before," and that he received no reports from the painter of anything wrong with the railing. He described the condition of the house in April of 1968 as "excellent."

Defendant Charles E. Kerchner was called as an adverse witness for the plaintiff. He testified that the house was eight years and nine months old at the time of the accident, and that a contractor built it according to floor plans drawn by him. Defendant Taylor was the third tenant to live in the house; her tenancy began 22 November 1962. First grade lumber was used in building the house. He did not handle the rental directly, but rented it through an agent. He went by the house occasionally, but had no regular schedule of inspection. He sometimes walked around the house, but did not enter it to inspect it. He had received no complaints of a loose railing; such complaints would ordinarily be directed to the rental agency. No repairs were made to the wooden structure of the house prior to the accident. Kerchner said, "In my experience, that sort of thing in a house that is well built just doesn't require any repairs in ten years or less, wooden repairs." The only testimony as to the size and number of nails in the railing came from Kerchner. He said, "I know that there are at least two nails placed in the two by fours in the ends. There may be more, I don't know. The types of nails used were steel nails, cut nails. I'm not sure I could tell you what size. I'm sure they were more than eight penny. I'm sure of that. I couldn't say the exact size of nails."

Defendant Irene Taylor was also called, and testified as an adverse witness for the plaintiff, in substance as follows: She does not go out on her back porch very much; she sometimes put towels on the porch railings to dry before putting them in the clothes hamper. She had never noticed the porch railings being loose prior to the time of the accident. She is not at home in the day time, and therefore does not know when the rental agent came to the premises to inspect them, but the agent has

come when she has called him. On the occasion in question, she was holding a cookout in her back yard, to which the plaintiff was invited.

John Fox, Assistant Director of Public Works for the City of Greensboro, testified that the custom and practice of builders in the community in nailing rails or banisters to posts and other supports was to put three or four nails into the end of the banister to secure it to the support to which it is attached. Plaintiff asked Mr. Fox numerous questions to which objections were made and sustained. Plaintiff also submitted Mr. Fox as an expert witness; the court refused to allow Mr. Fox to testify as an expert.

From the granting of defendants' motion for a directed verdict, plaintiff appealed.

Clark and Tanner by David M. Clark for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellees Kerchner.

VAUGHN, Judge.

Appellant contends that the court erred in granting defendants' motion for a directed verdict. Before we can decide whether the evidence, taken in the light most favorable to the plaintiff was sufficient to be considered by the jury as to whether defendants breached a duty owed to plaintiff, we must decide (1) whether certain expert testimony should have been considered by the court below, and (2) what duty defendants owed plaintiff.

[1-3] Appellant assigns as error the failure of the court below to recognize her witness, John Fox, as an expert, and the failure to allow the witness to state his opinion in answer to hypothetical questions. The competency of a witness to testify as an expert is addressed to the discretion of the trial court, and its determination is ordinarily conclusive on appeal unless an abuse of discretion is shown or unless there be no evidence to support the finding. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *In re Humphrey,* 236 N.C. 142, 71 S.E. 2d 915. No abuse of discretion affirmatively appears in the record nor is there a showing of a lack of evidence to support the finding. Because the witness

was not qualified as an expert, his answers to hypothetical questions were properly excluded.

[4-6] According to the well-established common law rules in effect in North Carolina, the duty owed a person on the premises of another depends on the status enjoyed by the visitor; different duties are owed to the invitee, the licensee, and the trespasser. *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154. At the time of her injury, plaintiff was a social guest of the defendant Taylor. An invited social guest is a licensee. *Cobb v. Clark*, 265 N.C. 194, 143 S.E. 2d 103; *Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717; *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E. 2d 50. The duty an owner owes a licensee is described in detail in *Dunn v. Bomberger*, 213 N.C. 172, 195 S.E. 364:

> "As plaintiff's intestate was a licensee, defendant did not owe him the duty to keep his premises in a reasonably safe condition. The only duty resting upon the defendant was to refrain from willful or wanton negligence and from the commission of any act which would increase the hazard. The owner of land is not required to keep his premises in a suitable or safe condition for those who come there solely as licensees and who are not either expressly invited to enter or induced to come upon them for the purpose for which the premises are appropriated and occupied. In authoritative decisions of this and other jurisdictions the degree of care to be exercised by the owner of premises toward a person coming upon the premises as a bare or permissive licensee for his own convenience is to refrain from willful or wanton negligence and from doing any act which increases the hazard to the licensee while he is upon the premises. The owner is not liable for injuries resulting to a licensee from defects, obstacles or pitfalls upon the premises unless the owner is affirmatively and actively negligent in respect to such defect, obstacle or pitfall while the licensee is upon his premises, resulting in increased hazard and danger to the licensee. *Brigman v. Construction Co.*, 192 N.C., 791, and cases there cited. The *Brigman* case is reported and annotated in 49 A.L.R., 773."

Such is the common law duty of the owner of premises, when the owner is in possession. To understand the common law duty of a lessor, one must keep in mind the rule that a lessor is not

under an implied covenant to repair the premises, and in the absence of agreement to the contrary, is not under a duty to keep the premises under repair, or to repair defects existing at the time the lease is executed. *Thompson v. Shoemaker*, 7 N.C. App. 687, 173 S.E. 2d 627. Thus, the liability of the lessor is summarized as follows:

> "The lessor is not ordinarily liable to a tenant, or the tenant's sublessee, family, servants, or guests, for personal injuries resulting from disrepair, or patent defects, even when the lessor is under a contractual obligation in his lease to keep the premises in repair, or even if the dangerous condition had been brought to the lessor's attention and he had agreed to repair the same, or the lessor had assumed the duty of making repairs. The doctrine of *caveat emptor* ordinarily applies, and the lessor is not liable unless the lessee shows that there was a latent defect known to lessor, or of which he should have known, and that the lessee was unaware of, or could not by the exercise of ordinary diligence discover, the defect, the concealment of which would be an act of bad faith on the part of the lessor." 5 Strong 2d, N. C. Index, Landlord and Tenant, § 8, pp. 162-163.

[7] An understanding of the duty owed by defendant Taylor can be gleaned from *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408. There the defendant was the occupant of the premises, a contractor who was constructing the building. The Court described the duty owed by the owner or occupant of a building to a licensee:

> "The owner or person in possession of property is ordinarily under no duty to make or keep property in a safe condition for the use of a licensee or to protect mere licensees from injury due to the condition of the property, or from damages incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees even though there are dangerous holes, pitfalls, obstructions or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of

property, is not liable for injuries to licensees due to the condition of the property, or as it has been expressed, due to passive negligence or acts of omission. [Citations omitted.] The duty imposed is to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger."

The duty described above is imposed on owner (defendants Kerchner) and occupant (defendant Taylor) when the premises are controlled by the tenant and the injury is caused by a defective condition of the premises, rather than by affirmative, active negligence. The evidence, taken in the light most favorable to the plaintiff, was not sufficient to be considered by the jury on the question of breach of the common law duty by defendants. There was no evidence that either defendant willfully injured the plaintiff, or wantonly or recklessly exposed her to danger.

[8] Appellant contends that a violation of the Greensboro Housing Code is negligence *per se,* and that once proof of a violation is introduced, the case should go to the jury on the question of proximate cause. For the purpose of discussing this theory, we assume, but explicitly do not decide, that plaintiff presented evidence sufficient to be considered by the jury on the questions of defendants' failure to comply with provisions of the ordinance. According to appellant's theory, the purpose of the Greensboro Housing Code is to protect life and limb; therefore, it is a safety statute which imposes upon owner and occupant a duty to maintain the premises they own or occupy in a safe condition as required by the maintenance standards; a deviation from the maintenance standards set out therein (a breach of duty) causing injury to a person on the premises would produce liability for owner and occupant, regardless of the status of the person injured under the common law rules. In support of that theory, appellant cites numerous cases in which violation of a municipal ordinance was held to be negligence *per se,* among them *Bell v. Page,* 271 N.C. 396, 156 S.E. 2d 711. In *Bell,* a nine-year-old boy drowned in a motel swimming pool which the evidence tended to show was not being maintained in accordance with a municipal ordinance of Washington, N. C. The court held that the ordinance was a safety statute, and that a violation of the ordinance would be negligence *per se,* despite the fact that the boy was a trespasser. "The primary purpose and

intent of said ordinance in imposing such legal duty on persons maintaining swimming pools was to provide protection for children without reference to whether they were legally entitled to use the pool." *Bell v. Page, supra.* We detect several distinctions between the housing code involved in this case and the safety statutes involved in *Bell* and other cases cited by appellant. While there was no doubt in those cases that the purpose of the statute or ordinance was to impose a standard of care, there is no indication that the housing code being considered was so intended. The stated purpose of the Greensboro Housing Code is " . . . to arrest, remedy and prevent the decay and deterioration of places of habitation and to eliminate blighted neighborhoods by providing minimum requirements for places of habitation for the protection of the life, health, welfare, safety and property of the general public and the owners and occupants of places of habitation." The primary purpose and intent of this ordinance was not to impose a legal duty on persons owning or occupying housing for the protection of their guests regardless of whether owner or occupant would otherwise owe them the same duty. The purpose is "to arrest, remedy and prevent the decay and deterioration of places of habitation and to eliminate blighted neighborhoods. . . . " The method for improving housing in Greensboro is "by providing minimum requirements." Although N. C. Gen. Stat. 14-4 provides that violation of a city ordinance is a misdemeanor, the ordinance in question is not penal in nature. It is a remedial statute; if a building is found to be unfit for human habitation, it may be closed until repairs are made. Finally, if the statute were the standard of care by which owners of buildings were judged regardless of whether the area complained of was within the owner's control, the result would be either an unfair burden on the landlord (requiring him to maintain an area he could not enter), or an invasion of the domain of the tenant in his leased premises. For these reasons, we do not think this ordinance imposes upon the landlord (who does not even have the duty to repair the premises, *Thompson v. Shoemaker, supra)*, a duty to maintain the premises in a safe condition. Nor does the ordinance alter the duty owed by the tenant.

Cases from other jurisdictions support the view that provisions in a city's housing code requiring maintenance by the

owner or occupant or both do not change the common law duties of landlord and tenant unless the intention of the legislative body to do so is explicitly stated. In one case plaintiff, a tenant's guest, had fallen off some steps and was suing the lessor. The jury was instructed that the defendant lessor would be guilty of negligence if he failed to comply with a statute requiring properly maintained handrails. The appellate court said if they gave the statute that effect, they "would be extending it to create a new area of civil liability in the relationship between landlord and tenant." *Fechtman v. Stover*, 139 Ind. App. 166, 199 N.E. 2d 354. Another case in which the standard of care as explained to the jury in the charge was based on statutory standards of care is *Tair v. Rock Investment Co.*, 139 Ohio St. 629, 41 N.E. 2d 867. The court held that the city ordinance did not set the standard of care for several reasons, among them that the statute did not distinguish demised premises from those used in common. The court said, "[I]f the ordinance were interpreted as an intended modification of the established rule, as contended by the plaintiff, the civil liability of a landlord would be the same irrespective of whether possession and control of the premises were retained by him. A majority of the members of this court are of the opinion that if any such change is to be injected into the law, it should be based upon express legislative enactment and not upon judicial inference." In *Corey v. Losse*, 297 S.W. 32 (Mo. 1927), plaintiff, age two years, fell from a porch when a banister came loose. Plaintiff's mother, the tenant, had frequently notified the landlord of the condition, but the lease did not require the landlord to repair. An ordinance of St. Louis said: "It shall be the duty of every owner, trustee or lessee of every tenement house to provide for and maintain the same in all parts in good repair." The court explained, quoting from *Burnes v. Fuchs*, 28 Mo. App. 279, 282: "[A]s between the owner and the city, the obligation under such a police regulation may well rest upon the owner; and yet, as between the owner and his tenant, the rule of the common law will prevail which casts the obligation upon the tenant." Other cases holding that such a statute does not modify the common law rules of liability are *Newman v. Sears, Roebuck & Co.*, 77 N.D. 466, 43 N.W. 2d 411, 17 A.L.R. 2d 694; *Garland v. Stetson*, 292 Mass. 95, 197 N.E. 679; *Johnson v. Carter*, 218 Iowa 587, 255 N.W. 864, 93 A.L.R. 774. Although some jurisdictions,

notably Michigan have held to the contrary, we regard the reasoning in the cases discussed as more persuasive.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CHARLIE WADE POWELL

No. 7121SC334

(Filed 23 June 1971)

1. **Criminal Law § 84— illegal search — incompetency of evidence**

Evidence is not rendered incompetent under the exclusionary rule set forth in G.S. 15-27 unless it is obtained in the course of an illegal search.

2. **Criminal Law § 84; Searches and Seizures § 1— articles in plain view — seizure without warrant**

No search warrant was required for the seizure of packets containing heroin which were in plain view of the officers after defendant, while on a public street, threw the packets behind him upon the approach of the officers.

3. **Criminal Law § 162— evidence admitted without objection**

The competency of evidence is not presented on appeal where it was admitted without objection or exception.

4. **Criminal Law § 162— failure to object — motion to strike — discretion of court**

When objection is not made in apt time to an improper question asked by counsel, a motion to strike a responsive answer is directed to the discretion of the trial judge except where the evidence is incompetent by virtue of a statute.

5. **Criminal Law § 162— broadside motion to strike**

Broadside motion to strike "everything relating to the testing" was properly denied where some of the evidence was competent.

6. **Criminal Law § 169— admission of evidence — harmless error**

Defendant was not prejudiced by the admission of testimony by a police officer, a non-expert, that a chemical test he performed on a substance which had been thrown down by defendant showed the presence of an opiate derivative, where the State did not rely upon the officer's testimony to identify the substance but offered expert testimony that it was heroin.

7. **Criminal Law § 130— motion for mistrial — newspaper article read by jurors**

In this prosecution for possession of heroin, the trial court did not err in the denial of defendant's motion for mistrial made on the ground that during the progress of the trial two of the jurors read a newspaper article which revealed that defendant was then appealing a conviction for attempted armed robbery, where the court, after questioning the jurors, found that they would not be influenced or prejudiced by the newspaper article.

8. **Criminal Law § 114— instructions — expression of opinion**

The trial court did not express an opinion in stating the contentions of defendant in this prosecution for possession of heroin.

9. **Criminal Law § 116— instruction on failure of defendant to testify**

Absent a request, it is discretionary with the trial judge as to whether or not he instructs the jury on the failure of defendant to testify.

10. **Criminal Law § 116— instruction on failure of defendant to testify**

Instruction that defendant may remain off the witness stand as he may elect "or as his counsel may advise him," while not approved, did not constitute prejudicial error.

ON *certiorari* as substitute for an appeal from *Johnston, Judge,* 26 October 1970 Session of Superior Court held in FORSYTH County.

Defendant was tried upon a bill of indictment reading as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Charlie Wade Powell late of the County of Forsyth on the 24th day of September, 1970 with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously possess narcotic drugs, to-wit, six glassine packets of heroin, in violation of the Uniform Narcotic Drug Act, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The evidence for the State tended to show that on 24 September 1970 at about 8:00 p.m., the defendant was sitting on a wall 3-½ to 4 feet high located on the north side of the 1500 block of East Fourteenth Street in the City of Winston-Salem. There were other people in the vicinity. Police officers of the City of Winston-Salem approached the defendant, and when they got within 10 feet of the right side of the defendant,

who was looking the other way, one of the officers said, "Police officers. We have a search warrant. Don't move." When this statement was made, the defendant, with his left hand, "flipped" or threw behind him "six glassine packets" which were bound together with a rubber band and contained the narcotic drug, heroin. The officer saw this and picked them up, and they were later introduced into evidence.

The evidence for the defendant tended to show that he knew police officers were in the vicinity. He did not throw anything behind him. When the police officers approached, they said, "Don't move, do I'll shoot you"; and he held his hands out and said, "I don't have anything." The defendant's four witnesses were present and did not see him throw anything behind him.

The jury returned a verdict of guilty as charged. From judgment of imprisonment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Ricks for the State.

Hatfield, Allman & Hall by James W. Armentrout for defendant appellant.

MALLARD, Chief Judge.

Defendant has ten assignments of error. Assignments of error four and seven relate to the failure of the trial judge to allow the defendant's motions for judgment as of nonsuit. We hold that there was ample evidence to require submission of the case to the jury.

[1, 2] In defendant's first assignment of error, he contends that the trial judge erred in finding as a fact that the search warrant in possession of the officers as they approached the defendant was a valid search warrant; and in his second assignment of error, defendant contends that the trial judge committed error in admitting the heroin into evidence. The State contends that when the defendant spontaneously exposed the heroin to the police officers before the intended search could be had, he obviated the need for proof by the State of a valid search warrant and that the judge properly admitted the heroin into evidence. Evidence is not rendered incompetent under the ex-

clusionary rule now set forth in G.S. 15-27 unless it is obtained in the course of an illegal search. An illegal search is one made without a proper search warrant under conditions which require a search warrant. See *State v. Colson,* 1 N.C. App. 339, 161 S.E. 2d 637 (1968), and *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied,* 393 U.S. 1087, 21 L. Ed. 2d 780, 89 S.Ct. 876 (1969). The incriminating heroin in this case was not obtained in the course of an illegal search. The defendant did not give it to the officers because they had a search warrant. It was obtained when the defendant, in an apparent attempt to voluntarily dispose of it, unintentionally exposed it to the view of the officers. It is lawful and proper for an officer to seize an article in the discharge of his official duties without a warrant where the article is in plain view. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968); *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95 (1967); *State v. Simmons,* 10 N.C. App. 259, 178 S.E. 2d 90 (1970). The police officers stated that they had a search warrant, and while this may have motivated the defendant to attempt to surreptitiously dispose of the heroin, the evidential fact remains that the heroin was seen and obtained before a search could be made under the search warrant. The defendant and the officers were on a public street, and no search was involved or required to obtain the heroin which was in plain view of the officers from the time the defendant made his attempt to dispose of it until it was picked up by one of the officers. Under the peculiar circumstances of this case, the question of the validity of the search warrant does not arise and is not decided. The trial judge did not commit error in admitting the heroin into evidence.

After the six glassine packets found to contain heroin were identified and introduced into evidence, over defendant's objection, the following transpired during the examination of the arresting officer:

"Q. After you picked these items up, what did you do then?

A. I tested—

MISS WESTMORELAND: Objection.

THE COURT: Objection overruled.

EXCEPTION: Which is defendant's EXCEPTION NO. FOUR.

Q. Go ahead, sir.

A. I tested one pack of the white material to try to find positive results for opiate derivative.

Q. Opium derivative?

A. Yes, sir.

Q. Did you open one of these packages?

MISS WESTMORELAND: Your Honor, we would object and move to strike, on the grounds he is not an expert.

THE COURT: Well, he is just telling what he did.

THE SOLICITOR: I am not saying he is an expert.

THE DEFENDANT EXCEPTS TO THE IMPLIED OVERRULING OF HIS OBJECTION BY THE COURT. WHICH IS DEFENDANT'S EXCEPTION NO. FIVE.

I am not a chemist, or anything like that. This was strictly a preliminary test for probable cause to draw my arrest warrant. I ran the Marquis reagent test. I did that at this time. As to how you do it, you simply put the substance that you suspect to be an opiate derivative into a solution, add another solution, and then look for a color change. The color change was purple, which is positive for an opiate derivative. I then placed the defendant under arrest. I did this thing right on the spot."

[3] The defendant moved to strike "everything relating to the testing" which was denied. Defendant assigns the foregoing as error and contends that the police officer, who was not an expert, was permitted to testify as to the results of a chemical test he ran on these six glassine packets. It may be common knowledge that litmus paper when inserted into a solution will turn red to indicate its acidity and blue to indicate its alkilinity, but we do not think that it is common knowledge that a "Marquis reagent test" will cause a combination of two unknown solutions (insofar as this record discloses) to turn purple when an opiate derivative is added. Upon proper objection, the testimony of this witness, who was not an expert, with respect to his conclusion after he made the test should have been excluded. However, the testimony of the conclusion of the witness that the color change of this solution was purple and this "is positive for an opiate

derivative" was admitted without objection or exception, and its competency is therefore not presented on this appeal. The last objection shown on this record was to the question, "Did you open one of these packages?"; this question was proper and the answer was competent. The rule is stated in *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), as follows:

> "When a specific question is asked, objection should be made before the witness has time to answer. However, when admissibility is not indicated by the question and only becomes apparent by the content of the answer, objection should be made immediately by a motion to strike the answer, or the objectionable part of it. (citations omitted.)
>
> Failure to object in apt time to incompetent testimony results in a waiver of objection so that admission of the evidence will not be reviewed on appeal unless the evidence is forbidden by statute or results from questions asked by the trial judge or a juror. (citations omitted)"

[4-6] The defendant's motion to strike "everything relating to the testing" was made after the witness had testified that he had taken the defendant to the police station and also, in detail, what he had done with the glassine packets and how he had marked them for identification. This motion to strike was not made in apt time. When objection is not made in apt time to an improper question asked by counsel, a motion to strike a responsive answer is directed to the discretion of the trial judge except where the evidence is incompetent by virtue of a statute. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969). In addition, it was a broadside motion to strike; and inasmuch as some of the evidence (relating to what the witness did with the six glassine packets in connection with the testing before he arrested the defendant) was competent, the broadside motion to strike was properly denied. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970). The State did not rely upon the police officer's test to identify the substance but offered a witness (stipulated by the defendant to be an expert in chemistry, specializing in the field of opiate derivatives) who testified that he tested and analyzed two of the packets in question and that they contained the narcotic drug, heroin. The defendant does not make it appear that he was prejudiced by the police officer's testimony as to the testing of the heroin or that a different result would have likely ensued if the evidence thereof had been excluded. *State v. Bar-*

bour, 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); and 3 Strong, N.C. Index 2d, Criminal Law, § 169, p. 135.

[7] Defendant's fourth assignment of error is to the denial of his motion for a mistrial made in the absence of the jury on the grounds that a Winston-Salem newspaper published an article while this trial was in progress which contained "misleading" and "prejudicial" statements. The article bearing the title "Drug Possession Trial Opens" reads as follows:

> "Charlie Wade Powell went on trial in Superior Court yesterday, charged with possession of heroin, a felony.
>
> Powell, 37, pleaded not guilty.
>
> His arrest came on the evening of Sept. 24, on 14th Street, near the corner of Jackson Avenue. Testimony indicated that several members of the police drug squad, backed up by a flock of heavily-armed uniformed officers, moved in on Powell as he sat with a group by the sidewalk.
>
> Police drug agents said they seized several small bags of cut heroin near where Powell was sitting. They later searched his house at 2810 N. Patterson Avenue and confiscated weapons.
>
> As court recessed for the night yesterday, defense witnesses were testifying, primarily concerning the circumstances of Powell's arrest.
>
> Powell is free under an appearance bond during the appeal of a December 1969 conviction for attempted armed robbery, to the N. C. Court of Appeals. That conviction was the second under the same set of circumstances, stemming from an incident at the ABC store on Old Lexington Road in January 1969.
>
> He was first convicted by a jury in Forsyth Superior Court, but won a new trial when the appeals court found that error had been committed during the original trial. It is the 12-to-20 year sentence handed down at his new trial, last December, that Powell is now appealing."

The judge inquired of the jury if any of them had read the article after the motion for mistrial was made. Two of them

indicated they had read the article, and three of them indicated they had read the headline. The judge said to the jury:

> "Well, of course, this Court in observing the headlines would realize that there would certainly be nothing prejudicial in connection with the article insofar as the headlines are concerned, so the Court directs these remarks now to you two gentlemen who have read the article.
>
> As we all know, the news media sometimes reports things correctly and sometimes they report them incorrectly; and, certainly, nobody ought to try any case as a juror on the strength of something that was said outside the courtroom by any person, the news media included, because that is the very purpose of a trial: to bring everything together in the presence of a jury and have it passed on in an orderly manner and under the law of the State."

After due inquiry of the jury, the court made the following finding based upon their response:

> "The Court finds as a fact that the jury, after proper inquiry, retain an open mind in the case and will try the case solely under the evidence offered in the trial and will not be prejudiced in any manner by any news article that has appeared or that might appear in connection with the trial, and denies the motion of the defendant."

Defendant did not take the witness stand and contends that under the ruling in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600, 86 S.Ct. 1507 (1966), this newspaper article read by two of the jurors, denied him due process of law. The factual situations in *Sheppard* and in *Marshall v. United States,* 360 U.S. 310, 3 L. Ed. 2d 1250, 79 S.Ct. 1171 (1959), are distinguishable. The newspaper article in the case at bar revealed that the prior conviction mentioned therein was not final but was being appealed. The court immediately and properly made inquiry of the jury upon defendant's motion. Each of the two jurors who had read the article stated that they were able to disabuse their minds of everything that they had read in the article and try the case solely on the evidence in the courtroom and the instructions of the court on the law. There is nothing in this record to indicate that the verdict of the jury was in any way affected by the information or statements contained in the newspaper article. In fact, the record shows that the trial judge, after talking

to the jurors, affirmatively found that the jurors would not be influenced or prejudiced by the newspaper article. On this record we hold that the defendant was not prejudiced by the publication of the newspaper article and that the trial judge correctly overruled the motion for a mistrial. See Annot. 3 L. Ed. 2d 2004.

The circumstances of this case point to the need for a trial judge to instruct jurors not to listen to any television or radio accounts or read any newspaper accounts concerning the case they are trying.

In defendant's sixth assignment of error he contends that the trial judge committed error in allowing the solicitor "to try to impeach" his character. This contention is without merit and requires no discussion.

[8] In his eighth assignment of error defendant contends that the trial judge, in stating the defendant's contentions, expressed an opinion. When the charge is construed as a whole, as we are required to do, no prejudicial error appears. This assignment of error directs attention to the desirability for the trial judge to abstain from or to minimize the giving of contentions in criminal cases. G.S. 1-180. See also concurring opinion in *State v. Stroud* and *State v. Mason* and *State v. Willis,* 10 N.C. App. 30, 177 S.E. 2d 912 (1970).

In the ninth assignment of error it is contended that the trial judge committed error in instructing the jury that the defendant need not testify because his attorney may have advised him not to do so. The judge said concerning this:

> "Now, Members of the Jury, the defendant has not testified in the case. Our law is emphatic that a person who is charged with crime may go upon the witness stand and testify in his defense or he may remain off the witness stand, as he may elect or as his counsel may advise him. Our law is equally emphatic that his failure to go upon the witness stand and testify in his defense shall not be considered by the jury to his prejudice."

[9] The first argument the defendant makes is that absent a special request, the court is not required to instruct the jury concerning his failure to testify; and since there was no request, the instructions emphasized the failure of the defendant to

exercise his right to testify or refrain from testifying under the provisions of G.S. 8-54. We do not agree. The greater weight of authority is that giving unrequested proper instructions relating thereto is not reversible error. See Annot., 18 A.L.R. 3d 1335 (1968). However, in *State v. Barbour, supra,* it is said:

> "Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by the defendant."

Instructions concerning the failure of a defendant to testify relate to a subordinate feature of the case. Absent a request, it is discretionary with the trial judge as to whether he does or does not instruct the jury on a subordinate feature of a case. *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1943); *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654 (1966). The rule is stated in 3 Strong, N.C. Index 2d, Criminal Law, § 113, as follows:

> "While the court is not required to charge on a subordinate feature of the case, nevertheless when it undertakes to do so, it becomes the duty of the court to charge thereon fully and accurately."

[10] The defendant also argues that the trial judge did not accurately instruct the jury and committed error in stating that the defendant may remain off the witness stand "as he may elect or as his counsel may advise him." The use of the word "emphatic" and the words "or as his counsel may advise him" are not approved, but we do not think they are prejudicial in this case. See *State v. Horne,* 209 N.C. 725, 184 S.E. 470 (1936). The better practice is for the trial judge to use the language employed in the statute (G.S. 8-54) without additions if there is a request for such instructions. *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733 (1948).

The defendant's tenth assignment of error is a formal one and in view of what is said herein requires no further discussion.

In the trial we find no prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

McRorie v. Shinn

GRACE TAYLOR McRORIE AND HUSBAND HOWARD S. McRORIE, ELIZABETH TAYLOR BURGESS (WIDOW), AND KENNETH B. CRUSE, PLAINTIFFS v. ANNIE M. SHINN AND HUSBAND P. S. SHINN, AND L. O. CLINE AND WIFE ANNIE M. CLINE, ORIGINAL DEFENDANTS, AND CABARRUS COUNTRY CLUB, INCORPORATED, ET AL, *ADDITIONAL DEFENDANTS*

No. 7119SC394

(Filed 23 June 1971)

1. Executors and Administrators § 16— sale of lands to make assets — presumption of validity of proceedings

Proceedings by an executor to sell lands to make assets to pay debts due by the estate of his testator will be presumed regular in the absence of evidence to the contrary.

2. Executors and Administrators § 13— sale of lands to make assets — life tenant — unborn remaindermen

Where lands were devised to testator's daughter for life with remainder to her children, the life tenant represented the entire title, as far as her unborn children were concerned, for the purpose of enabling the court to proceed in special proceedings instituted by the executor to sell the lands to make assets to pay debts of the testator, and children thereafter born to the life tenant are bound by the judgments ordering sales of the lands, notwithstanding unborn remaindermen were not made parties to the proceedings.

3. Infants § 6— guardian ad litem for unborn infants

In the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem.*

4. Executors and Administrators § 13— sale of lands to make assets — guardian ad litem for unborn infants

There was no statute in this jurisdiction in 1907 or 1908 requiring or authorizing a guardian *ad litem* for unborn infants in a special proceeding to sell lands to make assets to pay debts of a decedent.

5. Executors and Administrators § 13— sale of lands to make assets — class representation of unborn remaindermen

In special proceedings to sell lands to make assets to pay debts of the estate, failure to provide plaintiff remaindermen, then unborn, with class representation by making contingent beneficiaries then living parties to the proceedings did not render the proceedings fatally defective.

6. Judgments § 19— attack on voidable judgment

The proper procedure for attacking an irregular or voidable judgment is by motion in the cause, and such motion must be made within a reasonable time.

7. **Estates § 3; Executors and Administrators § 16— sale of lands to make assets — attack by remaindermen — death of life tenant**

Remaindermen did not have to wait until the death of the life tenant to attack the validity of proceedings in which lands were sold to make assets to pay debts of an estate.

8. **Executors and Administrators § 16— attack on sale of lands to make assets — reasonable time**

Action instituted in 1970 by plaintiff remaindermen, who had both reached majority by 1941, attacking the validity of 1907 and 1908 proceedings in which lands were sold to make assets was not brought within a reasonable time.

APPEAL by plaintiffs from *Gambill, Judge,* 8 March 1971 Session of CABARRUS Superior Court.

This action was brought for the purpose of determining the title, if any, of plaintiffs in certain lands in Cabarrus County. Plaintiffs contend that the action is not only to determine their title but to remove cloud upon and quiet title to the real estate in question; also to obtain possession of the real estate.

The action was heard without a jury on stipulations, agreed facts and documentary evidence. Pertinent facts necessary for an understanding of this appeal are summarized as follows:

George M. Misenheimer (George) died testate on 17 January 1907, a resident of Cabarrus County, leaving a Last Will and Testament dated 24 November 1904 and containing the following pertinent provisions: "I want enough of land sold to pay my debts. I bequeath and give the balance of my land and other property except my mill property to my beloved wife Sarah & daughter Rosanna Misenheimer—their lifetime. Provided Rosanna has no heirs, Then it shall go to C. W. Misenheimer my son, his life time and then go to his heirs at his death. My interest in the mill property with what he owes me goes to C. W. Misenheimer. * * * I appoint or name Chas. A. Fisher as my executor of my last will and testament." Said will was probated on 1 February 1907 and Fisher qualified as executor of the estate on 2 February 1907.

George owned six separate parcels of land at the time of his death, as follows: a 41½ acre tract, a 109 acre tract, a 38 acre tract, two lots, and the Misenheimer graveyard tract. He was survived by his widow, Sarah, a son, Charles W., and a daughter, Rosanna, all of whom were more than 21 years of

age; also three grandchildren, minor children of C. W. Sarah died in 1918 or 1919, C. W. died in 1945, Rosanna died intestate on 26 December 1965 survived only by her two children, plaintiff Burgess who was born in 1917 and plaintiff McRorie who was born in 1920.

In June 1907, Fisher, as executor, instituted a special proceeding to sell the 41½ acre tract, the 109 acre tract, and the two lots to make assets to pay debts and charges of administration. Fisher was named as petitioner in the proceeding and C. W., Rosanna and Sarah were named as respondents. Following a public sale of the land, and confirmation of the sales by the clerk, deeds were made by Fisher, as commissioner, for the 109 acre tract to E. W. Misenheimer, for the 41½ acre tract to David Earnhardt, for one of the lots to C. W., and for the other lot to Rosanna.

On 9 June 1908, Fisher, as executor, instituted a second special proceeding to sell the 38 acre tract to make assets to pay the remaining debts and charges of administration of George's estate. The parties in the second proceeding were the same as in the first and a sale of the 38 acre tract to Rosanna was confirmed and commissioner's deed made to her.

Defendants are in possession of various portions of the lands, claiming title by mesne conveyances from the grantees in the deeds from Fisher pursuant to the two special proceedings.

In recent years the lands have become highly improved through the development of residential subdivisions, a country club and the construction of numerous residences and other structures including a church occupied by the Epworth United Methodist Church.

Plaintiff Cruse claims title to an undivided one-half interest in the subject property by virtue of quitclaim deeds from the femme plaintiffs (and their husbands) executed in 1954.

Plaintiffs contend that under the will of George, Rosanna was devised a life estate in the subject property, subject to the life estate of Sarah, and that the femme plaintiffs were contingent remaindermen under the will; that their title accrued when they were born in 1917 and 1920; that the 1907 and 1908 special proceedings were void as to them for the reason that

they were not made parties to said proceedings, either by guardian *ad litem* or by virtual representation; that the children of C. W. were living contingent remaindermen in 1907 and 1908 and were not made parties to the proceedings; that had the children of C. W. been made parties, the femme plaintiffs would have been bound under the doctrine of virtual representation.

In their pleadings, defendants pled validity of the special proceedings, validating statutes, seven years and twenty years statutes of limitations, and laches on the part of plaintiffs.

The trial court found facts and made conclusions of law in favor of defendants, ordered that the action be dismissed, and adjudged that defendants are the rightful owners and entitled to possession of the property. Plaintiffs appealed.

Cole & Chesson by James L. Cole for plaintiff appellants.

Hartsell, Hartsell & Mills by William L. Mills, Jr., and W. Erwin Spainhour; Williams, Willeford & Boger by John Hugh Williams; Wardlow, Knox, Caudle & Wade by Lloyd C. Caudle and E. T. Bost, Jr., for defendant appellees.

BRITT, Judge.

In their brief, defendants state that the grounds upon which they rely for their right of ownership and possession of the subject lands are summarized as follows:

(1) Chain of title from the common source, George M. Misenheimer, through valid deeds from the Commissioner-Executor, pursuant to special proceedings for the sale of said real property in 1907 and 1908 to make assets to pay debts, and from power of sale contained in the will of George M. Misenheimer, and mesne conveyances.

(2) Curative statutes validating any defect in the special proceedings, G.S. 28-100, 101, 102, 103 and G.S. 41-12.

(3) Adverse possession for more than twenty (20) years under G.S. 1-39 and G.S. 1-40.

(4) Adverse possession under color of title for more than seven (7) years under G.S. 1-38.

(5) Laches on the part of plaintiffs barring recovery by them.

Suffice to say, if the record establishes either of the five defenses listed above, defendants are entitled to prevail and the judgment appealed from should stand. We hold that defense (1) is sufficiently sustained by the record to entitle defendants to an affirmance of the judgment and it is not necessary for us to pass upon the merits of the other defenses.

George's will has been partially construed by the Supreme Court of North Carolina in two instances. In *Taylor v. Honeycutt,* 240 N.C. 105, 81 S.E. 2d 203 (1954), the court held that Rosanna acquired a life estate under the will; the court specifically refrained from further interpretation. In *McRorie v. Creswell,* 273 N.C. 615, 160 S.E. 2d 681 (1968), the court held that Rosanna's interest in a .60 acre lot was clearly a life estate, and that when she died her two children took the remainder in fee by clear implication.

[1] With respect to the validity of the 1907 and 1908 special proceedings, we begin with the premise that the regularity of the proceedings by an executor to sell lands to make assets to pay debts due by the estate of his testator will be presumed in the absence of evidence to the contrary. *Wadford v. Davis,* 192 N.C. 484, 135 S.E. 353 (1926).

The validity of the conveyances pursuant to the 1907 and 1908 special proceedings must be determined by statutes and court decisions applicable at that time. Several statutes pertaining to judicial sales have been enacted since 1908 and court decisions based on those enactments have been rendered. Therefore, our holding to the effect that the deeds executed by Fisher, pursuant to the 1907 and 1908 special proceedings, passed good title to the subject property to defendants' predecessors in title is based upon our interpretation of pertinent statutes and court decisions applicable at the time.

The case of *Carraway v. Lassiter,* 139 N.C. 145, 51 S.E. 968 (Filed 26 September 1905), provides guidance for us in the case at hand. Pertinent facts in *Carraway* are as follows: Testatrix died in 1895, leaving a will devising her estate including an 1100 acre plantation to her minor granddaughter Inez for life, remainder to such children as Inez might leave surviving, and in default of issue, to the Oxford Orphan Asylum. Pursuant to a petition by the executor in which Inez, her husband, her guardian *ad litem,* and the orphan asylum were named respond-

ents, the clerk of superior court ordered a sale of a substantial portion of the land to make assets to pay debts of the testatrix. After due advertisement the land was sold at public sale, the sale was later confirmed and deed dated 30 December 1896 was made to the purchaser upon payment of purchase price. On 7 November 1904, a petition was filed in the cause by Inez, her husband and their children, said children being born subsequent to the decree of confirmation aforesaid. Inez died after the filing of the last mentioned petition; her children claimed title to the land as remaindermen after the termination of the life estate of Inez under the will. The court held that although Inez's children were not parties to the proceeding that they were bound by the judgment ordering the land sold to make assets.

In *Carraway,* the court appears to have made a distinction between a special proceeding to sell land to make assets to pay debts and a proceeding to sell land for some other purpose such as partition. We quote from the opinion: "If the proceeding had been one in which the life tenant had, for any proper reason, invoked the aid of the court to sell the land, as for partition, only those who were parties, either personally or by representation, would be bound by the decree." However, obviously referring to the proceeding before it, the court said:

> "The proceeding is based upon the theory that the executor is by order of the court selling the lands of his testatrix which are subject to the payment of her debts, and the devisees or heirs at law are brought in that they may show cause why he may not have license to do so. If the petitioners had been IN ESSE at the time the proceeding was instituted it would have been necessary to divest their interest to make them parties. It cannot be that a person indebted may, by devising his lands, upon contingent limitations to parties not IN ESSE prevent their sale for the payment of his debts until all who may by possibility take are born or every possible contingency is at an end. Mrs. Carraway (Inez), for the purpose of enabling the court to proceed in the cause, represented the entire title, and children thereafter born to her are bound by the judgment."

[2] We think Rosanna occupied the same position in George's will that Inez occupied in the will in the Carraway case; and

that in the 1907 and 1908 proceedings to sell land to make assets to pay debts of the testator, Rosanna, "for the purpose of enabling the court to proceed in the cause, represented the entire title" as far as her children were concerned "and children thereafter born to her are bound by the judgment." We do not consider it necessary to pass upon defendants' contention that George's executor was authorized under the will to sell without a court proceeding a sufficient amount of land to pay George's debts.

[3, 4] Plaintiffs' contention that the 1907 and 1908 special proceedings were void as to plaintiffs because the femme plaintiffs were not represented by a guardian *ad litem* is without merit. In *McPherson v. Bank,* 240 N.C. 1, 81 S.E. 2d 386 (1954), it is said: "The rule is that, in the absence of statute, the capacity to be sued exists only in persons in being. 67 C.J.S., Parties, Sec. 30; McIntosh, North Carolina Practice and Procedure, pp. 228, 230, and 235. With us, in the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem. Deal v. Sexton,* 144 N.C. 157, 56 S.E. 691." Our investigation fails to disclose the existence of any statute in this jurisdiction in 1907 or 1908 requiring or authorizing a guardian *ad litem* for unborn infants in a special proceeding to sell land to make assets to pay debts of a decedent. We are aware of Section 1590 of the Revisal of 1905 and the Revisal of 1908 but do not think they are applicable to a proceeding to sell land to make assets; it appears clear that they would be applicable to a proceeding to sell land for reinvestment of proceeds.

[5] Plaintiffs also contend that the 1907 and 1908 special proceedings were void as to them for the reason that the children of C. W. who were living at that time were not made parties to the proceedings; plaintiffs contend that if said children had been made parties, the femme plaintiffs would have had virtual representation. Although we think better practice would have been followed if C. W.'s children had been made parties and a guardian *ad litem* had been appointed for them, we do not think the failure to provide the *femme* plaintiffs with class representation rendered the proceedings fatally defective. *Carraway v. Lassiter, supra. Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641 (1945).

[6-8] At most the 1907 and 1908 special proceedings were irregular or voidable. It is well settled in this jurisdiction that the proper procedure for attacking an irregular or voidable judgment is by motion in the cause, 5 Strong, N. C. Index 2d, Judgments, Section 19, Page 38, and that such motion must be made within a reasonable time. *Menzel v. Menzel,* 254 N.C. 353, 119 S.E. 2d 147 (1961). It is admitted that plaintiff McRorie became 21 in 1941 and that plaintiff Burgess became 21 in 1938; the femme plaintiffs admit that they have lived in Cabarrus County in the general vicinity of the subject property during their entire lifetimes. Mrs. Burgess resided within sight of the property from the time of her birth until 1969, and they both had general knowledge of the improvements (valued at more than one million dollars) made from time to time upon the parcels of land deeded to the defendants. Plaintiffs' contention that they had no right to bring any type of action to attack the 1907 and 1908 proceedings until Rosanna died in 1965 is not supported by decisions of our Supreme Court. In *Menzel v. Menzel, supra,* the court said: "It is true that the statute of limitations in an ejectment action does not begin to run against the remainderman until the death of the life tenant. 'This does not mean, however, that such remainderman may not move to vacate a void or voidable judgment until after the expiration of the life estate. This he may do at any time if the action is taken seasonably and laches cannot be imputed to him.' " (Citations.) We think the femme plaintiffs waited an unreasonable time to attack the validity of the 1907 and 1908 proceedings, and the male plaintiff is bound by their unreasonable delay.

For the reasons stated, the judgment of the superior court denying plaintiffs any relief and declaring defendants the rightful owners of the property in controversy is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

GLENN E. KETNER v. CHARLES I. ROUZER, TRUSTEE, AND CHARLES I. ROUZER, INDIVIDUALLY, AND WIFE, FRANCES LOWE ROUZER; H. ALLAN ROUZER, JR. AND WIFE, MARY R. ROUZER; MARION F. JARRELL AND WIFE, JUANITA D. JARRELL; THOMAS G. THURSTON AND WIFE, SUSAN F. THURSTON, AND J. HAYDEN LINGLE AND WIFE, BLENNA H. LINGLE, CESTUIS QUE TRUST

No. 7119SC173

(Filed 23 June 1971)

1. **Rules of Civil Procedure § 56— summary judgment — notice to plaintiff**

The hearing of defendants' motion for summary judgment without at least 10 days' notice to the plaintiff was reversible error. G.S. 1A-1, Rule 56(c).

2. **Trusts § 13— parol trust in land — statute of frauds**

The provision of the English Statute of Frauds which requires all trusts in land to be manifested in writing has not been adopted in this State.

3. **Trusts § 13— parol trust — sufficiency of evidence**

Evidence of the establishment of a parol trust is required to be clear, cogent, and convincing; a mere preponderance of the evidence is not sufficient.

4. **Trusts § 13— allegations of parol trust in land — claim for relief — sufficiency of allegations**

Plaintiff's allegations (1) that, during negotiations for the sale of school property, he offered to refrain from bidding on the property on condition that the defendant would sell two portions of the property to plaintiff if the defendant became the successful bidder of the property and (2) that the defendant agreed to the proposal and became the successful bidder but has since refused to convey the two portions in question to the plaintiff, *held* sufficient to give notice of transactions and occurrences which might support a finding that a valid parol trust in the two portions had been established. G.S. 1A-1, Rule 8(a).

APPEAL by plaintiff from *Gambill, Judge,* October 1970 Civil Session of Superior Court held in ROWAN County.

Plaintiff filed complaint in which he alleged: Prior to 15 November 1968 the Salisbury City Board of Education was the owner of a certain tract of land in the City of Salisbury. On 2 March 1968 the Board authorized its Building Committee to negotiate a sale or to hold another public auction for the property. Paragraphs 5 and 6 of the complaint are as follows:

"5. That in June or July 1968 the Building Committee of Salisbury City Board of Education negotiated a sale of said property with deed subsequently made to Charles I. Rouzer, Trustee; that at the meeting culminating in the negotiated sale of said property a number of potential purchasers including plaintiff and defendant, Charles I. Rouzer, were present and submitted bids on the aforesaid property; that during this period of negotiation, plaintiff approached defendant, Charles I. Rouzer, and offered to refrain from further participation in the sales negotiation provided that if defendant, Charles I. Rouzer, did in fact purchase the property he would sell and convey to plaintiff for the sum of Twenty Thousand ($20,000.00) Dollars either of two portions of the property hereinafter described. That defendant, Charles I. Rouzer, did accept such proposal, did promise plaintiff to convey one of the two hereinafter described tracts to plaintiff for the price of Twenty Thousand ($20,000.00) Dollars if he succeeded in purchasing the property. That the alternate tracts of land agreed upon by plaintiff and defendant, Charles I. Rouzer, are described as follows: (The two tracts of land are then described by metes and bounds.)

"6. That on the date and at the place of said negotiations as aforesaid, relying on the representations of the defendant, Charles I. Rouzer, the plaintiff refrained from further bidding and thereupon defendant, Charles I. Rouzer, became the successful bidder and on the 15th day of November 1968, the Salisbury City Board of Education conveyed to Charles I. Rouzer, Trustee, the property described in Paragraph 3 of this Complaint and said deed has been duly recorded in the Office of the Register of Deeds for Rowan County in Deed Book 539, page 501, and legal title to said property remains in Charles I. Rouzer, Trustee, as of the date of filing this suit, and Charles I. Rouzer, Trustee, remains in possession of said property."

In his complaint plaintiff further alleged that defendant Rouzer, Trustee, holds the record title to the property for the benefit of Rouzer, individually, and other named defendants as *cestuis que* trust; that prior to commencement of this action plaintiff had demanded of defendant Rouzer that he execute and deliver to plaintiff a deed conveying either of the two parcels of land

mentioned in Paragraph 5 of the complaint and had offered to defendant Rouzer the sum of $20,000.00 "as agreed for the property"; and that plaintiff is now ready, willing and able to pay said sum, but defendant Rouzer has refused to convey either of said premises to the plaintiff.

In the prayer for relief, plaintiff demanded judgment:

"1. That the defendant, Charles I. Rouzer, Trustee, be decreed to be a Trustee of either tract of real property described in Paragraph 5 of this Complaint and to hold title thereto for the benefit of the plaintiff;

"2. That the defendant, Charles I. Rouzer, Trustee, be ordered and decreed to convey either tract of real property described in Paragraph 5 of this Complaint to the plaintiff in fee simple upon payment to Charles I. Rouzer as Trustee the sum of Twenty Thousand ($20,000.00) Dollars by the plaintiff."

Defendants moved under G.S. 1A-1, Rule 12(b)(6) to dismiss the action because the complaint failed to state a claim against them upon which relief could be granted. This motion was denied by order dated 26 January 1970, signed by Judge George R. Ragsdale, Judge of the Superior Court.

Defendant Rouzer then filed answer in which he alleged that the Building Committee of the Salisbury City Board of Education "held an open session to negotiate a sale of said property and a number of potential purchasers were present and at the request of those bidders present oral bids were made on said property; that during the period of negotiation the plaintiff approached the defendant Charles I. Rouzer, and offered to refrain from further participation in the sales negotiations if Charles I. Rouzer would sell and convey to plaintiff a tract out of said property if he did in fact purchase the property; that defendant Charles I. Rouzer would not accept such proposal and did not promise to convey any land to the plaintiff under any conditions or circumstances." Defendant Rouzer denied he had made any representation to plaintiff to cause plaintiff to refrain from any further bidding but admitted that he had become the successful bidder and had received a deed to the property. He also admitted that he held title for the use and benefit of himself, individually, and for the other named defendants, and that plaintiff had demanded he execute and deliver a deed

conveying to plaintiff one of the two parcels mentioned in Paragraph 5 of the complaint, but denied he had ever promised to convey any land to plaintiff on any terms or conditions.

The remaining defendants also filed answer in which they alleged they were informed and believe that defendant Rouzer did not promise to convey any land to plaintiff under any conditions or circumstances. In a further answer these defendants alleged that defendant Rouzer was acting as agent for himself and for them and that as such agent he had no authority to make any arrangements for the sale of any of the property. These defendants also alleged that if any agreement was made as alleged in the complaint, it was not in writing as required by the Statute of Frauds, it was not supported by any valid consideration, and would be against public policy and unenforceable.

The case was calendared for trial in October, 1970. A pretrial conference was held with the presiding judge in chambers, at the conclusion of which the following judgment was entered:

"THIS CAUSE, coming on to be heard and being heard before the undersigned, Robert M. Gambill, Judge Presiding at the October, 1970 term of the Rowan County Superior Court, and it appearing that this is an action brought by the Plaintiff seeking to enforce an alleged parol contract between the Plaintiff and the Defendant, Charles I. Rouzer; and it appearing to the Court from the Complaint that the Salisbury City Board of Education was the owner of certain real estate that was unnecessary for school purposes and said real estate was to be sold at public auction, and when sold the price was not adequate and the school board met with several proposed purchasers to attempt to negotiate a sale and during said meeting, at a recess, the Plaintiff approached the Defendant, Charles I. Rouzer and offered to refrain from further bidding if the Defendant, Charles I. Rouzer would convey a certain strip of land to the Plaintiff if said Defendant, Charles I. Rouzer was the successful bidder.

"A prior motion was filed in this cause to dismiss the action against the Defendants because the Complaint failed to state a claim against them upon which relief could be granted (Rule 12(b)(6)). Said Motion was denied on January 26, 1970, by George Ragsdale, Jr., Judge Presiding

(a copy of said Motion and Order being attached hereto marked Exhibits A and B respectively).

"At the pre-trial hearing of this case it was stipulated that the Plaintiff's testimony and evidence would be as set out in the Complaint. Thereupon the Defendants move for Summary Judgment under Rule 56(b) of the rules of Civil Procedure.

"The court being of the opinion and finding as a fact that there was no promise in writing as required by the Statute of Frauds and no consideration for the alleged contract except the offer to refrain from further bidding which is an illegal consideration and against public policy;

"The court also holds that the seller is entitled to get the highest price for his property and in this case the seller, being a public body, was under a duty to get the highest amount for the property being sold and a Board of Education cannot participate in any agreement among purchasers that would tend to suppress bidding on the property, but it is under a duty to follow the Statutory requirements for said sale.

"IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the action be dismissed.

"This the 26 day of October, 1970.

"s/ Robert M. Gambill
"Judge Presiding"

From this judgment, plaintiff appealed.

Burke & Donaldson by George L. Burke, Jr., for plaintiff appellant.

Woodson, Hudson & Busby by Max Busby for defendant appellees.

PARKER, Judge.

[1] Rule 56 of the Rules of Civil Procedure, G.S. 1A-1, Rule 56, relating to summary judgments, contains the following:

"RULE 56. SUMMARY JUDGMENT.

* * * * *

"(b) *For defending party.*—A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The 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. . . ."

In this case defendants' motion for summary judgment was not served on plaintiff "at least 10 days before the time fixed for the hearing" as required by Rule 56(c). It was made without any prior notice during the course of the pretrial hearing at which the summary judgment dismissing plaintiff's action was rendered. Plaintiff's stipulation made at that hearing to the effect that his testimony and evidence "would be as set out in the Complaint" did not constitute a waiver of the requirement of Rule 56(c) that the motion for summary judgment "*shall* be served at least 10 days before the time fixed for the hearing." There is, we think, a sound reason for the mandatory form in which the 10-day requirement is expressed in the Rule.

[2, 3] In the summary judgment appealed from the trial judge determined, solely on the basis of the complaint and plaintiff's stipulation that his evidence would be "as set out in the complaint," that plaintiff's action is one to enforce an alleged parol contract for conveyance of land. As such, the trial judge found it unenforceable on two grounds: first, because there was no promise in writing as required by the Statute of Frauds, and second, because there was no consideration for the alleged contract except the offer to refrain from further bidding, which the court found to be an illegal consideration and against public policy. It is possible, however, that if plaintiff is given the opportunity, which proper notice of the motion for summary

judgment would provide, he might by affidavit develop more fully the facts as to what actually occurred, and the facts so developed might support a different theory of the case. North Carolina has never adopted the Seventh Section of the English Statute of Frauds which requires all trusts in land to be manifested in writing. *Bryant v. Kelly,* 279 N.C. 123, 181 S.E. 2d 438, (Opinion filed 10 June 1971). "[I]t is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement." *Paul v. Neece,* 244 N.C. 565, 94 S.E. 2d 596; *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869. Moreover, a parol trust "does not require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even if in favor of a mere volunteer." *Hare v. Weil, supra.* Evidence of the establishment of a parol trust is required to be clear, cogent, and convincing; a mere preponderance of the evidence is not sufficient. *Bryant v. Kelly, supra.*

[4] Under G.S. 1A-1, Rule 8(a), a pleading which sets forth a claim for relief 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." When the allegations of the complaint in this case are liberally construed, they give notice of transactions and occurrences which, when more fully developed at some evidentiary stage of this lawsuit, might support a finding that a valid parol trust had been established. The prayer for relief in plaintiff's complaint is consistent with this theory of his case; he expressly demanded judgment that defendant Rouzer be decreed a trustee to hold title for his benefit.

As to the second grounds on which the trial court dismissed plaintiff's action, while "[i]t is well established in this and other jurisdictions that a contract to stiffle or to puff bidding at a public sale at auction is *contra bonos mores* and will not be enforced at the suit of either party," *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872, it is not certain that such was the nature of the transactions referred to in the complaint. It is

possible, as plaintiff now contends on this appeal, that the effect of those transactions was to increase rather than to diminish bona fide competitive bidding for the property; that plaintiff was less interested in acquiring the whole of the tract being sold than in acquiring a small portion thereof adjoining lands he already owns for which he would pay a good price; and that his proposal to defendant Rouzer had the effect of increasing the latter's ability to bid to the extent of $20,000.00. Here, again, plaintiff is entitled to the opportunity, which compliance with the 10-day notice provision of Rule 56(c) would provide, to develop the facts more fully.

Because it was entered without prior notice of the motion as required by Rule 56(c), the judgment appealed from is

Reversed.

Chief Judge MALLARD and Judge VAUGHN concur.

THE AETNA CASUALTY AND SURETY COMPANY v. LUMBERMEN'S MUTUAL CASUALTY COMPANY, ESTEL OREN DOBY, GERALDINE DOBY BYARS TROUTMAN, DON M. EARNHARDT, PENNY KAY EARNHARDT FARABEE, AND MARIE O. CONRAD, ADMINISTRATRIX OF THE ESTATE OF LINDA JO CONRAD

No. 7122SC95

(Filed 23 June 1971)

1. **Insurance § 87— automobile insurance — driving without permission of insured — peremptory instruction**

Evidence warranted a peremptory instruction that the automobile insured by an automobile liability insurer was being driven without the actual permission of the insured at the time of the accident.

2. **Automobiles § 105— statutory presumption of agency — action between automobile insurers**

The statute relating to proof of agency in automobile accidents does not apply in an action brought by one insurer against another insurer for a declaratory judgment of their rights and obligations under their respective policies of insurance. G.S. 20-71.1(a).

3. **Rules of Civil Procedure § 50; Declaratory Judgment Act § 2— directed verdict**

A directed verdict may not be entered in a declaratory judgment action. G.S. 1A-1, Rule 50.

APPEAL by defendant Marie O. Conrad, Administratrix of the Estate of Linda Jo Conrad, from *McLean, Judge,* July 1970 Session of Superior Court of DAVIDSON County.

The Aetna Casualty and Surety Company (Aetna) brought this declaratory judgment action asking that judgment be entered adjudicating that its policy of insurance afforded no coverage and that it had no duty to defend Penny Kay Earnhardt Farabee in an action in which Marie O. Conrad, administratrix of the estate of Linda Jo Conrad (Linda), is plaintiff and Penny Kay Earnhardt Farabee (Penny) is defendant. Aetna alleged that on 19 December 1967 (the date on which the collision occurred from which the lawsuit resulted) it had issued to defendant Don M. Earnhardt, father of Penny, a family automobile liability policy, and that Penny was then 16 years of age and a member of his household. At that time, Lumbermen's Mutual Casualty Company (Lumbermen's) had in effect a liability insurance policy issued to defendant Estel Oren Doby, who was then the owner of a 1955 Ford. Defendant Geraldine Doby Byars Troutman was the daughter of Estel Oren Doby and had express permission to use the 1955 Ford and did use it regularly to go to and from her job at Central School in Davidson County. On 19 December 1967, Linda and Penny approached Geraldine Troutman on several occasions to obtain permission to use the 1955 Ford to go into Lexington from school. Permission was refused. They, nevertheless, took the car, and, while Penny was driving, the car left the highway and overturned and Linda was killed. The 1955 Ford was being operated without the knowledge or permission of the owner and Geraldine Troutman had no authority, express or implied, to permit anyone else to drive the car and did not give permission to Penny to drive the car. At the time of the accident, Penny was driving the car with the knowledge that she had no permission either from the owner or the person in possession, and she, therefore, could not qualify as a "person insured" under Aetna's policy.

The administratrix answered, demanding a jury trial, admitting the existence of the two insurance policies, that the car was owned by Doby and that Geraldine Troutman had express permission to use it, that Penny was driving the car, and that Linda was killed instantly. All other allegations were denied. For further defense, she alleged that Penny was driving the car with permission and both Aetna and Lumbermen's are obli-

gated to pay any judgment obtained by the administratrix against any of the defendants.

Penny and Don Earnhardt filed a joint answer admitting the existence of the policies, that Doby owned the car and Geraldine Troutman had permission to use it, that Penny was driving, and that Linda was killed. They specifically denied it was being driven without permission. By further answer they alleged that Penny and Linda were given specific permission to use the car and that at the time of the accident it was being used with the permission of both Doby and Geraldine Troutman.

Lumbermen's answered admitting the two policies, that Doby owned the Ford but that coverage for it was limited to the terms, provisions and conditions contained in the policy; that Geraldine Troutman had permission to use it; that Penny and Linda had no permission; that it was being operated by Penny without the knowledge of the owner or the person in possession; that Penny was operating the car with knowledge that she had no permission; that she had no reason to believe she had permission and, therefore, no liability coverage was afforded under either Aetna's policy or Lumbermen's policy. For a further defense, Lumbermen's alleged that the policy issued to Doby extended coverage to any person while using the insured automobile "provided the actual use of the automobile is by the named insured or such spouse or with the permission of either"; that no coverage is afforded unless the user of the car has permission of insured or the spouse of insured; that Penny did not have permission of Doby or any other person authorized to grant permission. Lumbermen's asked for a declaratory judgment adjudicating that its policy does not afford coverage to Penny and that it be adjudicated not to be obligated or liable with respect to the defense of Penny and the payment of any judgment which might be rendered against her arising out of the facts alleged in her complaint.

The Earnhardts replied to the further defense denying no permission and alleging further that Geraldine Troutman regularly used the Ford as a member of Doby's household, had control of it, expressly permitted Penny and Linda to use it on this occasion as she had on previous occasions, and that both Aetna and Lumbermen's are obligated to pay any judgment obtained against the Earnhardts or either of them, to the extent of their policy limits.

Upon trial, at the close of all the evidence, Lumbermen's moved for a directed verdict under Rule 50 on the ground that the evidence was insufficient to support an answer to the issue which would establish coverage under the liability insurance policy issued by it, the only issue relating to Lumbermen's being "Did the the defendant, Penny Kaye Earnhardt Farabee, operate the 1955 Ford automobile without the permission of Geraldine Troutman on December 19, 1967, as alleged in the complaint?" The court allowed the motion and defendant Conrad objected, excepted and assigns the allowance of the motion as error on appeal. Aetna's motion for directed verdict was denied.

Issues as to Aetna were submitted to the jury and answered against Aetna. The court entered judgment that Aetna be declared to be directed to furnish liability coverage to Penny under its liability policy issued to Don Earnhardt. Aetna moved for judgment notwithstanding the verdict and for a new trial, moved to amend the judgment granting directed verdict in favor of Lumbermen's to state specifically that it is without prejudice to Aetna and the other defendants to proceed against Lumbermen's on its policy of insurance, and filed a "request for and proposed findings of fact and conclusions of law" with respect to Lumbermen's motion for directed verdict. All of these appear in the record. All were denied by the court. Aetna did not except and does not appeal. Defendant administratrix of the estate of Linda Jo Conrad did appeal.

White, Crumpler and Pfefferkorn, by Joe P. McCollum, Jr., for defendant Marie O. Conrad, Administratrix of the Estate of Linda Jo Conrad, appellant.

Walser, Brinkley, Walser and McGirt, by Walter F. Brinkley, for defendant Lumbermen's Mutual Casualty Company, appellee.

MORRIS, Judge.

[1] Although the policies involved in this litigation were attached to the pleadings and introduced into evidence as exhibits, neither was sent up with the record nor does the record contain any stipulation giving a verbatim quote of the pertinent portions of either policy. Lumbermen's, in its further defense, alleges that its policy "included a provision enumerated as III(a)

which extended coverage to any person while using the insured automobile 'provided the actual use of the automobile is by the named insured or such spouse or with the permission of either.' " The Earnhardts admitted the policy included this phraseology but alleged the policy had other provisions. The issues submitted to the jury as to Aetna were: "Did the defendant Penny Kay Earnhardt Farabee operate the 1955 Ford automobile without the permission of Geraldine Troutman on Dec. 19, 1967, as alleged in the complaint?" and "If not, *(sic)* did the defendant Penny Kay Earnhardt Farabee operate the 1955 Ford autobile without reasonable ground to believe that she had the permission of Geraldine Troutman to so operate the Ford automobile as alleged in the complaint?" There appears to be no conflict as to the terms of the two policies: Lumbermen's required actual permission, and Aetna's required actual permission or reasonable grounds to believe that permission had been granted.

Aetna's evidence came from Geraldine Troutman, Mrs. Carlie Styers, and Cathy Bentley James.

Mrs. Troutman testified that she worked as a maid at the school attended by Penny and Linda; that she used her father's car to drive to and from her work; that she had, on one occasion, allowed Penny Earnhardt to use the car, but had been told she should not do so; that on 19 December 1967, these girls came to her several times requesting permission to use the car but on each occasion she refused and never did give either girl permission to use the car.

Mrs. Styers testified that she was Mrs. Troutman's supervisor; was with Mrs. Troutman all morning and heard the girls on several occasions ask Mrs. Troutman for permission to use the car. She further testified that each time they asked they were refused and that she heard Mrs. Troutman tell them that one reason was that her father might want the car.

Cathy James, a student at the school, testified that she talked to Penny and Linda in the school clinic. "They just told me they was going to leave school and asked me if I wanted to go along. They said how they were going. Said they was getting Mrs. Geraldine's car. Mrs. Troutman's car. The 1955 Ford. The girls went out and asked for permission to use the car. I did not learn whether they got permission there in the clinic. Linda

left for a while and came back to the clinic. Penny was there in the clinic when Linda came back. Linda said Mrs. Troutman told her she could not have the car. Penny told her to go back and ask again. Linda came back into the clinic. Penny was there. I was there. Linda said at the time she said they couldn't have the car. Still couldn't have the car. Penny said go back and ask again; she kept sending her out. The last time I saw them in the clinic—the last time Linda told Penny they didn't have permission to use the car, that's when they started to leave."

Estel Doby testified for Lumbermen's that he owned the car and had told his daughter on that day that if he needed it he would come and swap cars with her. On cross-examination, he testified that his daughter used the car with his permission; that she had no reason to let anybody have it; that he didn't know anybody had ever driven it; and that he had told her not to let anybody drive it.

Penny Earnhardt Farabee testified for defendants that she had driven the 1955 Ford on another occasion; that she hadn't asked to use it but "I knew it was all right to drive the automobile because she told Kathy it was"; that on this particular day, the day of the accident, when she went with Linda to ask Mrs. Troutman for the use of the car, "she said it was hard to start that morning and she was afraid if we took the car we might not get back; she didn't say yes; she didn't say no." She testified that she saw Linda talking with Mrs. Troutman later but did not know what they said because they were far up the hall; that a second time Linda went to ask her. Over objection by Lumbermen's and Aetna, Penny was allowed to testify that when Linda came back, Linda said "she said we could," that Joyce Keller was present at the time and the witness asked Linda " 'Are you sure?' and she said yes."

Judy Keller Hedrick testified over objection that Penny told her they had permission to use it and asked if she wanted to go along.

[2] Appellant assigns as error the court's allowing a directed verdict in favor of defendant Lumbermen's upon the grounds that the evidence was insufficient to take the question of Lumbermen's coverage of the automobile involved to the jury. Appellant contends that proof of ownership of the vehicle is also

prima facie proof of agency, under G.S. 20-71.1(a) which provides: *"In all actions to recover damages for injury to the person or to property or for the death of a person,* arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which said injury or cause of action arose." (Emphasis ours.) This action is not an action to recover damages for injury to the person or to the property or for the death of a person arising out of an accident or collision involving a motor vehicle. This is an action brought by an *insurer* against another *insurer* to have the Court declare the rights and obligations of the *insurers* under their policies of insurance. What we said in *Phillips v. Insurance Co.,* 4 N.C. App. 655, 167 S.E. 2d 542 (1969), is applicable here. This is not the type of case to which the statute was intended to apply.

[1, 3] The only evidence as to permission competent as to Lumbermen's was all to the effect that no permission was given. Whether incompetent evidence is to be considered on a motion for directed verdict is not presently before us. We have previously said that a motion for directed verdict under the new rules produces virtually the same effect and ordinarily will be treated the same as a motion for nonsuit under the old rules in determining whether the evidence should be submitted to the jury. *Pergerson v. Williams,* 9 N.C. App. 512, 176 S.E. 2d 885 (1970); *Sawyer v. Shackleford,* 8 N.C. App. 631, 175 S.E. 2d 305 (1970); *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365 (1970). It follows, we think, that those classes of cases not subject to nonsuit under the old rules would not be ordinarily subject to directed verdict under the new rules. A nonsuit was prohibited in caveat proceedings. *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544 (1939). The Supreme Court adopted the rule that a judgment of nonsuit may not be entered in a declaratory judgment action. *Hubbard v. Josey,* 267 N.C. 651, 148 S.E. 2d 638 (1966); *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654 (1964); *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749 (1953). See also *Chatfield v. Farm Bureau Mutual Automobile Ins. Co.,* 208 F. 2d 250 (C.A. 4th Cir.) (1953). Since the nonsuit and directed verdict are so analogous, we are of the opinion that directed verdict here was

not appropriate. Upon the evidence in this case, a peremptory instruction in favor of Lumbermen's would have been appropriate.

New trial.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ARTHUR LEE McDONALD

No. 7120SC307

(Filed 23 June 1971)

1. **Criminal Law § 161— record on appeal — requisite of exceptions**

The appellant is required to point out in his brief the numbered exception upon which he is relying and to indicate upon what page of the printed record the exception may be found. Court of Appeals Rule of Practice No. 28.

2. **Criminal Law § 166— appeal — abandonment of exceptions**

Exceptions for which no argument or authority is given are deemed abandoned. Rule of Practice No. 28.

3. **Criminal Law § 42— introduction of exhibits — defendant's right of examination**

Defendant's contention that the State introduced into evidence certain exhibits which he had not been permitted to examine prior to trial, *held* without merit. G.S. 15-155.4.

4. **Criminal Law § 66— identification of defendant — contention of illegality**

Contention that the victim's in-court identification of the defendant as the perpetrator of the crimes was tainted by illegal out-of-court procedures, including illegal photographic identification, *held* without merit.

APPEAL by defendant from *Braswell, Judge,* 15 October 1970 Session of Superior Court held in UNION County.

This is a criminal prosecution upon two bills of indictment charging the defendant with assaulting Laura Morgan and Jack Morgan with a deadly weapon with intent to kill inflicting serious injuries, in violation of G.S. 14-32(a).

The defendant, represented by privately employed counsel, pleaded not guilty to the bills of indictment.

The State offered evidence tending to establish the following facts: At approximately 7:00 p.m. on 25 June 1970, Miss Laura Morgan (74 years old) and her brother, Jack Morgan (76 years old), were assaulted by two black men. The assaults on this elderly couple apparently occurred during an attempted robbery at their isolated farm homeplace located in the northern part of Union County.

The Union County Sheriff's office was notified of the assaults within fifteen minutes thereafter at approximately 7:00 p.m. By 7:20 p.m., Deputy Sheriff Myers had arrived at the Morgan homeplace and was talking with Miss Morgan.

Miss Morgan gave a description of the assailants to the police authorities. She described one of the assailants generally as follows: He had a little streak of beard around his chin, he was black, his beard and hair were black and neither was artificial, he was about 5′ 7 or 8″ tall, and he wore a white shirt and dark pants at the time of the assaults.

Miss Morgan testified that she and her brother were assaulted with a lug wrench (tire tool) after having been tied up with adhesive tape. Her face and head were cut severely.

During the beatings, both Morgans resisted, and during the scuffle Jack Morgan pulled a .22 caliber pistol and shot one of his assailants. Blood was found inside the Morgan home and a trail of blood from the assailant was found leading from the inside of their home to the get-away automobile, a yellow Chevelle, parked in the driveway outside their home. Also, Jack Morgan shot at and hit the get-away car as it was leaving his home with a .410 gauge shotgun.

Following the assaults and the arrival of police, the injured Miss Morgan was taken to the Union County Memorial Hospital. Jack Morgan, also injured, stayed at home and was treated only by a nurse, though a physician saw him at the homeplace about ten days later. Miss Morgan's treating physician said he saw her at the hospital about 7:30 to 8:00 p.m. and she had then lost a great deal of blood, was weak, almost in shock.

The State also offered evidence tending to show that the defendant called an ambulance and the Mecklenburg County Police and reported that he had been kidnapped, robbed, and shot.

As a result of this report, the defendant was found near the yellow Chevelle somewhere in the vicinity of the Cabarrus County line. The defendant was hospitalized in Charlotte where he was questioned and photographed by the Mecklenburg County Police. He was also seen in the hospital by Union County Deputy Sheriff Myers.

The defendant offered evidence that on 25 June 1970, at about 3:45 p.m., he was driving his mother's yellow Chevelle along the Old Monroe Road when he stopped to pick up a black male hitchhiker. After continuing for a short distance, the hitchhiker drew a pistol on him and ordered him to pull off the road behind a pickup truck parked along the shoulder. Two men, one white and one black, got out of the pickup and came back to the defendant's automobile. After some discussion, the white man went back to the pickup and the black man got into the defendant's automobile on the driver's side. Both the pickup and the automobile then proceeded to The Hideaway Fish Camp where the defendant was robbed and locked in the trunk. The defendant estimated that the automobile was driven for 45 minutes, then stopped for approximately 10 or 15 minutes, and then driven again for 35 or 45 minutes. At this point defendant was taken out of the trunk and shot by one of the two black men who had been in the automobile. The defendant passed out, and after coming to he walked to a nearby house and had the police and an ambulance called. After relating this story to the police who came to the scene, he was taken to Charlotte Memorial Hospital.

Before State's witness, Miss Morgan, was permitted to identify the defendant as one of the assailants, the court held a *voir dire* as to the identification of the defendant by the witness. In the absence of the jury, Miss Morgan testified that late in the afternoon on the day she and her brother were assaulted, she first saw the defendant and another man at the front of her house near the steps when she returned from feeding her chickens. The defendant, Arthur Lee McDonald, was in her presence for approximately 15 minutes before he left in the yellow Chevelle automobile which Miss Morgan had observed parked in her driveway. The defendant asked Miss Morgan if she made sweaters, and tried on a sweater, size 38, which was too large for him. The defendant took off the sweater and threw it at Miss Morgan. He knocked her down and bound her hands and

feet. The witness testified that she wore glasses to read, sew, and drive an automobile, and when she first saw the defendant she was wearing her glasses which were knocked off when she was assaulted. Miss Morgan described the defendant in considerable detail. She had never seen the man before, and stated that she based her identification of him on his face as it appeared on the day of the assault.

The court on *voir dire* also heard the testimony of Officers Eugene C. Myers and H. C. Dutton, both with the Sheriff's Department of Union County.

At the conclusion of the *voir dire* hearing, and from the evidence produced at the hearing, the court made detailed findings of fact as to what the witness Laura Morgan observed at her home on the occasion she and her brother were assaulted. As to her opportunity and ability to see and observe the assailants, the court made thorough findings of fact as to what transpired immediately before, during, and after the alleged assaults, and what the investigating officers did both in Union and Mecklenburg Counties. The court made findings of fact as to all of the circumstances surrounding the defendant's arrest and hospitalization, and as to the taking of the defendant's photograph and the use thereof.

Based on the evidence and its findings of fact, the court made and entered in the record extensive conclusions which include the following:

> "The Court concludes that Miss Morgan has made photographic identification of this defendant and has made in-court identification of this defendant at the Preliminary Hearing and that nothing has happened or transpired so as to exclude her present in-court identification of the defendant as one of the perpetrators of the alleged assault.
>
> "The Court further concludes that there has been no misidentification by Miss Morgan of the defendant; that her identification comes from her own memory and was as retained in her own mind of the defendant; that there is nothing within the several photographs in evidence so as to impose upon her memory the image of the person depicted in the photograph rather than the person whom she actually saw and whom she alleged actually assaulted her on the occasion complained of; that there is nothing

about Miss Morgan's identification so as to reduce the same to untrustworthiness and also that the photographic identification procedure which was used in each incident was not so impermissively suggestive as to give rise to any likelihood or substantial likelihood of irrefutable misidentification, and the Court concludes, as a matter of law beyond a reasonable doubt, it is now proper for Miss Morgan to make identification of the defendant in the courtroom as the perpetrator of the alleged offenses.

* * *

" . . . the Court concludes, as a matter of law, that he was not unlawfully detained by any officer of Mecklenburg or Charlotte so far as the evidence before this court reflects and that there is nothing in this evidence to show in the slightest that any of the constitutional rights of this defendant were violated when photographs were taken of him at the Charlotte Hospital. . . . "

The jury found the defendant guilty of felonious assault with intent to kill upon Laura Morgan as charged in the bill of indictment, and guilty of misdemeanor assault with a deadly weapon upon Jack Morgan.

From a judgment of imprisonment of nine years for the assault upon Laura Morgan, and two years for the assault upon Jack Morgan, the sentences to run concurrently, the defendant appealed.

Attorney General Robert Morgan and Associate Attorney Walter E. Ricks III for the State.

Clark, Huffman & Griffin by Robert L. Huffman for defendant appellant.

HEDRICK, Judge.

Rule 28 of the Rules of Practice in this Court provides in pertinent part: "The brief of appellant . . . shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record. . . . "

[1] The rule simply requires that appellant, in his brief, point out the numbered exception upon which he is relying and indicate upon what page of the printed record the exception may

be found. In the instant case, the numbered exception relied on in the brief does not appear on the printed page of the record to which we are referred. When the printed record is as voluminous as in the instant case, 175 pages with 125 exceptions, it is most difficult for the Court to locate the specific exception upon which appellant relies if counsel has failed to comply with that portion of Rule 28 quoted above.

The defendant states his first question as follows:

"(1) Whether the police authorities failed to either produce the results of or make certain scientific tests and procedures analyzing physical facts, which if produced or made would and could have completely proven the guilt or innocence of defendant in these criminal actions and, therefore, are in violation of the due process requirements of the fourteenth amendment?"

[2] Defendant, in his brief, states that this argument covers exceptions 39-46, 55-60, 62-71, 88-93, 101-106, 115-117, and 120-125. After voyaging through the printed record we have discovered that 43 of these exceptions are not related to the question quoted above. These exceptions relate primarily to the admissibility of evidence, the denial of defendant's motions to strike certain testimony, the court's rulings on defendant's various motions for dismissal and mistrial, and the court's findings and conclusions with respect to the *voir dire* examination of Miss Morgan and other State's witnesses.

Since defendant has not stated any reason or argument nor cited any authority in support of these 43 exceptions, they are deemed abandoned by him. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[3] Exception 44 relates to the court's denial of the defendant's motion regarding the use at trial of certain exhibits. The record reveals that the court, upon motion of the defendant, ordered the State to deliver certain exhibits to the defendant's counsel for examination before trial, and the record further reveals compliance with this order by the State. Before any evidence was introduced at the trial, defendant moved that the State not be permitted to use any exhibits or evidence which defendant had requested, but had not had an opportunity to examine. Pursuant to G.S. 15-155.4, the solicitor in a criminal trial is obligated to furnish certain specifically identified exhibits

to the defendant to better enable him to prepare his defense. *State v. Macon,* 276 N.C. 466, 173 S.E. 2d 286 (1970). The record reveals that all the exhibits requested by the defendant and not made available for examination by him were either nonexistent, unavailable, or not offered in evidence at the trial. This exception is without merit.

Defendant contends by Exception No. 122 that the court committed prejudicial error by denying his motion for a mistrial "on the grounds that blood sample tests were apparently ordered and fingerprint tests were apparently ordered and these were never produced." This exception is without merit. There is no evidence in the record that any blood tests were ever made. There is evidence that the automobile driven by the defendant, and owned by his mother, was "dusted for fingerprints," but there is no evidence whatsoever as to whether any prints were found or lifted from the automobile.

[4] Next, the defendant contends, by numerous assignments of error, that the in-court identification of the defendant as the perpetrator of the crimes charged in the bills of indictment by the victim, Miss Morgan, was tainted by illegal out-of-court procedures by law enforcement officers, including illegal photographic identification procedures.

In *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970), Chief Justice Bobbitt stated the rule to be followed by the trial court with respect to the admissibility of an in-court identification:

> "[T]he court must determine upon the evidence *then* before it whether 'the photographic identification procedure' was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Simmons v. United States, supra.* Whatever the indicated prior determinations may be with reference to the out-of-court photographic identifications, the court must make an additional factual determination as to whether the State has established by clear and convincing proof that the in-court identifications were of independent origin and were untainted by the illegality, if any, underlying the photographic identifications."

In the instant case, the able trial judge followed precisely the procedure outlined by Chief Justice Bobbitt. The court held

a *voir dire* hearing and made detailed findings and conclusions that Miss Morgan's in-court identification of the defendant as one of the assailants was "one of her own recollection as an eyewitness and as one who personally experienced the event and that the same is not tainted by any unconstitutional or illegal procedure. . . . "

We have examined the entire record of the *voir dire* hearing and find and hold that the court's findings and conclusions are amply supported by the evidence. From a careful examination and review of each exception in the record, it is our opinion that the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

NORTH AMERICAN ACCEPTANCE CORPORATION
v. MATTIE P. SAMUELS

No. 7121DC377

(Filed 23 June 1971)

1. **Appeal and Error § 14— dismissal of appeal — notice of appeal**

Appeal from the entry of judgment should be dismissed when the notice of appeal was given more than ten days after the entry of judgment. G.S. 1-279; G.S. 1-280.

2. **Vendor and Purchaser § 11; Rules of Civil Procedure § 8— seller's action for possession of realty — sufficiency of claim for relief**

In a seller's action to recover possession of real property and back payments from a defaulting buyer, allegations of the complaint were sufficiently particular to give defendant notice of the transactions and occurrences intended to be proved and the type of relief demanded. G.S. 1A-1, Rule 8(a).

3. **Rules of Civil Procedure § 8— failure to answer pleadings — admission of allegations**

Allegations in a pleading to which a responsive pleading is required are deemed admitted when no responsive pleading is filed. G.S. 1A-1, Rule 8(d).

4. **Rules of Civil Procedure § 55— establishment of default**

Default was established where the defendant failed to answer seller's complaint demanding possession of real property and recovery of back payments for the property, and where the court thereafter entered default judgment. G.S. 1A-1, Rules 55(a) and 55(b)(2).

5. **Rules of Civil Procedure § 55— setting aside judgment by default — discretion of court**

The determination of whether an adequate basis exists for setting aside the entry of default and the judgment by default rests in the sound discretion of the trial judge.

6. **Rules of Civil Procedure § 55— motion to set aside default judgment — ignorance and indigency of movant**

A defendant's unverified motion to set aside a default judgment on the ground that she was uneducated, ignorant of the law, and living on welfare without funds to employ counsel, *held* insufficient, standing alone, to warrant the setting aside of the judgment on the grounds of mistake, inadvertence, surprise, excusable neglect, or meritorious defense.

APPEAL by defendant from *Billings, District Judge,* 14 January 1971 Session of District Court held in FORSYTH County.

In the verified complaint filed 14 October 1970, plaintiff alleges that it is a Georgia corporation; that the defendant is a resident of Forsyth County; that under date of 10 August 1968 plaintiff agreed to sell and defendant agreed to buy certain real property located in Forsyth County; that under the agreement, defendant is in possession of the property and is now indebted to plaintiff in the sum of $247.50; that plaintiff is entitled to and has demanded possession of the property but defendant refuses to pay the amount due and refuses to give up possession. In its prayer for relief, plaintiff asks, among other things:

"1. For a judgment against the defendant in the amount of TWO HUNDRED FORTY-SEVEN DOLLARS AND FIFTY CENTS ($247.50) plus interest from August 19, 1970.

2. For a judgment declaring the plaintiff entitled to immediate possession of the real property described herein.

3. For a Writ of Possession commanding the Sheriff to remove the defendant from the real property described herein."

Under date of 14 January 1971, the assistant clerk of superior court signed the following "Entry of Default":

"THAT WHEREAS it has been made to appear to the undersigned Clerk of the Superior Court of Forsyth County, upon affidavit or otherwise that the defendant has failed

to plead and that the defaulting party is neither an infant nor incompetent.

That the defendant is otherwise subject to default judgment as provided by the Rules of Civil Procedure.

Now, therefore, default is hereby entered against the defendant in this action as provided by Rule 55(a) of the Rules of Civil Procedure."

Under date of 14 January 1971, the district court judge signed the following "Entry of Default Judgment":

"It further appearing to the Court that a verified Complaint was filed and summons issued in this action on the 14th day of October, 1970, and said summons together with a copy of said Complaint was served on the defendant, Mattie P. Samuels, on the 15th day of October, 1970.

And it further appearing to the Court that affidavit was filed herein on December 31, 1970;

And it further appearing to the Court that no answer, motion to dismiss for failure to state a claim upon which relief can be granted, or pleadings has been filed by the defendant and no extension of time to file pleadings has been granted and that the time for pleading or otherwise defending has expired;

And it further appearing to the Court that the default of the said defendant having been duly entered according to Law; upon the request of said plaintiff, Judgment is hereby entered against said defendant in pursuance of the prayer of said verified complaint.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That a Writ of Possession be issued commanding the Sheriff of Forsyth County to remove the defendant from the premises described in the Complaint, to wit:

Being Lot 74, Section B, as shown on the Map entitled Bon Air Property made by J. E. Ellerbe, C.E., and recorded in the office of the Register of Deeds of Forsyth County, N.C., in plat book 3, Page 25.

and to put the plaintiff in possession of the above described land and premises."

Under date of 21 January 1971, Vernon Hart, as attorney for the defendant, filed an unverified motion asking that the court set aside the "default judgment" entered herein on 14 January 1971. In this motion it is asserted:

> "This motion is predicated on the premises that the defendant is an uneducated person ignorant of the law, was an indignet *(sic)* person living on welfare without funds to employ the assistance of legal counsel and was therefore totally unaware of the consequences of her failure to answer timely; that this unawareness constitutes mistake and inadvertance *(sic)* and therefore amounts to excusable neglect."

In this unverified motion the defendant's attorney makes many allegations with respect to why the "default judgment" should be set aside but does not ask that the "entry of default" be set aside under Rule 55(d).

The district court judge made the following order "(e)ntered January 28, 1971—signed February 1, 1971" relating to the defendant's motion:

> "THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the District Court Division of the General Court of Justice of Forsyth County, upon motion of the defendant to set aside the default judgment duly entered in this cause on Thursday, January 14, 1971; and
>
> The Court after reviewing the pleadings and after hearing argument of counsel for the plaintiff and the defendant finds that there is not excusable neglect on the part of the defendant and the Court further finds that the defendant has no meritorious defense.
>
> IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendant's motion to set aside the default judgment entered herein is denied and said judgment is no longer stayed and may be enforced as by law allowed."

After the entry of the above order denying the motion to set aside the judgment by default, the defendant filed a notice

of appeal to the Court of Appeals which was dated 29 January 1971 in the following words: "From the entry of judgment rendered herein by the Honorable Rhoda B. Billings, District Judge, on January 14, 1971, exceptions to the signing of said judgment to be hereafter assigned and further appeals the Courts denial of her motion to set the judgment aside." No service on the plaintiff of this notice is shown on the record.

Hollowell & Ragsdale, P.A., by William L. Ragsdale for plaintiff appellee.

Vernon Hart for defendant appellant.

MALLARD, Chief Judge.

Neither appellant nor appellee filed brief within the time prescribed by the rules. However, both have filed briefs and we therefore consider the case.

The parties stipulated that "for purposes of this record of appeal it shall not be necessary to set out the Summons." The certificate of service of the summons and complaint is not in the record. However, in the "Entry of Default Judgment" and in defendant's brief, it is asserted that the summons and complaint were served on the defendant on 15 October 1970. We assume, therefore, that the summons and complaint were lawfully served.

The defendant's only assignment of error is as follows:

"1. THE ENTRY OF JUDGMENT DATED JNAUARY *(sic)* 14, 1971 WHEREIN THE WRIT OF POSSESSION WAS ORDERED. (R p 4)

The Presiding Judge erred in signing said judgment in that:

a. The complaint alleges an agreement existed between Plaintiff/Appellee and Defendant/Appellant and yet said agreement was never filed with the Court and has never been made a part of the record nor has the Court made findings setting forth the contents of said agreement.

b. The complaint alleges that said agreement between the parties was one of vendor/vendee wherein Plaintiff/Appellee was selling real property to Defendant/Appellant.

c. The complaint prays for relief in the form of summary ejectment of the Defendant/Appellant from the real property allegedly being purchased by Defendant/Appellant from the Plaintiff/Appellee.

d. North Carolina General Statute 42-26 expressly provides that an action of summary ejectment only lies when the relationship of Landlord/Tenant exists between the parties. No finding has been recorded setting forth that such a relationship existed between Plaintiff/Appellee and Defendant/Appellant but to the contrary the record shows their relationship to be that of Vendor-Vendee.

e. The Court was without authority on the record to enter judgment for summary ejectment."

[1] The assignment of error does not mention the order dated 1 February 1971 denying the defendant's motion to set aside the default judgment. The notice of appeal was dated and filed 29 January 1971, more than ten days after the rendition of the judgment dated 14 January 1971, and no notice of appeal was served on the plaintiff. The appeal from the entry of the judgment dated 14 January 1971 should be dismissed because timely notice was not given nor properly served. See *Brady v. Town of Chapel Hill,* 277 N.C. 720, 178 S.E. 2d 446 (1971); G.S. §§ 1-279, 1-280.

[2] We hold that the allegations of the verified complaint were sufficiently particular as required by G.S. 1A-1, Rule 8(a) [see *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970)] to give the defendant notice of the transactions and occurrences intended to be proved and the type of relief demanded.

[3] Under G.S. 1A-1, Rule 8(d), allegations in pleadings are admitted when not denied in a responsive pleading if a responsive pleading is required. In this case a responsive pleading was required, and the defendant did not file an answer denying the allegations of the complaint. Therefore under the rule, the allegations were deemed admitted.

In 3 Barron & Holtzoff, Fed. Prac. & Proc. (Wright Ed.), § 1216, it is stated:

"* * * If the default is established, the defendant has no further standing to contest the merits of plaintiff's

right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery."

[4] Although possession of the described real property and a money judgment were demanded in the complaint, the judge, after the entry of default by the clerk under G.S. 1A-1, Rule 55(a), entered default judgment under G.S. 1A-1, Rule 55(b)(2) for the recovery of the possession of the real property but did not include therein a judgment for the recovery of a sum of money. The defendant, by failing to answer, admitted that plaintiff was entitled to the possession of the real property. G.S. 1A-1, Rule 8(d). The default was thus established.

In 3 Barron & Holtzoff, Fed. Prac. & Proc. (Wright Ed.), § 1217, the federal rule with respect to setting aside a default judgment is as follows:

> "A motion to set aside a default or a judgment by default is addressed to the discretion of the court, and an adequate basis for the motion must be shown. In exercising this discretion the court will be guided by the fact that default judgments are not favored in the law. Courts exist to do justice, and are properly reluctant to lend their processes to the enforcement of an unjust judgment. At the same time, the rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity. In balancing these policies the court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was a good reason for the default and that he has a meritorious defense to the action. However, the fact that defendant has a meritorious defense does not justify setting the judgment aside if no good excuse for the default is shown. The merits of the controversy will not be considered unless an adequate reason for the default is shown."

[5, 6] Under our Rules of Civil Procedure, the determination of whether an adequate basis exists for setting aside the entry of default and the judgment by default rests in the sound discretion of the trial judge. See *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). On the record before us the defendant did not offer any evidence showing a good reason for her

default upon which the judge could have set aside the entry of default. Neither was there an adequate basis shown for the judge to have set aside the judgment by default on the grounds of mistake, inadvertence, surprise, excusable neglect or meritorious defense. The unverified motion of the defendant may not be considered in this case as a showing of good cause or evidence of mistake, inadvertence, surprise, excusable neglect or a meritorious defense. The unverified motion did not prove the matters alleged therein and is not evidence thereof. We hold that the judge did not abuse her discretion in failing to set aside the entry of default or the judgment by default.

Under the facts in this case, it was proper for the clerk on 14 January 1971 to enter default under G.S. 1A-1, Rule 55(a), and for the judge to enter the default judgment under Rule 55(b) (2) on the same date.

The default judgment dated 14 January 1971 and the order denying defendant's motion to set aside the default judgment "(Entered January 28, 1971—signed February 1, 1971)" are affirmed.

Affirmed.

Judges PARKER and VAUGHN concur.

CHARLES E. CALLOWAY v. FORD MOTOR COMPANY AND MATTHEWS MOTORS, INC.

No. 7128SC171

(Filed 23 June 1971)

1. **Pleadings § 32— amendment of answer after time for filing answer expires**

The right to amend an answer after the time for filing answer has expired is addressed to the discretion of the court, and decision thereon is not subject to review except in case of manifest abuse.

2. **Courts § 9— appeal from one superior court judge to another**

No appeal lies from one superior court judge to another.

3. **Courts § 9; Pleadings § 32— discretionary denial of motion to amend— authority of another judge to allow amendment**

Where a superior court judge had, in his discretion, denied defendant's motion to amend its answer to plead the statute of limitations

after the time for filing answer had expired, another superior court judge could not thereafter allow the amendment.

Judge BROCK dissenting.

ON *certiorari* as a substitute for an appeal by defendant Matthews Motors, Inc. (Matthews), to review an order of *Ervin, Judge,* entered on 12 November 1970 in the Superior Court held in BUNCOMBE County.

This is a civil action instituted on 9 August 1968 to recover damages for personal injuries allegedly sustained by the plaintiff while operating an automobile manufactured by the defendant Ford Motor Company, and sold to the plaintiff's employer by the defendant Matthews.

On 8 November 1968, the defendant Matthews filed answer denying the material allegations of the complaint.

On 27 March 1970, the defendant Matthews moved to amend its answer by pleading the three-year statute of limitations in bar of the plaintiff's claim. Judge Hasty, on 4 May 1970, denied the motion to amend by an order which in pertinent part reads: "[T]he Court is of the opinion, in its discretion, that said Motion should be denied."

On 20 October 1970, Matthews again moved to amend its answer by pleading the statute of limitations in bar of plaintiff's claim, and by an order dated 12 November 1970, Judge Ervin denied the motion, stating in pertinent part: ". . . and it appearing to the Court that the Honorable Fred H. Hasty had by order dated May 4, 1970, denied an earlier motion of the defendant, Matthews Motors, Inc., to amend its answer to plead the three year statute of limitations in the exercise of his discretion; . . . that the undersigned is inclined to grant the motion of Matthews Motors, Inc. dated October 20, 1970, . . . but does not have the authority to exercise his discretion but must rule as a matter of law."

The defendant Matthews excepted to the order of Judge Ervin and gave notice of appeal to this Court.

No counsel for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Hyde by O. E. Starnes, Jr., for defendant appellant.

HEDRICK, Judge.

When this case was called for argument in this Court, the defendant Matthews moved that its appeal be treated as a petition for *certiorari* to review the order of Judge Ervin. The petition for *certiorari* as a substitute for an appeal is allowed.

The question presented is whether Judge Ervin on 12 November 1970 was precluded as a matter of law from allowing the motion of the defendant Matthews to amend its answer by pleading the statute of limitations. The answer lies in a consideration of Judge Hasty's denial of the same motion on 4 May 1970.

[1] The complaint in this action was filed on 9 August 1968. The first motion to amend was filed on 27 March 1970, well after the time for filing answer had expired. In *Blanton v. McLawhorn,* 6 N.C. App. 576, 170 S.E. 2d 559 (1969), Parker, Judge, quoting with approval from *Hardy v. Mayo,* 224 N.C. 558, 31 S.E. 2d 748 (1944), stated: "After the time for answering a petition or complaint has expired, the respondent or defendant may not as a matter of right, file an amended answer. The right to amend after the time for answering has expired, is addressed to the discretion of the court, and the decision thereon is not subject to review, except in case of manifest abuse." This is equally true of a motion to amend by pleading the statute of limitations when the time for answering has expired. *Smith v. Smith,* 123 N.C. 229, 31 S.E. 471 (1898); *Balk v. Harris,* 130 N.C. 381, 41 S.E. 940 (1902).

If the appellant felt that Judge Hasty's order denying its motion to amend was erroneous, then relief should have been sought through the appellate courts. *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82 (1961).

[2] The appellant excepted to Judge Hasty's order denying his motion to amend, but instead of seeking appellate review, he filed the same motion before Judge Ervin. It is a well settled principle of law that no appeal lies from one superior court judge to another. *In re Register,* 5 N.C. App. 29, 167 S.E. 2d 802 (1969); *Bank v. Hanner,* 268 N.C. 668, 151 S.E. 2d 579 (1966).

[3] Therefore, we hold that Judge Ervin was precluded as a matter of law from allowing appellant's motion to amend by

pleading the statute of limitations. The order of Judge Ervin is affirmed.

Affirmed.

Judge MORRIS concurs.

Judge BROCK dissents.

Judge BROCK dissenting.

The straight line approach of the majority opinion in this case brings forth principles of law with which I have no quarrel; however, there have been occurrences in this case which seem to me to create a situation which urgently demands relief. The Ford Motor Company filed its answer during the same month in 1968 in which Matthews Motors filed its answer. According to the record on appeal the matter was dormant until 27 March 1970 when Matthews Motors filed its motion for leave to amend its answer to allege the running of the statute of limitations. The motion of Matthews was denied by Judge Hasty on 4 May 1970 in the exercise of his discretion.

At this point the two defendants were on equal footing; neither of them had pleaded the running of the statute of limitations. However on 8 May 1970, the Ford Motor Company filed an amended answer alleging the running of the statute of limitations, the preamble to its amended answer reading as follows: "The defendant, Ford Motor Company, by leave of Court granted by the Honorable Fred H. Hasty, Judge holding the Courts of the 28th Judicial District, files its amended answer to the plaintiff's complaint as follows."

Thereafter on 14 May 1970 Matthews Motors filed an amended answer wherein it alleged the running of the statute of limitations. The preamble to the amended answer of Matthews Motors reads as follows: "The defendant, Matthews Motors, Inc., by leave of court granted by the Honorable Fred H. Hasty, Judge holding the Courts of the 28th Judicial District, files its amended answer to the plaintiff's complaint as follows."

On 20 May 1970 the plaintiff filed a motion to dismiss the amended answer of Matthews Motors upon the grounds that leave to amend had been denied by Judge Hasty. Judge Fate J.

Beal at the 22 June 1970 session allowed the motion to dismiss, and the portion of the amended answer of Matthews Motors which pleaded the statute of limitations was stricken.

On 5 November 1970 plaintiff filed a motion seeking to strike the amended answer of Ford Motor Company. This motion was heard by Judge Sam J. Ervin III on 5 November 1970 and was denied.

The situation at this point is that one co-defendant has been allowed to successfully amend its answer to plead the running of the statute of limitations and the other co-defendant has been denied a similar privilege. To add further impetus to my feeling that the circumstances urgently demand further consideration, the record on appeal discloses that on 5 November 1970 Judge Ervin granted summary judgment in favor of Ford Motor Company upon the grounds that the complaint affirmatively disclosed all facts necessary to establish the defendant Ford Motor Company's plea of the 3-year statute of limitations.

Defendant Matthews Motors, again filed a motion for leave to plead, as its co-defendant had been allowed to plead, the statute of limitations. On 12 November 1970, only seven days after granting summary judgment in favor of Ford Motor Company, Judge Ervin entered the order denying Matthews Motors' motion for leave to amend its answer to plead the statute of limitations. Judge Ervin's order states: ". . . that the undersigned is inclined to grant the motion of Matthews Motors, Inc. . . . so that said defendant can also allege the three year Statute of Limitations against plaintiff's claim, but does not have the authority to exercise his discretion but must rule as a matter of law." It is clear that Judge Ervin felt that the order entered by Judge Hasty and the order entered by Judge Beal were binding upon him as a matter of law.

However it seems to me that the circumstances had so changed since the entry of Judge Hasty's order and the entry of Judge Beal's order that Judge Ervin was authorized to act in his discretion to meet the exigencies of the case. "Interlocutory judgments or orders are under the control of the court and may be corrected or changed at any time before final judgment to meet the exigencies of the case." McIntosh, N. C. Practice 2d, § 1711. *Miller v. Justice,* 86 N.C. 26; *Maxwell v. Blair,* 95 N.C. 317.

Under the application of Matthews Motors, for the reason that its co-defendant had been permitted to plead the statute of limitations, it seems to me that Judge Ervin could modify the previous interlocutory orders and permit the amendment. This is particularly reasonable because it is clear that no rights of third parties would be prejudiced.

I would vote to reverse the order of Ervin, J. and allow Matthews Motors to amend its answer to allege the running of the statute of limitations. Whether it could succeed upon this plea is another matter.

STATE OF NORTH CAROLINA v. JOHN STERLING COPELAND

No. 7114SC336

(Filed 23 June 1971)

1. **Criminal Law § 105— motion for nonsuit — question presented**

Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense; if so, the motion is properly denied.

2. **Crime Against Nature § 1— elements of offense — proof of penetration**

The crime against nature, G.S. 14-177, is sexual intercourse contrary to the order of nature; proof of penetration of or by the sexual organ is essential to conviction.

3. **Crime Against Nature § 2— sufficiency of evidence for jury**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of crime against nature against an eleven-month-old male child.

4. **Crime Against Nature § 2— refusal to instruct on taking indecent liberties with children**

In a prosecution for a crime against nature, the trial court did not err in refusing to charge the jury that defendant could be convicted of the crime of taking indecent liberties with children in violation of G.S. 14-202.1, since a violation of G.S. 14-202.1 is not a lesser included offense of the crime against nature described in G.S. 14-177.

APPEAL by defendant from *Bickett, Judge,* 30 November 1970 Session of Superior Court held in DURHAM County.

State v. Copeland

Defendant was charged in an indictment with committing the crime against nature with a named male child, age 11 months. He pleaded not guilty. The jury found him guilty as charged. From judgment of imprisonment for not less than seven nor more than ten years, defendant appealed.

Attorney General Robert Morgan, by Assistant Attorney General I. Beverly Lake, Jr., and Staff Attorney Ronald M. Price for the State.

Standish S. Howe for defendant appellant.

PARKER, Judge.

Defendant assigns as error the denial of his motion for nonsuit made at the close of the evidence. After the record on appeal was docketed in this Court, the Attorney General moved on behalf of the State to dismiss the appeal for that the record failed to reflect all of the testimony given at the trial and the testimony was summarized rather than stated in narrative form as required by the Rules of this Court. By stipulation of the parties a copy of the court reporter's transcript of the testimony given at the trial was filed with this Court "as part of the record in the case."

The following is a summary of the facts disclosed by the testimony of the State's witnesses:

Defendant, an Army companion and friend of the child's father, had been staying as a guest in the home of the child's parents. On occasion he looked after the baby while the parents were away at work. On Wednesday afternoon, 23 September 1970, at about 4:45 p.m., the mother left home to go to work, leaving defendant and the eleven-month-old baby boy as the only occupants of the house. The child had a slight cold, but otherwise nothing was physically wrong with him. He was asleep in bed when the mother left. At about 5:30 or 6:00 p.m. the father came home, finding defendant and the baby and no one else in the house. The child was crying, and the father was unable to stop him. The father called the mother at work and told her to come home. When she arrived home about 8:00 p.m., she changed the baby's diaper and found fresh blood inside his diaper. There seemed to be a cut about an inch long going into his rectum, which was still bleeding. She took the baby to a doctor and on

his advice took the child to Duke Hospital. At about 12:30 a.m. on 24 September 1970 a doctor at the hospital examined the baby and found he was a healthy baby except for the area of his rectum and anus, where he had two anurectal fissures, one superficial with mucosa of the rectum, and the other deep and involving the muscles. These were tears which were lacerations, not cuts. The tears appeared to have been caused by a distention, an expansion of the anal canal. Something larger than the canal had gone through the opening. It looked like the opening had been forced open more than it could expand normally. It had ripped the rectum. There was a small amount of bleeding and stool in the area of the fissure. The doctor made tests for semen and found none. The baby remained in the hospital until the following Friday.

A detective with the Durham Police Department testified he talked with defendant on the night of 23 September 1970, and that after he gave the defendant the Miranda warnings the defendant told him that in order to stop the baby from crying he had inserted his two larger fingers into the baby's rectum, causing him to bleed. The detective also testified that defendant told him that he had masturbated and had wiped himself off on the baby's diaper, using the same diaper to wipe blood from the baby.

Defendant testified that on the morning of the day he had been left alone to look after the child, the child had been sick and irritable and the mother had given the baby medication which seemed to quiet him down; that in his opinion the child was suffering from pneumonia; that defendant had had to change the baby's diapers once and realized the baby had been scratched and was bleeding; that the baby had thrown or kicked his bottle out on the floor and when defendant bent down to pick the bottle up, he had a momentary blackout lasting approximately 10 or 15 seconds; that he suffered from occasional blackouts as a result of a head wound he had received in Vietnam; that after the blackout, he noticed the child was crying and that was when he noticed the blood; that he thought the child's tears or cuts were caused by an object in the crib, one of the toys; that he did not remember doing anything improper; that it was possible that when he changed the diapers his fingers could have caused some of the bleeding. Defendant denied he had told the police officers that he had stuck his fingers in the baby's rectum.

On cross-examination he admitted he told the officers that he had masturbated and testified he had told them so when the detective said the child had been sexually molested and the defendant had semen on his pants. He also admitted that the semen was clearly visible on his pants and that he had masturbated. He testified he did so while kneeling in the doorway and that at the time this occurred, the baby was lying on the floor approximately eight to ten feet away.

[1] On the foregoing evidence it is our opinion that the motion for nonsuit was properly denied. "Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777; *State v. Goins* and *State v. Martin,* 261 N.C. 707, 136 S.E. 2d 97. In making this determination, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it." *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

[2, 3] The crime against nature, G.S. 14-177, is sexual intercourse contrary to the order of nature. *State v. Harward,* 264 N.C. 746, 142 S.E. 2d 691. Proof of penetration of or by the sexual organ is essential to conviction. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396. There was in this case direct evidence from which the jury could find that the baby's rectum had been forced open and penetrated by some object larger than it could receive without injury and that this occurred while the baby and defendant were alone in the house together. Defendant admitted that shortly after this occurred there was semen clearly visible on his pants and that he had wiped himself off with the baby's diaper which he had also used to wipe blood from the baby. From this evidence it was a permissible inference for the jury to draw that it was the defendant's sexual organ which had penetrated the baby's rectum. In our opinion there was substantial evidence of all material elements of the offense with which defendant was charged and of the identity of the defendant as the perpetrator of that offense. This was all that is required to withstand the motion for nonsuit. *State v. Vestal, supra; State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

[4] Defendant's second contention is that the court erred in refusing to charge the jury that under this bill of indictment and the evidence in this case the defendant could be convicted of the crime of taking indecent liberties with children in violation of G.S. 14-202.1, which, for a first offense, is a misdemeanor. G.S. 14-177 condemns crimes against nature whether committed against adults or children. G.S. 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. G.S. 14-202.1 condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled and both declared to be operative without repugnance. *State v. Harward, supra; State v. Lance,* 244 N.C. 455, 94 S.E. 2d 335; *State v. Chance,* 3 N.C. App. 459, 165 S.E. 2d 31. Because the two offenses are separate and distinct and the constituent elements are not identical, it is our opinion that a violation of G.S. 14-202.1 is not a lesser included offense of the crime against nature described in G.S. 14-177. See: *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424. There was no error in the court's refusal to charge the jury in this case relative to the offense described in G.S. 14-202.1.

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. DUKE STAFFORD

No. 7118SC345

(Filed 23 June 1971)

1. **Criminal Law § 134— sentence to work on county properties**

Judgment sentencing defendant to imprisonment "in the custody of the Sheriff, Common jail of Guilford County, in any County Institution, under supervision of Board of County Commissioners" is not specific enough to sentence defendant under the authority of G.S. 148-32.

2. **Criminal Law § 138; Physicians, Surgeons and Allied Professions § 5.5— fine for practicing veterinary medicine without license**

Fine of "$500.00 to include the cost" for practicing veterinary medicine without a license is in excess of the maximum fine of $100 allowed by G.S. 90-187.

3. **Criminal Law § 142— continuation of suspended sentence — deficiency in judgment**

Judgment providing that defendant be "continued on suspended sentence for a period of one year" is deficient in failing to specify or refer to any conditions of suspension.

4. **Criminal Law § 143— revocation of suspended sentence — necessity for findings as to violation**

Judgment of the superior court affirming revocation of a suspended sentence by the district court must be vacated where the superior court judge failed to make any findings of fact as to what conditions of the suspended sentence defendant had violated.

APPEAL by defendant from *Long, Judge,* 8 January 1971 Session of Superior Court held in GUILFORD County.

Defendant was convicted in the Municipal-County Court for Greensboro and Guilford County on 20 September 1968 with the practice of veterinary medicine without a license in violation of G.S. 90-187. He was sentenced to a term of 30 days in the county jail which sentence was suspended, with the consent of defendant, for a period of two years upon conditions, including the condition he not engage in practice of veterinary medicine.

On 8 May 1969, after due notice to defendant, the District Court of Guilford County [The functions of the Municipal-County Court were taken over by the District Court on the first Monday in December 1968. G.S. 7A-131(2)] found that defendant wilfully violated the terms of his suspended sentence by practicing veterinary medicine in certain particulars on 11 November 1968, 16 November 1968, and 15 January 1969. The judgment of the District Court on 8 May 1969 was that prayer for judgment be continued from term to term, upon certain conditions, until the original two-year term of suspension expired. One of the conditions was that defendant not engage in the practice of veterinary medicine.

On 5 October 1970, after due notice to defendant the District Court of Guilford County found that defendant wilfully violated the terms of his suspended sentence in certain particulars on 15 November 1969. Upon this finding the District Court ordered the 30-day sentence, which had theretofore been suspended, invoked and commitment be issued. Defendant appealed to the Superior Court.

On 8 January 1971, after hearing evidence, the judge of Superior Court found that defendant violated the terms of his suspended sentence, and affirmed the judgment of the District Court. The judge of Superior Court thereupon undertook to order the 30-day sentence into effect, and undertook to add that in lieu of the active sentence defendant might pay a fine of $500.00 within a period of forty-eight (48) hours.

Defendant appealed to this Court.

Attorney General Morgan, by Staff Attorney Davis, for the State.

Shreve & Morton, by Clyde A. Shreve and J. Bruce Morton, for defendant.

BROCK, Judge.

It seems that the Courts of Guilford County have been uncommonly patient in their efforts to convince this defendant that he should not practice veterinary medicine without a license. It can be seen from the conviction of 20 September 1968, from the findings of the District Court on 8 May 1969, and the finding of the District Court on 5 October 1970, that the defendant violated G.S. 90-187 on five different occasions. Yet, he has only been charged with the one offense for which he stands convicted on 20 September 1968. A warrant could have been issued for each violation. " . . . [E]ach act of such unlawful practice shall constitute a distinct and separate offense." G.S. 90-187.

There is a strong inference from the evidence in the Superior Court that defendant was continually practicing veterinary medicine. An agent of the State Bureau of Investigation carried a dog to defendant's residence for treatment, and his description of defendant's basement during the examination and visit was, in part, as follows: " . . . And during this time I observed certain items in the basement. There were four animal cages downstairs in this basement area, and there was a metal table similar to the examining tables I have seen in veterinarian hospitals. And there was a refrigerator and one large table on the far wall behind this examining table that contained various bottles and boxes and items that I read on several of the boxes, mange treatment, flea and tick spray, pow-

ders. . . . There was an instrument cabinet to my left facing this table near the examining table. I could see different metal instruments inside of this cabinet that appeared to me to be types of instruments I have seen around hospitals. . . . On this examining table was a tray with liquid and string-like items. There was also some hypodermics lying there on this examining table and bottles with rubber tops on them and some other medicines or pills I was not able to identify. . . . " There was testimony of defendant's actual treatment and prescription of medication for the dog carried there by the SBI Agent.

Defendant does not contend that the evidence does not support a finding that he wilfully violated the terms of his suspended sentence. His only contention upon this appeal is that the judgment entered is erroneous and should be reversed.

The judgment entered in Superior Court reads as follows:

> "It is ADJUDGED that the defendant be imprisoned for the term of thirty (30) days *in the custody of the Sheriff, Common jail of Guilford County in any County Institution, under supervision of Board of County Commissioners.* In lieu of the active sentence defendant may pay a fine of *$500.00 to include the cost* within a period of forty-eight (48) hours *and continued on suspended sentence for a period of one year.*" (Italics ours)

G.S. 15-200.1 provides that on appeal to the Superior Court from the revocation of suspended sentence by a District Court, the Superior Court may modify or revoke the terms of a suspended sentence. In this case the Superior Court undertook to modify the 30-day sentence to provide for the payment of a fine as an alternative to going to jail.

Defendant argues that the requirement of the judgment that he pay the fine within 48 hours deprived him of the right to appeal from the imposition of the excessive fine, and therefore the judgment should be reversed. Defendant is not in position to complain that he was granted 48 hours rather than being immediately placed in custody. His appeal stayed the execution of the entire judgment and defendant has suffered no loss of rights.

[1] That portion of the judgment quoted above which is in italics and reads "in the custody of the Sheriff, Common jail of

Guilford County in any County Institution, under supervision of Board of County Commissioners" is not specific enough to accomplish anything. It may be that the trial judge intended to sentence defendant under authority of G.S. 148-32, but he failed to be specific enough to accomplish that purpose.

[2] That portion of the judgment quoted above which is in italics and reads "$500.00 to include the cost" is in excess of the maximum fine of $100.00 allowed by G.S. 90-187.

[3] That portion of the judgment quoted above which is in italics and reads "and continued on suspended sentence for a period of one year" fails to specify or refer to any conditions of suspension.

We note *ex mero motu* that the last paragraph of the judgment provides for commitment to the State Department of Correction. This seems contrary to the possible intent of the sentence imposed.

[4] We further note, *ex mero motu,* that the judge of Superior Court failed to make any findings of fact concerning a violation of the terms of the suspended sentence imposed 20 September 1968. It would appear at first glance that defendant had been tried in Superior Court upon a charge of practicing veterinary medicine without a license, instead of being charged with violation of terms of a suspended sentence. The first paragraph of the judgment reads as follows:

> "In open court, the defendant appeared for trial upon the charge or charges of AFFF Practicing being a Veterinarian without a license. The court finds as a fact that the defendant did violate terms of the suspended sentence and affirms the sentence of the District Court and which is a violation of and of the grade of misdemeanor."

It seems clear that there are times when one of the judgment forms cannot be used with accuracy. From the recitals in this judgment it cannot be determined with accuracy what terms of what suspended sentence the judge has found that defendant violated, or what sentence of what District Court the judge undertook to affirm. This judgment tells very little about the accusation against defendant or the resolution of the controversy.

Unfortunately Judge Long made no findings of fact and we, therefore, cannot remand for entry of a proper judgment; it is necessary that the case be remanded for a complete new hearing in the Superior Court.

The judgment of the Superior Court entered in this cause on 8 January 1971 is vacated, and this cause is remanded to the Superior Court of Guilford County for hearing upon defendant's appeal from judgment of the District Court entered on 5 October 1970.

Judgment vacated.

Cause remanded.

Judges MORRIS and HEDRICK concur.

FRANKLIN DELANO WIDENER v. JUDY FOX AND JERRY M. FOX

No. 7121SC390

(Filed 23 June 1971)

Automobiles § 83— injury to pedestrian — contributory negligence

Testimony by a 26-year-old plaintiff that he ran into the street at such a speed that he was unable to stop until reaching the middle, and that he saw defendant's approaching car but had time to take only two steps back before being struck, *held* to establish the plaintiff's own negligence as a matter of law.

APPEAL by plaintiff from *Armstrong, Judge,* 1 February 1971 Civil Session of Superior Court held in FORSYTH County.

Civil action to recover damages for personal injuries sustained when plaintiff, a 26-year-old pedestrian, was hit by an automobile operated by Judy Fox and owned by her husband, Jerry Fox. The pleadings raised issues of negligence and contributory negligence. Plaintiff appeals from a directed verdict in favor of the defendants.

The evidence shows the following: Plaintiff and Jerry Fox are cousins. About 10 o'clock p.m. on 19 October 1969 plaintiff and a friend arrived at the Fox home for a visit. The home was on the west side of the street and the front of the house was about fifty feet from the edge of the street. The front

yard was covered by a grass lawn and was slightly higher than the street. There was a cinder block retaining wall at the street edge of the front yard, the top of the wall being even with the surface of the yard. When plaintiff and his companion arrived at the Fox residence, they found Jerry Fox and other men present, but Mrs. Judy Fox was not at home at that time. A friendly poker game ensued. About two hours later Mrs. Judy Fox arrived home to find her husband, plaintiff, and two other men playing cards in the kitchen, another man sleeping in her bed, and still another sleeping on the couch. After speaking with her husband, Judy Fox decided to go to her mother's home to spend the night. Shortly after Judy Fox walked out, Jerry Fox jumped up from the table and ran out the door. At that time, about midnight, according to plaintiff:

> "Well, we were sitting there playing cards, and so, where it all took place is that Jerry jumped up from the table and, he then took off out the door, and I didn't know what was going on at the time, and so I thought that he may be in some kind of trouble; that there might be some boys coming over there trying to cause trouble, or something another, because, I mean he took off in such a quick way like that. And so I got up to go out to see if it was anything going on out there. And when I come out, when I seen a car and I seen him running down the street, I mean going towards that car, you know, and he was running, too, and so I took off running, also. And I run out and jumped off of this wall—it's about 2 foot high—I jumped off of the wall to the street. Well, the wall's off—it's right in front of Jerry Fox's house, in other words, where he was living, the wall is. His front yard was even with the top of that wall. And the wall was a retaining wall because the street was lower than his yard. And I jumped off of that, down into the area where the street was. It was a paved street. Well, I'd say that my feet first hit where the sidewalk would be, in other words, and then I was going at such a speed that I couldn't get stopped until I got about middleways of the street.
>
> "When I got middleways of the street, I saw the car coming up the street. That is not the same direction the car had been going in that I saw Jerry running after. The

car had gone down and turned around, in other words, as far as I know; I mean it must have. . . . "

* * * * *

" . . . Well, I seen the car coming, and so I was about middleways of the street there; and so I started to come back across this way of the street here, and—I started coming back to my side. Back toward the house. The same side I had come from. Well, I got probably two, three steps maybe, back towards that way. Then I got hit. I got hit by the automobile. I was maybe a foot or two, something like that, I'd say, back toward my side of the street, when I got hit."

Plaintiff testified he did not know before the car hit him that Judy Fox was the driver, that the car stopped about 25 feet from where he got hit, and that Judy Fox got out and came to him. He also testified that the lights on the car were burning and there was a street light about 25 or 30 feet away. On cross-examination he testified:

"When I came running out of this house, I jumped off this porch and jumped off at a full run—this wall. One foot did not land in the street and the other foot about on the dirt shoulder. One foot hit the dirt first, I know, because I didn't jump as far as into the street. One foot had to hit the dirt first, and then, I mean, the other foot went into the street then. I did not stumble. I did not stumble. Then I ran from that point right in the area of the middle of the street. And then I saw the car approaching.

"I would say I had time enough to move two steps, or about two steps, before I was struck, something like that. So far as the time that elapsed from my getting out into the street and realizing what was taking place and then attempting to get away and then the actual impact, all of that took place in a very short period of time. I would say within a few seconds to a minute, I would say, anyway, something like that. I am not sure. I mean probably around a minute, minute's time, or a minute, something like that. It was just enough time for me to get out there and take the two steps. Back, yes, sir.

"Well, after I seen I couldn't get out of the way, I mean, I tried to jump up on the hood, you know, but I

didn't make it, and the hood or the headlight or something caught this leg. When I say 'this leg', I mean the left leg."

On redirect examination plaintiff testified:

"When I first saw the car, I did not know the car was moving. I didn't pay no attention to it then. I mean I didn't notice whether it was in motion or not. I was more concerned with whether or not Jerry was in some kind of trouble, or something. I believe Mr. Fox was running down toward the car, or running somewhere about the car. He was over on that side of the street over there (indicating), I believe he was. Across the street from his house. I don't remember if he was in the street. I believe he was on the edge of the street. I'm not sure. When I turned around to go back, he was about as far as from here to that door over there (indicating), I'd say, something like that. I would say 30 to 40 feet. The car was near him at that time. It was close to him. I mean it was pretty—real close to him, I mean."

Mrs. Judy Fox testified that the street in front of her house came to a dead end a short distance south of her home; that when she left her house she got in her car, which was parked headed south, and drove south to the second driveway from her home, where she turned around; that as she was coming back up the street, "all of a sudden" her husband was in the road in front of her car; that she made a quick turn to get around her husband; that plaintiff's car was parked in front of her house, partly on the street and partly on the dirt; that she turned back, and "that's when he (the plaintiff) was hit"; that plaintiff was "just a little ways up from his car" and "a little more than a car length" from where she first saw her husband; that the first time she saw the plaintiff was just about the time she hit him; and that she couldn't have been going over 25 miles per hour. She also testified that other cars were parked in the immediate area along the sides and partly on the paved portion of the street.

At the close of all the evidence the court allowed defendant's motion for a directed verdict on the grounds that plaintiff's evidence failed to show actionable negligence and showed contributory negligence on the part of the plaintiff as a matter of law. From judgment dismissing the action, plaintiff appealed.

White, Crumpler & Pfefferkorn by James G. White and Michael J. Lewis for plaintiff appellant.

Allan R. Gitter and Eddie C. Mitchell for defendant appellees.

Womble, Carlyle, Sandridge & Rice of counsel for defendant appellees.

PARKER, Judge.

The evidence in this case, even when considered in the light most favorable to the plaintiff, was insufficient as a matter of law to justify a verdict for the plaintiff. The judgment directing verdict for defendants was therefore proper. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. Not only was there insufficient evidence from which the jury could legitimately find actionable negligence on the part of the defendant driver, but plaintiff's own evidence so clearly established his own negligence as a proximate cause of his injuries that no other reasonable inference can be drawn. In the middle of the night a 26-year-old man ran from a house a distance of some fifty feet toward the street, jumped down from a two-foot retaining wall while going at such speed that he was unable to stop until reaching the middle of the street, then saw the car approaching, and had time to take only two steps back before being struck. In our opinion it would be difficult to imagine a more clear-cut case of negligence on the part of a plaintiff. The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

BANK OF STATESVILLE, STATESVILLE, NORTH CAROLINA v. BLACK-WELDER FURNITURE COMPANY

No. 7122DC375

(Filed 23 June 1971)

1. **Bills and Notes § 10; Uniform Commercial Code § 27— holder in due course — burden of proof**

Purported holder in due course has the burden of proving, under both the Negotiable Instruments Law and the Uniform Commercial Code, that he is, in all respects, a holder in due course, which includes establishing the authority of a purported endorser to execute such endorsement. G.S. 25-3-307(3); G.S. 25-3-403(1).

2. **Bills and Notes § 10; Uniform Commercial Code §§ 27, 29— holder in due course — failure to show authority of agent to endorse note**

Plaintiff failed to show that it was a holder in due course of a promissory note endorsed by a purported agent of the corporate payee where it merely introduced the note but offered no evidence to prove the authority of the purported agent to endorse the note for the payee, the endorsement itself being insufficient to prove such authority.

APPEAL by defendant from *Cornelius, District Judge,* 1 March 1971 Session of IREDELL County, General Court of Justice, District Court Division.

Plaintiff instituted this action to recover on a promissory note executed by defendant. Plaintiff alleged that it was an innocent purchaser for value of the note executed by defendant in the amount of $576.00 dated 8 November 1968 (date shown on note was "11-4-1968") and payable to the order of Harper Industries, Inc., Louisville, Ky. (Industries). On the back of the note appeared "Harper Industries, Inc. Alfred Edwards Agent."

After purchasing the note, plaintiff gave notice to defendant, and defendant made five monthly payments to plaintiff. There was no allegation or proof that defendant in any way induced plaintiff to purchase the note or that Edwards had any authority to transfer the note to plaintiff.

Defendant had executed the note in payment for some advertising material which was to be sent to the defendant. The advertising material was never received by the defendant, and the defendant refused to pay any further on the note and asserted that it had a good defense to collection of the note by

Industries. Plaintiff claimed to be a holder in due course of a negotiable instrument and therefore any defenses which defendant had as against Industries were not valid against the plaintiff.

Both parties moved for summary judgment and attached affidavits in support of the motions. Plaintiff introduced in support of its motion the note, together with the writing on the back thereof but did not offer any evidence as to the authority of Edwards to sign on the back as agent for Industries. Defendant objected to the note as being insufficient by itself to prove the authority of Edwards.

The trial judge found:

> "There was no evidence tendered at the hearing on the motions for summary judgment to prove the endorsement on the back of the note or to prove the authority of the purported agent, Alfred Edwards, to endorse the note for Harper Industries, Inc."

The trial court further concluded as a matter of law:

> "The endorsement on the back of the note was competent to prove both the endorsement and the authority of Alfred Edwards, agent, to endorse the note for Harper Industries, Inc."

The trial judge then found that the plaintiff was a holder in due course and that the defendant's defense of failure of consideration is not available as against the plaintiff.

From the judgment granting plaintiff's motion for summary judgment, defendant appealed.

Sowers, Avery & Crosswhite by W. E. Crosswhite for plaintiff appellee.

Raymer, Lewis, Eisele by Douglas G. Eisele for defendant appellant.

CAMPBELL, Judge.

The question presented to this Court is whether the endorsement on the back of the note was sufficient to prove both the endorsement and the authority of Edwards to endorse the note for Industries.

The case of *Whitman v. York,* 192 N.C. 87, 133 S.E. 427 (1926) presents a factual situation quite similar to this case. In that case the plaintiff acquired negotiable notes in good faith and for value without notice of any infirmity in either note or of any defect in the title by which the Paul Rubber Company, Payee, held the said notes. On the back of each note there appeared the words, "The Paul Rubber Company, by W. M. McConnell, Pres." The plaintiff, as the owner and holder of the notes, presented no evidence tending to show by whom the words on the back of the note were written. The trial judge instructed the jury to find that the plaintiff was not a holder in due course. Connor, J., speaking for the court, stated:

> " . . . It is well settled by the decisions of this Court, as well as of other courts, and by approved text-writers, that words, written on the back of a negotiable instrument, purporting to be an indorsement by which the instrument was negotiated, do not prove themselves. The mere introduction of a note, payable to order, with words written on the back thereof, purporting to be an indorsement by the payee does not prove or tend to prove their genuineness. . . . "

Several authorities are cited in support of this statement including *Tyson v. Joyner,* 139 N.C. 69, 51 S.E. 803 (1905); *Mayers v. McRimmon,* 140 N.C. 640, 53 S.E. 447 (1906).

[1] Under the Law Merchant and the Negotiable Instruments Law, for a person to acquire the position of a holder in due course of a negotiable instrument so as to effectually cut off any defenses which the maker might have, he has the burden of establishing that he was, in all respects, a holder in due course. This included establishing the authority of a purported endorser to execute such endorsement. The old bank adage of "know your endorser" meant something. This was, as it should be, because the bank, as a purchaser of the instrument, was in the best position to inform itself as to the authority of the seller-endorser to make the transaction.

The Session Laws of 1965, which repealed the Negotiable Instruments Law and enacted in lieu thereof the Uniform Commercial Code, have not changed this requirement.

G.S. 25-3-307(3) provides:

"After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course."

[2] Here, defendant has established, by admissions and affidavits, that it has a defense of failure of consideration insofar as Industries is concerned. The plaintiff seeks to cut off this defense by being a holder in due course. The burden thereupon fell to the plaintiff to show that it was "in all respects a holder in due course." By presenting nothing more than the note itself to prove the authority of Edwards to endorse for Industries, plaintiff failed to carry its burden. G.S. 25-3-403(1) provides that:

"A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. . . . "

The case of *Smathers v. Hotel Co.*, 168 N.C. 69, 84 S.E. 47 (1915) relied upon by the plaintiff is not contrary to the facts herein expressed. In that case, the burden of proof was placed upon the party claiming to be a holder in due course to establish that fact. That case points out that where an infirmity in the note has been established so as to create a valid defense by the maker and this defense is sought to be avoided by the establishment of a holder in due course, then the person claiming to be the holder in due course has the burden of proving it. In that case, the claimant introduced evidence to prove it. The question as to the authority of the endorser of the note to endorse it to the claimant was not controverted, and thus that case is not pertinent to the particular facts in this case.

Plaintiff having failed to carry its burden of proof to show that it was in all respects a holder in due course, defendant was entitled to summary judgment; and it was error for the trial court to deny the defendant's motion for summary judgment. Therefore, we remand the case to the District Court for entry of the appropriate judgment.

Reversed and remanded.

Judges BRITT and GRAHAM concur.

HERMAN J. WHITE AND WIFE, ETHEL L. WHITE v. GLENN W. MOORE AND WIFE, JANE MOORE; J. N. DIMLING AND WIFE, LILLIAN H. DIMLING AND JOE H. LEONARD, TRUSTEE

No. 7122SC273

(Filed 23 June 1971)

1. **Judicial Sales § 1— power of commissioner — deed of sale — restriction against house trailers**

Where the commissioner appointed by the court to conduct a judicial sale had no authority to insert a restriction against house trailers in the deed of sale, the commissioner's insertion of such restriction in the deed was null and void, and the purchaser at the judicial sale could transfer title free of the restriction.

2. **Estoppel § 4— equitable estoppel**

Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change his position to his disadvantage.

APPEAL by plaintiffs from *Exum, Judge,* at the December 1970 Civil Session of DAVIDSON Superior Court.

This is an action seeking (1) to enjoin defendants from using certain lands as a house trailer park or as property on which house trailers can be located, (2) the removal of house trailers from the property, and (3), in the alternative, recovery of $15,000 damages. Jury trial was waived and the action was heard on stipulations and oral testimony.

Pertinent facts are summarized as follows:

Pursuant to a special proceeding to sell for partition 48.64 acres of land in rural Davidson County, a commissioner appointed by the court exposed the lands, divided into several parcels, to public sale. Although the order appointing the commissioner and providing for a sale of the property did not authorize him to do so, the commissioner announced at the sale that the lands were being sold with the understanding that no house trailers and no automobile junk yards would be located on the property. Plaintiffs purchased a 14.39 acre parcel at the sale and on 15 November 1967 the commissioner made them a deed for their land; the deed was filed for registration on 17 November 1967. Following the description of the land, the deed contains this clause: "It is understood by the parties of the second part that

no house trailers and no automobile junk yards shall be located on this property."

At the commissioner's sale, one B. B. Kinlaw (Kinlaw) purchased a 10.13 acre parcel adjoining the tract purchased by plaintiffs; Kinlaw and wife were given a commissioner's deed on 22 November 1967 which they filed for registration on 28 November 1967. The granting clause and the habendum in the Kinlaw deed, as was true in plaintiffs' deed, indicated a fee simple conveyance, and the Kinlaw deed, following the description of the land, contains a clause as follows: "It is understood that no house trailer parks and no automobile junk yards shall be located on this property." The trial judge found as a fact that Kinlaw was present at the public sale and purchased his parcel after the commissioner publicly announced that no house trailer parks and no automobile junk yards could be located on the property being sold.

On 9 May 1969, Kinlaw and wife conveyed their 10.13 acre tract to the male defendants Moore and Dimling. The conveyance was by warranty deed and following the description of the land the deed contains this proviso: "This conveyance is made subject to whatever restrictions, if any, in deed recorded in Deed Book 449, page 388, in the office of the Register of Deeds for Davidson County, North Carolina." The deed from the commissioner to Kinlaw and wife is recorded in said book 449 at page 388. On 9 May 1969, male defendants Moore and Dimling executed a deed of trust on the 10.13 acre tract to defendant Leonard, trustee, to secure the balance of the purchase price and the deed of trust contains a proviso, following the description, identical to the proviso quoted in deed from Kinlaw.

After receiving their deed, the male defendants laid out an area on the land in question, installed septic tanks and concrete patios, and allowed some three or four mobile homes to be parked on the property. Defendants' land adjoins plaintiffs' land on one side; other lands adjoining plaintiffs have no restrictions against use for house trailers or automobile junk yards.

The trial judge concluded that the purported restrictions in the deed from the commissioner to Kinlaw and wife are void for that the commissioner did not have authority from the court to impose the restrictions; and that defendants were not estopped from using their property as a house trailer park. From judgment denying plaintiffs any recovery, they appealed.

DeLapp, Ward & Hedrick by Sim A. DeLapp for plaintiff appellants.

Robert L. Grubb for defendant appellees.

BRITT, Judge.

The questions raised by this appeal are: (1) Is the proviso prohibiting a trailer park and automobile junk yard inserted in the commissioner's deed to Kinlaw valid? (2) Are defendants estopped to deny the validity of the proviso? We answer both questions in the negative.

[1] (1) In *Peal v. Martin,* 207 N.C. 106, 176 S.E. 282 (1934), the court said: "A commissioner appointed by a court of equity to sell lands is empowered to do one specific act, viz., to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court."

In *Trust Company v. Refining Company,* 208 N.C. 501, 181 S.E. 633 (1935), a commissioner was authorized by the court to sell part of the lands of an estate for reinvestment. There were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase, no authority to restrict the use of the property was asked, and none granted in the order of the court. The commissioner executed deed to the purchaser upon order of the court, but inserted restrictions in the deed limiting the use of the property to white people and residence purposes. The Supreme Court held: the commissioner was without authority to insert the restrictions in the deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the disposition of the proceeds of sale; the restrictions were null and void and the purchaser at the sale could transfer title free of the restrictions.

See also *Craven County v. Trust Company,* 237 N.C. 502, 75 S.E. 2d 620 (1953). We hold that the restrictive proviso in Kinlaw's deed was void.

[2] (2) Although the doctrine of equitable estoppel is recognized in this jurisdiction, 3 Strong, N. C. Index 2d, Estoppel, § 4, page 582 et seq, we hold that the doctrine does not apply in this case. In *Finance Corp. v. Shivar,* 8 N.C. App. 489, 174

S.E. 2d 876 (1970), this court said: "Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change his position to his disadvantage. *Smith v. Smith,* 265 N.C. 18, 143 S.E. 2d 300." Conceding, *arguendo,* that Kinlaw's conduct was imputed to defendants, we do not think that Kinlaw was estopped. Plaintiffs received and filed for registration their deed at least five days before Kinlaw received his deed. How can it then be said that plaintiffs relied upon Kinlaw's conduct and were thereby led to change their position to their disadvantage?

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CAMPBELL and GRAHAM concur.

JAMES J. GRANT, ADMINISTRATOR OF THE ESTATE OF WARREN JEWEL GRANT v. ERNEST MARVIN GREENE

No. 7118SC25

(Filed 23 June 1971)

1. **Rules of Civil Procedure § 50— motion for directed verdict — specificity of grounds**

A motion for directed verdict which was based on "the case of Blake v. Mallard, decided by Justice Sharp in 1964" does not comply with the statutory requirement that the motion shall state the specific grounds therefor. G.S. 1A-1, Rule 50(a).

2. **Negligence § 12— last clear chance**

The doctrine of last clear chance contemplates that if liability is to be imposed the defendant must have a last "clear" chance, not a last "possible" chance to avoid injury.

3. **Automobiles § 89— striking a pedestrian — last clear chance — sufficiency of evidence**

Evidence in an accident case failed to show that the defendant motorist, who was traveling at a lawful rate of speed, had the last clear chance to avoid striking a legally blind pedestrian who had suddenly begun running across the highway.

ON *certiorari* to review judgment of *Collier, Judge,* entered 22 June 1970 Civil Session, Superior Court of GUILFORD County.

Plaintiff seeks to recover damages for the alleged wrongful death of his intestate resulting from defendant's having struck plaintiff's intestate, a pedestrian, while defendant was driving his automobile on U. S. Highway 29 in Guilford County.

Defendant by answer denied any negligence on his part and, as a further defense, interposed plaintiff's intestate's contributory negligence as a bar to recovery. Plaintiff replied, denying contributory negligence and, as a further defense to defendant's further answer and defense, set up the plea of defendant's last clear chance to avoid striking plaintiff's intestate.

At the close of plaintiff's evidence, defendant's motion for directed verdict was granted, and plaintiff appealed.

Stephen E. Lawing for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by David M. Moore II, for defendant appellee.

MORRIS, Judge.

The evidence, taken in the light most favorable to plaintiff, tends to show: At the scene of the accident, the highway was a four-lane smooth surface asphalt highway with two lanes northbound 23 feet and 9 inches wide and two lanes southbound 23 feet and 9 inches wide, divided by a 30-foot median, with an 8-foot paved shoulder for both lanes. The accident occurred at about 9:55 p.m. The night was clear and dark, the road was dry, and the street was not lighted.

Defendant had five passengers in his car, all members of his family. They had followed an ambulance transporting defendant's brother from Spartanburg, S. C., to Durham for admission to the Veterans' Hospital. They had had the brother admitted and were returning to their homes in South Carolina. Defendant was rounding a slight curve in the highway. A car had just passed him traveling in the same direction. Defendant had been traveling at about 55 to 60 miles per hour, not in excess of 60 miles per hour. Defendant noticed plaintiff's intestate and a woman he later understood was plaintiff's intestate's wife standing off the west side of the highway. They appeared to be scuffling. Someone in the car advised defendant to watch those people. When defendant saw plaintiff's intestate entering the

highway, he switched his lights from low to bright. He immediately took his foot off the accelerator and applied brakes. Plaintiff's intestate started running toward the inside southbound lane. Defendant immediately turned over onto the left-hand side. Plaintiff's intestate was struck by defendant's right front fender. Defendant's car was still in motion when it struck plaintiff's intestate. Plaintiff's intestate's body crossed the hood, the windshield, and the top of defendant's car and came off the left-hand side. Plaintiff's intestate was attempting to cross the highway in a diagonal direction. The debris—headlight glass, etc.,—from defendant's car was located approximately 32 feet from where plaintiff's intestate was standing. His body was found in the median area a distance of 31 feet from the location of the debris.

Officer L. R. Wood of the North Carolina Highway Patrol had been following behind defendant's vehicle for a short distance, less than a mile. The posted speed limit was 60 miles per hour. Officer Wood was approximately 300 yards behind the defendant and speeded up when he saw defendant swerve. Officer Wood observed the woman standing on the right shoulder a couple of feet from the edge of the road when he began approaching the location but did not see plaintiff's intestate at any time prior to the collision. He did not hear a horn blow. When he arrived at the location where the woman was standing he pulled his car onto the shoulder and stopped. The woman was hysterical and said her husband had been struck by a car. Officer Wood crossed the road into the median and found the plaintiff's intestate's body. Defendant stopped and then pulled down the highway onto the right side and parked. The occupants returned to the scene and defendant stated he felt he was in the grass median. No evidence was found indicating he was in the median at any time. There were no skid marks or tire impressions at any point on the road. Officer Wood testified that trees all along the area would obstruct vision to the right but would not obstruct vision of the road. In daylight there is approximately 1/10 of a mile good and clear visibility and approximately 200 feet at night, the difference in visibility being explained by the fact that while in the curve to the right the headlights shine straight ahead and it would be approximately 200 feet to where headlights would light up something on the side of the road where plaintiff's intestate was standing,

but the actual unobstructed vision is at least 1/10 of a mile at all times.

Plaintiff's intestate was completely blind in his left eye and vision in the right eye was 21/100 with corrective glasses. In all 50 states, 21/100 is considered legal blindness, industrial blindness.

[1] According to the record, defendant moved for a directed verdict "citing the case of *Blake v. Mallard,* decided by Justice Sharp in 1964." This is certainly not an approved method of complying with the requirement that "A motion for a directed verdict shall state the specific grounds therefor." G.S. § 1A-1, Rule 50(a). A reading of *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214 (1964), leads us to the obvious conclusion that defendant's motion was based on the contributory negligence of plaintiff's intestate. Since in our opinion the contributory negligence of plaintiff's intestate is patent, a ruling favorable to defendant on the motion thus grounded would not be error. The court allowed the motion on the grounds that there was no negligence on the part of defendant and even if there were negligence on the part of defendant, plaintiff's intestate was contributorily negligent as a matter of law. Plaintiff, both by oral argument and by brief, concedes negligence on the part of plaintiff's intestate but earnestly contends that defendant had the last clear chance to avoid injury to plaintiff's intestate.

[2, 3] Plaintiff relies on *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845 (1968). The case *sub judice* is factually distinguishable. There the facts tended to show plaintiff's intestate, wearing a white shirt, was squatting beside the rear wheel of his disabled station wagon changing a tire. His body projected over the edge of the pavement. The headlights, taillights, and interior dome lights were burning. Defendant, approaching, saw the station wagon 200 yards before he reached it but did not see plaintiff's intestate until virtually the moment of impact. We agree these facts, if true, were sufficient to bring the doctrine of last clear chance into operation, it being a question for the jury whether these were or were not the facts of the case. Under the principles relating to the application of the doctrine of last clear chance so clearly set out in *Exum,* defendant's duty to act arose only after he knew, or in the exercise of due care should have known that the plaintiff's intestate was insensitive to danger. *Wise v. Tarte,* 263 N.C. 237, 139 S.E. 2d 195 (1964).

The doctrine contemplates that if liability is to be imposed the defendant must have a last "clear" chance, not a last "possible" chance to avoid injury. *Battle v. Chavis,* 266 N.C. 778, 147 S.E. 2d 387 (1966). We are of the opinion that the evidence in this case fails to show such an opportunity.

The judgment is

Affirmed.

Judges BROCK and HEDRICK concur.

IN THE MATTER OF JAMES RAY LEWIS, AND WIFE ELIZABETH LEWIS, PETITIONERS

No. 7121DC309

(Filed 23 June 1971)

Rules of Civil Procedure § 27— information to file complaint — petition to examine respondent

Petition under G.S. 1A-1, Rule 27(b), for an order to examine respondent to obtain information to prepare a complaint should have been denied where it failed to describe the nature of any action the petitioners expect to commence and to state against whom they expect to bring such action.

APPEAL by respondent from *Billings, District Judge,* 17 December 1970 Session of District Court held in FORSYTH County.

This is a proceeding heard on a petition filed by James Ray Lewis and wife, Elizabeth Lewis, pursuant to G.S. 1A-1, Rule 27(b), seeking to obtain an order to take the deposition of John McDowell, Director of the Forsyth County Department of Social Services, respondent, to obtain information to enable the petitioners to prepare a complaint.

The petition is as follows:

"(1) That petitioners are citizens and residents of Forsyth County, North Carolina.

(2) That during June and July, Mr. John McDowell, the Director of Forsyth County Department of Social Services

caused an investigation to be made into alleged mistreatment and/or neglect of one of the petitioners' two children through one or more of his agents or representatives; that the said McDowell thereafter represented to petitioners that such investigation was caused by a complaint being received in May, 1970 from some third party unknown to petitioners; that the said McDowell thereafter informed petitioners that the alleged complaint was found to be untrue by his office and that petitioners were not guilty of mistreatment or neglect of their children as alleged; that your petitioners know any such alleged complaint was unfounded and untrue, and have repeatedly requested that McDowell disclose to them the exact nature of the alleged complaint and the name and address of the alleged complainant but the said McDowell has steadfastly refused and is continuing to refuse to divulge to petitioners any of the requested information, and that petitioners, except for McDowell's assertions, are unable to determine if such a complaint was made as alleged or whether McDowell acted arbitrarily and without cause in making said investigation on his own volition.

(3) That petitioners have been wronged, damaged and embarrassed by such investigation and/or complaints leading to the investigation and believe they are entitled to recovery of damages therefor; that petitioners need further information from McDowell before a formal complaint against him and/or any complainant can be filed, and that if any complaint was reported to McDowell as alleged, petitioners are informed and believe that such complaint was without basis in fact and was made purely and simply for the frivolous and malicious purpose of embarrassing petitioners in the community.

EXCEPTION #3

EXCEPTION #5

(4) That the said John McDowell has no legally justifiable reason for refusing to disclose such information to petitioners; that such refusal is frustrating petitioners' right of recovery and without such information petitioners are unable to determine against whom their action should be brought.

(5) That this petition is filed with the utmost good faith on the part of petitioners, and is the only method available for petitioners to discover the person or persons responsible for wrongs committed against them.

WHEREFORE, petitioners pray that this Court issue an Order finding the facts as alleged herein and directing Mr. John McDowell, Director, Forsyth County Department of Social Services, Winston-Salem, North Carolina, to answer by deposition or interrogatory, the following questions:

(a) Did you receive a complaint regarding the child or children of petitioners?

(b) What was the substance of said complaint?

(c) How and when did you receive this complaint?

(d) What is the name and address of the person or persons who made such complaint?

(e) Did you find the content of the complaint to be true or untrue?"

The respondent filed answer, and on 14 December 1970 the court heard evidence offered by petitioners and respondent. On 18 December 1970, the court found the facts to be as alleged in the petition and ordered the respondent to deliver to petitioners within ten (10) days written answers to the specific interrogatories.

The respondent excepted to the order dated 18 December 1970 and appealed to this Court.

Larry L. Eubanks for petitioner appellees.

P. Eugene Price, Jr., for respondent appellant.

HEDRICK, Judge.

G.S. 1A-1, Rule 27(b), in pertinent part, provides:

"(b) Depositions before action for obtaining information to prepare a complaint.—

(1) Petition.—A person who expects to commence an action but who desires to obtain information from an expected adverse party or from any person for whose

> immediate benefit the expected action will be defended for the purpose of preparing a complaint may file a verified petition in the county where any expected adverse party resides or in the county where resides any person for whose immediate benefit the expected action will be defended. . . .
>
> The petition shall be entitled in the name of the petitioner and shall show (i) that the petitioner expects to commence an action cognizable in a court of this State, (ii) the names and addresses of the expected adverse parties, (iii) the nature and purpose of the expected action, (iv) the subject matter of the expected action and the petitioner's interest therein, (v) why the petitioner is unable to prepare a complaint with the information presently available, and (vi) that the petition is filed in good faith. The petition shall also designate with reasonable particularity the matters as to which information will be sought."

Rule 27(b) replaces the former statutes providing the procedure for obtaining an order to take the deposition of an adverse party to obtain information to prepare a complaint or other pleading.

The former procedure, G.S. 1-568.4, as well as Rule 27(b), provides that only adverse parties or expected adverse parties may be examined. Prior to the effective date of Rule 27(b), a party could not examine an adverse party for the purpose of obtaining information to prepare a complaint or other pleading until the action had been commenced by the issuance and service of summons. Under Rule 27(b), the petitioner is required to allege that the person to be examined is an "expected adverse party."

Since Rule 27(b) provides that a petition may be filed before an action is commenced by the issuance and service of summons, it seems essential that the verified petition contain an unequivocal allegation that the petitioners expect to commence an action cognizable in the courts of this State, along with the names and addresses of the expected adverse parties, and that the party to be examined is an expected adverse party. No such allegation appears in the petition in the instant case. The petition shows on its face that the petitioners are not seeking

information to enable them to prepare a complaint, but that they are seeking information for the purpose of determining whether they have a valid claim which they may or may not commence.

The petitioners allege: "[T]hat petitioners need further information from McDowell before a formal complaint against him and/or any complainant can be *filed,* * * * and without such information petitioners are unable to determine against whom their action should be brought." (Emphasis ours)

In this regard, the North Carolina Supreme Court, in *Washington v. Bus, Inc.,* 219 N.C. 856, p. 858, 15 S.E. 2d 372 (1941), said: "But the court will not permit a party to spread a dragnet for an adversary to gain facts upon which to sue him, or to harass him under the guise of a fair examination."

The petitioners allege generally that they have been wronged, embarrassed and damaged by an investigation conducted by the Forsyth County Department of Social Services, but they have not described the nature of any action they expect to commence, nor, as was said earlier, against whom they expect to bring any such action. It is essential under Rule 27(b) that the nature and purpose of any expected action be described in the petition in such detail as will enable the court to determine whether the information sought to be obtained from an expected adverse party is material and necessary to enable the petitioners to prepare their complaint. *Bailey v. Matthews,* 156 N.C. 78, 72 S.E. 92 (1911); *Jones v. Guano Co.,* 180 N.C. 319, 104 S.E. 653 (1920).

A petition which shows on its face that the information sought is not necessary to enable petitioner to prepare a complaint will not support an order for such examination. *Chesson v. Bank,* 190 N.C. 187, 129 S.E. 403 (1925); *Knight v. Little,* 217 N.C. 681, 9 S.E. 2d 377 (1940).

It is our opinion that the petition in the instant case, when considered in the light of the requirements of Rule 27(b), is insufficient to support an order to examine the respondent to obtain information to enable the petitioners to prepare a complaint.

The order appealed from is

Reversed and the petition is dismissed.

Judges BROCK and MORRIS concur.

JESSE LEE CALLICUTT v. EDWARD ANDY HAWKINS AND ROY BASIL CRANFORD

No. 7119SC328

(Filed 23 June 1971)

1. **Damages § 3— personal injury — permanent damages — sufficiency of evidence**

Plaintiff's testimony that, since the automobile collision complained of, his back "hurts a little bit all the time, every day" and "it is paining me right now," together with his testimony that he had seen doctors only on two occasions since the collision, *held* insufficient to warrant an instruction on permanent injuries or on future pain and suffering.

2. **Attorney and Client § 7— personal injury action — award of attorney fees**

In a personal injury action in which the jury awarded plaintiff $500 in damages, plaintiff's motion that the trial court allow attorney fees to his attorney was properly denied by the court in its discretion. G.S. 6-21.1.

APPEAL by plaintiff from *Long, Judge,* November 1970 Civil Session of Superior Court held in RANDOLPH County.

Civil action for personal injuries sustained by plaintiff from a collision of two automobiles. Plaintiff was a guest passenger in the Cranford automobile when it was struck in the rear by the Hawkins vehicle. Judgment by default and inquiry was entered against Cranford. The jury found Hawkins negligent and awarded plaintiff $500.00 damages. From judgment on the verdict, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Smith & Casper by Archie L. Smith for Edward Andy Hawkins, defendant appellee.

Perry C. Henson and Daniel W. Donahue for Roy Basil Cranford, defendant appellee.

PARKER, Judge.

[1] Plaintiff contends the trial judge erred in instructing the jury that there was no evidence that plaintiff sustained a permanent injury or would suffer future pain or incur future medical expenses as a result of the collision. There was no error in this

instruction. The collision occurred on 6 June 1966. While plaintiff testified at the trial in November 1970 that his back "hurts a little bit all the time, every day," and "[i]t is paining me right now," he also testified that since the collision he had seen doctors only on two occasions. On 16 June 1966, ten days after the collision, he was examined by Dr. Everett L. Jeffreys in Winston-Salem. Arrangements for this examination were made by plaintiff's attorney. Dr. Jeffreys testified that he found plaintiff's condition normal except that in his opinion plaintiff had a small midline minimal herniation of the nucleus pulposus in the lumbar region in his lower back. Dr. Jeffreys did not testify that this injury would be permanent. Dr. Jeffreys did not again see plaintiff until they both appeared as witnesses at the trial. The only other doctor seen by plaintiff was Dr. Frank Edmundson, who examined plaintiff on 29 September 1970 at the request of defendant's attorney. Dr. Edmundson testified that "[i]nsofar as the herniation of this disc which Dr. Jeffreys testified to, I can say he did not have one at the time I examined him."

In our opinion the evidence in this case was not sufficient to warrant an instruction permitting an award for permanent injuries or for future pain and suffering or for future medical expenses. "To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural." *Short v. Chapman,* 261 N.C. 674, 682, 136 S.E. 2d 40, 46. The opinion in *Short v. Chapman, supra,* quotes with approval from *Diemel v. Weirich,* 264 Wis. 265, 58 N.W. 2d 651, as follows:

> " 'It is a rare personal injury case indeed in which the injured party at time of trial does not claim to have some residual pain from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long, in their opinion, they think such pain

will continue in the future, and fix damages therefor accordingly.' "

Where, as in the present case, the injury complained of was *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether the injury is permanent or whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize a jury to award damages for permanent injury or future pain and suffering, that there be offered evidence by expert witnesses who can testify, either from personal examination or knowledge of the case, or from a hypothetical question based on the facts, that there is reasonable certainty of permanency of the injury or that with reasonable certainty the plaintiff may be expected to experience future pain and suffering. *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753. In the case before us there was no such evidence. Appellant's assignments of error directed to the court's instructions to the jury are without merit.

[2] After the trial plaintiff moved that the court in its discretion under G.S. 6-21.1 allow attorney fees to his attorney for prosecution of this action. After hearing, this motion was denied, to which ruling appellant now assigns error. The allowance of counsel fees under the authority of G.S. 6-21.1 is, by express language of that statute, in the discretion of the presiding judge. There has been no showing of any abuse of the trial judge's discretion, and this assignment of error is overruled.

We have examined appellant's remaining assignments of error and find them without merit. In the trial and judgment appealed from we find

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

RUTH ELIZABETH SINK v. BROOKS GRAY SINK

No. 7121DC379

(Filed 23 June 1971)

1. **Rules of Civil Procedure § 50— motion for directed verdict — question presented**

The motion for a directed verdict in a jury trial presents the question whether the evidence, when considered in the light most favorable to the party against whom the motion is made, was sufficient for submission to the jury.

2. **Rules of Civil Procedure § 50; Appeal and Error § 59— motion for directed verdict — scope of appellate review**

In passing upon the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, the appellate court must look to the evidence and base decision thereon without regard to the trial court's "Findings of Fact" and "Conclusions of Law."

APPEAL by plaintiff from *Henderson, District Judge,* 15 February 1971 Session of District Court held in FORSYTH County.

Plaintiff wife sued defendant husband, seeking a divorce from bed and board, custody of their youngest child, support for the child, alimony, counsel fees, and other relief. She alleged abandonment, failure to provide adequate support, and various indignities to her person committed by defendant without provocation on her part. Defendant husband filed answer denying misconduct on his part, and in a further answer and counterclaim alleged various indignities to his person committed by the wife without provocation on his part. Defendant prayed for a divorce from bed and board, custody of the child, and other relief. At the close of the evidence the court directed verdict for defendant on plaintiff's action for divorce from bed and board and directed verdict for plaintiff on defendant's counterclaim. Plaintiff appealed.

Surratt & Early, by James H. Early, Jr., for plaintiff appellant.

James J. Booker for defendant appellee.

PARKER, Judge.

[1, 2] In the judgment appealed from the trial judge made findings of fact. The motion for a directed verdict in a jury

trial presents the question whether the evidence, when considered in the light most favorable to the party against whom the motion is made, was sufficient for submission to the jury. "In resolving this question, it was not required or appropriate that the trial court make 'Findings of Fact' and state 'Conclusions of Law.' To pass upon the single question of law presented, namely, the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, we must look to the evidence and base decision thereon without regard to the trial court's 'Findings of Fact' and 'Conclusions of Law.' " *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396.

Review of the record in the present case reveals that the evidence, when considered in the light most favorable to the plaintiff, was sufficient to require that the case be submitted to the jury on her action for divorce from bed and board. It may well be, as defendant's attorney states in his brief on this appeal, that "a steady job, less temper tantrums, and the adoption of the Golden Rule would appear to be in order in this cause, rather than further litigation." However, until the parties themselves bring those desirable elements into the matter, they are entitled to have their cause tried in accordance with established procedures. There being sufficient evidence to require submission of plaintiff's action for divorce from bed and board to the jury, the judgment directing verdict against her in that cause is

Reversed.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. MIKE PEATROSS

No. 7110SC235

(Filed 23 June 1971)

Narcotics § 5; Criminal Law § 138— possession of marijuana — validity of sentence — evidence in pre-sentence hearing

Sentence of fifteen months' imprisonment imposed upon defendant's plea of guilty to the possession of marijuana was valid. There is no merit to defendant's contentions that the trial court committed prejudicial error prior to the sentencing when it (1) heard hearsay testimony, (2) refused to allow disclosure of the informer's identity, and (3) allowed the probation officer to testify that defendant recently had been using drugs.

State v. Peatross

APPEAL by defendant from *Martin (Robert M.), Judge,* 13 November 1970 Session of Superior Court held in WAKE County.

The defendant Mike Peatross was charged in a bill of indictment, proper in form, with the possession of a narcotic drug; to wit, marijuana, in violation of G.S. 90-88. The record reveals that on 10 November 1970, the defendant, represented by privately employed counsel, understandingly and voluntarily pleaded guilty to the possession of marijuana, a misdemeanor. After the plea of guilty had been entered, the court directed the probation officer to make a pre-sentence investigation, and on 13 November 1970, at a pre-sentence hearing, the court heard evidence from the defendant, the State, and the report of the probation officer.

From a judgment sentencing the defendant as a youthful offender to prison for a maximum period of fifteen months, the defendant appealed to the North Carolina Court of Appeals.

Attorney General Robert Morgan by Staff Attorney Donald A. Davis for the State.

Tharrington & Smith by Wade M. Smith for defendant appellant.

HEDRICK, Judge.

By his three assignments of error the defendant contends the court committed prejudicial error at the hearing held on 13 November 1970 prior to the imposition of the fifteen months' active prison sentence by: (1) Allowing witnesses for the State to testify over defendant's objection to hearsay statements of persons not at the hearing; (2) not requiring witnesses for the State on cross-examination to reveal the identity of informers who had given the witnesses information as to the conduct of the defendant since he was arrested and charged with the offense to which he entered a plea of guilty; and (3) allowing the probation officer to testify that defendant's manner and speech indicated defendant had been using some type of drugs recently.

The North Carolina rule with respect to the conduct and scope of a hearing for the purpose of determining punishment in a particular case was laid down by Ervin, J., in *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695 (1953), as follows:

"In making a determination of this nature after a plea of guilty or *nolo contendere,* a court is not confined to evidence relating to the offense charged. It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced. *S. v. Stansbury, supra.* In so doing the court is not bound by the rules of evidence which obtain in a trial where guilt or innocence is put in issue by a plea of not guilty. *People v. McWilliams,* 348 Ill. 333, 180 N.E. 832."

In the instant case the scope of the inquiry was within reasonable limits, and the defendant has failed to show that he was in any way prejudiced by the conduct of the hearing. The defendant has likewise failed to show that the identity of the informants would have been relevant or helpful to his case. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969).

The defendant's plea of guilty to the valid bill of indictment authorized the judge to enter the judgment. The fifteen months' active sentence is within the maximum prescribed by law. We have carefully examined the entire record and find and hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES SMITH

No. 7121SC368

(Filed 23 June 1971)

Burglary and Unlawful Breakings § 5— sufficiency of evidence to support guilty verdict

The trial court did not err in failing to set aside a jury verdict finding defendant guilty of felonious breaking and entering.

ON *certiorari* to review order of *Johnston, Judge,* 4 March 1970 Criminal Session, Superior Court of FORSYTH County.

State v. Smith

Defendant was charged under G.S. 14-54 with felonious breaking and entering. He waived his right to counsel and entered a plea of not guilty. Defendant cross-examined some of the State's witnesses. He elected not to testify himself but requested that the arresting officer be called to testify. This was done. Defendant attempted to question the officer with respect to what was done at his preliminary hearing. When the court explained to him that what the judge did in the preliminary hearing was not competent, defendant said he did not want to ask the witness anything else. No arguments were made to the jury, the defendant having expressed his desire not to argue his case to the jury. Verdict of guilty as charged was returned on 4 March 1970. On 9 March 1970 he wrote the trial judge that he wanted to appeal. Whereupon the court appointed counsel to perfect his appeal.

Attorney General Morgan by Staff Attorney Price for the State.

Charles R. Redden for defendant appellant.

MORRIS, Judge.

Defendant's sole assignment of error reads as follows: "Counsel for appellant has read the transcript and sets out as the error that the Court failed to set aside the verdict *ex mero motu* as being based on circumstantial evidence." We think it only fair to counsel for appellant to state that the basis for appeal advanced by counsel was at the insistence of defendant himself.

The evidence for the State tended to show that the building of D. D. Bean & Sons, Inc., was broken into and that entrance was gained by breaking out a window in a garage type door to the building. An accomplice testified that he and defendant and a man named Thomas had gone to the building at defendant's urging. Defendant had told them they could get some "easy money" there. All three had been drinking, but they were not drunk. The accomplice testified that defendant broke a window, and all three entered the building. After entrance was gained, Thomas stumbled in the dark and was told by defendant to go to the back of the building. Defendant went to a desk and opened it and remarked that that wasn't what he was looking for. Defendant then told the witness he was making too much noise

and told him to go in the back and sit down. He did, and the next thing he knew the officers were there and he was arrested. Defendant was not caught in the building. Tracks in the snow were found by officers leading into a wooded area at the rear of the building. Willie Gadson, the accomplice, identified defendant as the third person involved.

It is obvious that this direct evidence is sufficient to support the verdict and the court did not err in failing to set the verdict aside.

Affirmed.

Judges BROCK and HEDRICK concur.

WEIL'S, INCORPORATED v. OVERNITE TRANSPORTATION CO.

No. 718DC119

(Filed 23 June 1971)

Carriers § 10— injury to goods in transit — negligence of carrier — evidence

Corporate plaintiff's failure to show that a table was damaged at the time when a common carrier delivered it to the plaintiff warrants a directed verdict in favor of the carrier on the issue of its negligence in causing the damage.

APPEAL by defendant from *Nowell, District Judge,* 14 September 1970 Session of District Court held in WAYNE County.

This is an action against a common carrier to recover for damages to a table which defendant delivered to plaintiff from the manufacturer. From judgment entered on a verdict awarding damages of $1.00, defendant appealed.

Taylor, Allen, Warren and Kerr by John H. Kerr for plaintiff appellee.

J. Faison Thomson, Jr. for defendant appellant.

VAUGHN, Judge.

The question we consider is whether the court erred when it declined to grant defendant's motions for a directed verdict

made at the close of plaintiff's evidence and at the close of all the evidence.

It was incumbent upon the plaintiff to prove that the damage to the table was caused by defendant's negligence. Absent direct evidence of negligence by the carrier, plaintiff could make out a *prima facie* case by showing: (1) That the table was delivered to the carrier in good condition; and (2) that the table was damaged when delivered by the carrier to the plaintiff's consignee. Such evidence would have entitled plaintiff to go to the jury and the jury would have been permitted but not compelled to find for the plaintiff. *Precythe v. R.R.*, 230 N.C. 195, 52 S.E. 2d 360. We conclude, however, that the present plaintiff is proscribed from benefit from the foregoing by reason of the substantial hiatus in its evidence. Plaintiff offered no evidence that the table was damaged *when delivered by the carrier.*

Plaintiff's evidence is conflicting as to when the damage was discovered. In the light most favorable to plaintiff, the evidence tends to show that the day after the table was delivered one of plaintiff's employees observed a crease in the carton in which it was packed. At that time the package was on the second floor of plaintiff's building about 15 feet from an elevator. Several days thereafter the package was opened and some damage to the table was then discovered. Plaintiff's evidence tended to show that Mrs. Ruby Gurley was plaintiff's receiving clerk and signed the freight bill for the shipment. The freight bill contained the following: "Received the above property in good condition except as noted." There were no notations of damage on the freight bill. Mrs. Gurley did not testify. Plaintiff offered no other evidence tending to show the condition of the package when it was delivered or what happened to the package after it was delivered. Defendant's driver testified that he took the package to plaintiff's loading dock, was told to take it to plaintiff's elevator and did so. The driver testified that he noticed no damage to the package; that Mrs. Gurley looked at the package, signed the freight bill and said nothing to indicate that there was anything wrong. There was no evidence to show what happened to the package during the time it was in plaintiff's possession after delivery and before discovery of the damage. Plaintiff offered no evidence to show by whom it was handled or the degree of care exercised in its handling.

We hold that the evidence was insufficient to survive defendant's motions for a directed verdict. We do not, therefore, think that it is necessary to discuss the other questions raised in the briefs of the parties. The judgment appealed from is reversed.

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

JAY LEE WALLACE, EMPLOYEE, PLAINTIFF v. WATKINS-CAROLINA EXPRESS, INC., EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE CO., CARRIER, DEFENDANTS

No. 7119IC400

(Filed 23 June 1971)

1. **Master and Servant § 93— workmen's compensation — credibility of witnesses — duties of Industrial Commission**

Although plaintiff's evidence was sufficient to support a finding that he suffered a compensable injury, the Industrial Commission is not bound to accept plaintiff's evidence as true or to infer from it that plaintiff had suffered a compensable injury, for the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

2. **Master and Servant § 93— workmen's compensation — uncontroverted testimony**

The Industrial Commission is not required to accept even the uncontroverted testimony of a witness.

3. **Master and Servant § 96— workmen's compensation — findings unsupported by evidence**

Where affirmative findings of fact upon which the Commission bases a decision are unsupported by any competent evidence, such findings must be set aside.

4. **Master and Servant § 94— workmen's compensation — medical report unrelated to plaintiff**

Medical report which shows on its face that it concerns a subject other than plaintiff was not relevant and was incompetent to support the Industrial Commission's finding with respect to injuries suffered by plaintiff in an unrelated accident.

5. **Master and Servant § 94— workmen's compensation — finding unsupported by evidence**

Finding by the Industrial Commission that plaintiff returned to work the day following his accident was unsupported by the evidence.

6. **Master and Servant § 94— denial of compensation — findings unsupported by evidence — failure to make crucial findings**

Industrial Commission's conclusion that any injuries sustained by plaintiff were minor, requiring no medical treatment and causing no disability, is set aside where some of the Commission's findings of fact were unsupported by the evidence, and the Commission failed to make crucial findings as to whether back sprains for which plaintiff was hospitalized on two occasions some months after the accident in question resulted from such accident.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and order of 27 February 1971.

The Industrial Commission denied compensation for injuries sustained by plaintiff in a truck accident arising out of and in the course of his employment. Denial was based upon the conclusion of the Deputy Commissioner, adopted by the Full Commission upon appeal, that "any injuries plaintiff sustained were minor in nature, required no medical treatment, and did not cause plaintiff to sustain any temporary total disability or any permanent disability."

Plaintiff's evidence tended to show that he was injured 29 May 1967 in a collision which occurred while he was driving his employer's truck in New Jersey. Plaintiff returned to North Carolina without receiving medical attention. He experienced pain and remained at home about a week, remaining in bed most of this time. On 25 July 1967 plaintiff consulted his physician, Dr. Hamrick, who referred him to Drs. Sellers and Weaver, orthopedic specialists. Dr. Weaver was of the opinion plaintiff had sustained a sprain of his neck and lumbosacral spine and ordered him to the hospital where he remained from 27 July 1967 through 4 August 1967. Plaintiff was subsequently referred to Dr. Carr at the Miller Clinic in Charlotte. In a letter received into evidence by stipulation, Dr. Carr reported: "This patient had an injury on May 29, 1967. As a result of his painful phenomena, I admitted him to the Charlotte Rehabilitation Hospital on October 26, 1967, and treated him for a sprained back, aggravating a pre-existing spodylarthrosis and arthro-fibrosis of the lumbar spine with surgical ankylosis. After a period of bed rest and conservative treatment, there was some improve-

ment in the situation, and he was discharged on November 17, 1967, wearing a back brace."

Plaintiff related a history of previous back trouble beginning with a slipped disc in 1951. He received a spinal fusion at the Miller Clinic in 1953 and a refusion about three years later. Plaintiff stated that he was dismissed from the care of Miller Clinic in May of 1960, and he denied any difficulty from that time until the accident of 29 May 1967.

Plaintiff appealed to the Full Commission from the order of the Hearing Commissioner denying recovery. The Full Commission adopted as its own the opinion and award of the Hearing Commissioner and plaintiff appealed to this court.

Williams, Willeford & Boger by John Hugh Williams for plaintiff appellant.

Hedrick, McKnight, Parham, Helms, Warley & Jolly by Philip R. Hedrick and Thomas A. McNeely for defendant appellee.

GRAHAM, Judge.

[1, 2] Plaintiff's evidence was sufficient to support a finding that he suffered a compensable injury. Even so, the Commission was not bound to accept plaintiff's evidence as true or to infer from it that plaintiff had suffered a compensable injury; for the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272. The Commission is not required to accept even the uncontroverted testimony of a witness. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265; *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619.

[3] However, where affirmative findings of fact upon which the Commission bases a decision are unsupported by any competent evidence, such findings must be set aside. 5 Strong, N.C. Index 2d, Master and Servant, § 96, pp. 488, 489. Plaintiff assigns as error two findings made by the Commission which are unsupported by any competent evidence.

[4] The Commission found "[p]laintiff had been involved in a vehicle accident on April 27, 1967, for which he received treat-

ment by Dr. William B. Jones of Greenville, South Carolina for injuries to his right leg, left long finger and skull." This finding was obviously based upon a report of Dr. Jones, forwarded to the Commission by defendant's attorney. The report was apparently considered by the Commission after plaintiff's attorney agreed in writing that reports of certain doctors could be admitted with the "question of relevancy" being left to the Commission. It does not appear in the record that plaintiff had been treated by Dr. Jones; nor does it appear why the testimony of Dr. Jones was considered relevant by defendant. At any rate, Dr. Jones' report has as its subject one Ray Wallace of Greenville, South Carolina. Defendant does not dispute the fact that Ray Wallace, age 36 of Greenville, South Carolina, is not the plaintiff, Jay Lee Wallace, who is considerably older and from North Carolina. The report, which shows on its face that it concerns a subject other than plaintiff, was not relevant and therefore it was incompetent to support the Commission's finding with respect to injuries suffered by plaintiff in an unrelated accident.

[5] The second finding attacked by plaintiff is that "Plaintiff continued to haul for Watkins-Carolina, using his own tractor, beginning May 30, 1967 and continuing for about six weeks." The only evidence concerning when plaintiff returned to driving his truck was his testimony that "[o]ne week after the accident [of 29 May 1967] was when I went back on the truck for the first time." Hence, a positive finding to the effect plaintiff returned to work the day following his accident is unsupported by the evidence.

[6] Defendant argues that although these findings are erroneous, they are not crucial to the Commission's decision and should therefore be disregarded. The difficulty with this approach is that we are unable to say to what extent, if any, these findings influenced the Commission's final conclusion that any injuries sustained by the plaintiff were minor, requiring no medical treatment and causing no disability.

We further note that the Commission found that Dr. Weaver was of the opinion plaintiff had sustained a sprain of his neck and lumbosacral spine and had him hospitalized from 25 July 1967 to 4 August 1967; also, that Dr. Carr had plaintiff hospitalized from 26 October 1967 to 17 November 1967 for conservative treatment of his sprained back. A crucial question

is whether these sprains resulted from the accident in question. If they did, the Commission's decision is legally unsound. In any event, a finding with respect to this determinative question has not been made. While it is not necessary that the Commission make a finding as to each fact presented by the evidence, *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596, specific findings must be made with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747; *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706; *Morgan v. Furniture Industries, Inc., supra.*

For the reasons given the case is remanded and the Industrial Commission is directed to make new findings of fact, based on the competent evidence in the record and determinative of all questions at issue.

Error and remanded.

Judges CAMPBELL and BRITT concur.

IN THE MATTER OF BABY JOHN DOE, OR BABY BOY BELTON

No. 7118DC361

(Filed 23 June 1971)

Adoption § 2; Bastards § 12— legitimation of child born out of wedlock — effect on mother's consent to adoption

Legitimation of a child born out of wedlock in a proceeding brought by the putative father under G.S. 49-10 did not invalidate or adversely affect the prior written consent to adoption given by the unwed mother under G.S. 48-6 or require the father's consent to the adoption proceedings; consequently, the father has no right to obtain custody of the child from the child-placing agency to which the child was surrendered by the mother. G.S. 48-6(a); G.S. 49-13.1.

APPEAL by petitioner from *Enochs, District Judge,* 5 April 1971 Session of District Court held in GUILFORD County.

This is a *habeas corpus* proceeding brought by the father of a child born out of wedlock to obtain custody of the child. The facts are as follows:

The baby was born 26 March 1970 to parents who have never been married. On 1 April 1970 the baby's mother executed, pursuant to G.S., Chap. 48, a general consent to adoption of the baby and surrendered the baby to The Children's Home Society of North Carolina, Inc., a licensed child-placing agency. Since that date the baby has remained in the custody of the Society. On 23 April 1970 the father instituted a special proceeding under G.S. 49-10 before the Clerk of Superior Court of Guilford County to have the child declared legitimated. The mother and The Children's Home Society were made parties to that proceeding. Upon appeal from an order of the Clerk denying petitioner's motion to stay the proceedings under the Soldier's and Sailor's Civil Relief Act, the matter came on for hearing before Judge Walter E. Johnston, Jr., Judge presiding at the 28 September 1970 civil session of Superior Court held in Guilford County. All parties having requested pursuant to G.S. 1-276 that the Judge proceed to hear and determine all matters in controversy, Judge Johnston signed judgment in the legitimation proceeding 1 October 1970 finding as a fact that the petitioner was the father of the child born out of wedlock and adjudging that the child be declared legitimated. This judgment contained the following: "No order is made herein with respect to custody of said child, no issue of custody arising upon the pleadings herein." No appeal was taken from this judgment.

On 4 December 1970 petitioner, father of the child, instituted the present *habeas corpus* proceeding in the District Court in Guilford County, seeking custody of the child. The mother and The Children's Home Society each filed answer, each pleading the provisions of G.S. 48-6(a) and G.S. 49-13.1 in bar to the relief prayed for in the petition. After notice, the matter came on for hearing upon motion of respondent, The Children's Home Society, for summary judgment. The District Judge, finding that no genuine issue as to any material fact existed between the parties and that respondent was entitled to judgment as a matter of law, entered summary judgment denying the relief demanded by petitioner, adjudging that The Children's Home Society has legal custody of the child and the right pursuant to the adoption laws to proceed with the placement of the child for adoption, and ordering petitioner not to interfere with any placement of the child for adoption. From this judgment, petitioner appealed.

Harry R. Stanley, for petitioner appellant.

Blair L. Daily and Edward L. Murrelle for repondent appellees.

Richard L. Wharton and Jordan, Wright, Nichols, Caffrey & Hill, of counsel for respondent appellees.

PARKER, Judge.

This appeal presents the question of the effect of a legitimation proceeding brought under G.S. 49-10 by the putative father of a child born out of wedlock, wherein the child is declared legitimate, upon the prior written consent to adoption given by the unwed mother under G.S. 48-6. Appellant contends that since his consent to the adoption would have been required by G.S. 48-7 had his child been born in wedlock and since G.S. 49-11 provides that "[t]he effect of legitimation under G.S. 49-10 shall be to impose upon the father and mother all of the lawful parental privileges and rights . . . to the same extent as if said child had been born in wedlock, . . . " it necessarily follows that absent his consent the adoption proceedings must fail and his custodial rights must be recognized. This contention, however, ignores other statutory provisions which in clear and express language answer the question here presented. G.S. 48-6(a) provides as follows:

> "§ 48-6. WHEN CONSENT OF FATHER NOT NECESSARY.—(a) In the case of a child born out of wedlock and when said child has not been legitimated prior to the time of the signing of the consent, the written consent of the mother alone shall be sufficient under this chapter and the father need not be made a party to the proceeding. *The legitimation of the child by any means subsequent to the signing of such consent of the mother shall not make such consent invalid nor adversely affect the sufficiency of such consent nor make necessary the consent of the father or his joinder as a party to the proceeding.*" (Emphasis added.)

The second sentence of G.S. 48-6(a), italicized above, was added by Section 1 of Chapter 534 of the 1969 Session Laws. Section 2 of the same statute amended Chapter 49, Article 2, of the General Statutes, the Article of the General Statutes under which the child was declared legitimate in the present case, by adding a new section, G.S. 49-13.1, which reads as follows:

"§ 49-13.1. EFFECT OF LEGITIMATION ON ADOPTION CONSENT.—Legitimation of a child under the provisions of this article shall not invalidate or adversely affect the sufficiency of the consent to adoption given by the mother alone, nor make necessary the consent of the father or his joinder as a party to the adoption proceeding, when the provisions of G.S. 48-6(a) and amendments thereto are applicable."

Chapter 534 of the 1969 Session Laws became in full force and effect upon and after the date of its ratification on 19 May 1969 and was in effect at all times pertinent to the present case. In Section 4 of that Act, the Legislature stated that the Act "is intended to clarify and express in part the original, as well as the present, purpose and intent of Section 48-6(a) of the General Statutes of North Carolina as related to Chapter 49, Article 2."

Appellant has cited no authority and we know no reason why these very clear statutory provisions should not be given full effect. Appellant's contention that the summary judgment of the District Judge in the *habeas corpus* proceeding in effect overruled the prior judgment entered by the Superior Court Judge in the legitimation proceeding is without merit; the judgment in the legitimation proceeding expressly provided that no order was made therein with respect to custody of the child. Under the facts presented by this record, The Children's Home Society had legal custody of the child, G.S. 48-9.1(1), and the District Judge correctly so determined. The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

C. H. DEARMAN, EXECUTOR OF THE ESTATE OF RICHARD SHAW BROWN v. LULA RUMPLE BRUNS, WIDOW, IDIVIDUALLY AND AS EXECUTRIX OF MINNIE RUMPLE BROWN; LENA RUMPLE LITTLE, WIDOW; MARGARET RUMPLE TRAMMWELL, DIVORCED; A. L. (BILL) RUMPLE AND WIFE, GLADYS RUMPLE; AND WILLIAM M. PRESSLY, WILLDRED M. POPE, DAVID W. SIDES, TRUSTEES OF NEW STERLING ARP CHURCH, PAULINE HEDRICK KATES AND HAMILTON BROWN

No. 7122SC246

(Filed 23 June 1971)

1. **Tenants in Common § 1; Husband and Wife § 14; Wills § 53— devise to husband and wife — creation of cotenancy**

A devise that the testator's daughter and her husband are "to share equally" in a 42-acre tract creates a tenancy in common between the daughter and her husband, not an estate by the entireties.

2. **Wills § 28— construction of will**

The cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the will.

3. **Wills § 28— intent of testator**

Intent of the testator is to be gathered from the four corners of the will.

APPEAL by plaintiff and defendants William M. Pressly, Willdred M. Pope, David W. Sides, Trustees of New Sterling ARP Church, from *Exum, Judge,* 16 November 1970 Session of IREDELL County Superior Court.

Plaintiff, as Executor of the Estate of Richard Shaw Brown, brought this action under the provisions of Chapter I, Article 26 of the North Carolina General Statutes, entitled "Declaratory Judgments," seeking a construction of the Will of E. A. Rumple, deceased of Iredell County. All parties stipulated that the case would be tried on an agreed statement of facts including:

> "All parties to this action, by and through their attorneys, further agree that the only question of law before the Court is as follows, to wit: whether the terms of the will of E. A. Rumple created an estate by the entirety between Minnie Rumple Brown and her husband, Richard Shaw Brown, or whether those terms created a tenancy

in common between Minnie Rumple Brown and her husband, Richard Shaw Brown."

The trial judge, upon consideration of the agreed statement of facts and the arguments and briefs of the parties, ruled that the Will of E. A. Rumple created an estate as tenants in common between Minnie Rumple Brown and her husband, Richard Shaw Brown. From a judgment decreeing that the Estate of Richard Shaw Brown and the Estate of Minnie Rumple Brown each owns a one-half undivided interest in the 42 acres mentioned in the will, plaintiff and defendants, beneficiaries under the Will of Richard Shaw Brown, appeal to this Court.

William P. Pope for plaintiff appellant.

Collier, Harris & Homesley by Richard M. Pearman, Jr., for defendant appellants.

Sowers, Avery & Crosswhite by W. E. Crosswhite for defendant appellees.

CAMPBELL, Judge.

[1] The sole question presented on this appeal is whether the terms of the Will of E. A. Rumple, deceased, created an estate by the entireties between Minnie Rumple Brown and her husband, Richard Shaw Brown, or whether the terms created a tenancy in common between Minnie Rumple Brown and Richard Shaw Brown.

[2, 3] It is well settled that the cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself. The intent is to be gathered from a consideration of the will from its four corners and such intent should be given effect insofar as that can be done within the limits of rules of law fixed by statute or by decisions of the Courts. *Olive v. Biggs,* 276 N.C. 445, 173 S.E. 2d 301 (1970); *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857 (1965).

[1] Here, E. A. Rumple, deceased, devised the land in question "[t]o my daughter Minnie and Shaw Brown Forty (42) two acres including the [*sic*] my residence and out buildings. . . . My daughter Minnie and Shaw Brown is to bear all my expenses—such as doctor bills and funeral expenses and they are to share

equally in the 42 acre tract above mentioned." A conveyance of land to husband and wife, nothing else appearing, creates an estate by the entireties, with right of survivorship. *Freeze v. Congleton,* 276 N.C. 178, 171 S.E. 2d 424 (1970). But here, the testator indicated a desire that his daughter and her husband "share equally" in the land.

A husband and wife do not "share equally" in an estate by the entireties. The husband has the exclusive right during coverture to possession, control, and use of the land. He has the absolute right to income from such property, including rents and profits. *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643 (1965); *Freeze v. Congleton, supra.* Execution against the husband can be levied on rents and profits to the exclusion of any claim of the wife. *Lewis v. Pate,* 212 N.C. 253, 193 S.E. 20 (1937). See also *Gas Co. v. Leggett,* 273 N.C. 547, 161 S.E. 2d 23 (1968). It is possible that a wife might receive no benefits at all from land held by the entireties if she predeceases her husband, for upon the death of one spouse, title to lands held by the entireties vests in the survivor, and no right, title, or interest of any kind passes to the estate of the deceased. *Underwood v. Ward,* 239 N.C. 513, 80 S.E. 2d 267 (1954).

If a tenancy in common is created, the cotenants do "share equally" in the land. The possession of one tenant in common is the possession of the other and each has a right to enter upon the land and enjoy it jointly with the other. If one cotenant commits an act amounting to waste or destruction of the property, the other cotenant has a right to recover of him. *Jones v. McBee,* 222 N.C. 152, 22 S.E. 2d 226 (1942). Each cotenant is entitled to his share of the rents and profits, and one cotenant is entitled to an accounting for rents collected by the other cotenant. *Hunt v. Hunt and Lucas v. Hunt,* 261 N.C. 437, 135 S.E. 2d 195 (1964).

The phrase "to share equally" is inconsistent with an intention to create an estate by the entireties. We are of the opinion that the phrase indicated a desire on the part of the testator to create a tenancy in common between Minnie Rumple Brown and Richard Shaw Brown. To hold that the will, considered from its four corners, created an estate in the entirety with the inclusion of the words "to share equally" would render that phrase meaningless and surplusage. But considering that phrase along with the rest of the devise, the intention of the

testator becomes reasonably clear. See *Faulkner v. Ramsey,* 178 Tenn. 370, 158 S.W. 2d 710 (1942).

The trial judge reached the correct result and the judgment appealed from is

Affirmed.

Judges BRITT and GRAHAM concur.

LARRY EDWARD MANESS, BY HIS NEXT FRIEND BERTHA L. MANESS v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

— AND —

DANIEL ALEXANDER MANESS, JR. v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

No. 7119SC199

(Filed 23 June 1971)

Rules of Civil Procedure §§ 26, 43— civil trial — reading of deposition — prejudicial error

The reading of a deposition in a civil trial was prejudicial error where there was no finding that the deponent was dead or that he lived more than 75 miles from the place of trial or that any other condition specified in Rule 26(d)(3) was applicable so as to make the deposition competent. G.S. 1A-1, Rules 26(d)(3) and 43(a).

Chief Judge MALLARD concurring.

APPEAL by plaintiffs from *Gambill, Judge,* 1 October 1970 Session of Superior Court held in RANDOLPH County.

These are actions to recover damages resulting from injuries sustained by a passenger in an automobile when the vehicle left the highway and struck a utility pole. From a verdict finding negligence on the part of defendant driver and contributory negligence by the plaintiff passenger, plaintiffs appealed.

Ottway Burton for plaintiff appellants.

Coltrane and Gavin by W. E. Gavin for defendant appellees.

VAUGHN, Judge.

Evidence of defendant driver's negligence was plenary. The defendants contended, however, that Larry Maness, the plaintiff passenger, was contributorily negligent in that he voluntarily rode with Bullins with knowledge that Bullins was under the influence of an intoxicant. Bullins testified that he and Maness drank a pint of whiskey together during a two-hour period immediately preceding the accident and that he, Bullins, was under the influence of liquor. Larry Maness testified that another passenger in the vehicle, one Clarence E. Henry, drank part of the pint of whiskey and that Bullins was not under the influence of intoxicating liquor. Over the objection of the plaintiffs, defendants were allowed to read into evidence the deposition of Clarence E. Henry which had been taken under Rule 31 of the North Carolina Rules of Civil Procedure, upon written interrogatories and filed several months prior to trial. Answers to the interrogatories were generally favorable to the defendants' contentions and unfavorable to the plaintiffs. Included in plaintiffs' fifteen assignments of error based on 35 exceptions is an assignment of error whereby plaintiffs contend that the admission of the deposition into evidence constituted prejudicial error. It did.

Although the North Carolina Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. Rule 43(a) provides that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." With specific exceptions not material here, Rule 26(d)(3) provides that a deposition may be used at trial *only* if the court finds: "(i) That the deponent is dead; or (ii) that the deponent is at a greater distance than 75 miles from the place of trial or hearing, unless it appears that the absence of the deponent was procured by the party offering the deposition; or (iii) that the deponent is a physician who either resides or maintains his office outside the county where the trial or hearing is held; or (iv) that the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (v) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (vi) upon motion and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice

and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. If the court makes any such finding, the deposition may be used by any party for any purpose, whether or not deponent is a party."

The record in this case contains no indication by evidence or stipulation as to the whereabouts of Clarence E. Henry at the time the case came on for trial. There was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in Rule 26(d)(3) which would have made the interrogatories competent and admissible in evidence. Absent such a finding, their admission constituted prejudicial error. We do not find it necessary to pass upon other matters raised in appellants' assignments of error since they may not recur upon a new trial.

New trial.

Judge PARKER concurs.

Chief Judge MALLARD concurring.

I concur in the foregoing opinion but consider it appropriate that the distinction between written interrogatories and depositions be made. A deposition may consist of answers to written interrogatories as well as oral questions. Under Rule 33, written interrogatories may only be addressed to parties, and these interrogatories are not depositions. I quote from Wright & Miller, Federal Practice & Procedure: Civil, § 2131, which shows the distinction made in the Federal rules and which should be made in our rules between the written interrogatories mentioned in Rule 31 and the written interrogatories mentioned in Rule 33:

> "Rule 31 specifies the procedure to be followed in taking depositions by means of written questions. Prior to 1970 these were referred to as 'depositions on written interrogatories.' As the Advisory Committee pointed out in connection with the 1970 amendments:
>
> > Confusion is created by the use of the same terminology to describe both the taking of a deposition upon 'written interrogatories' pursuant to this rule and the

serving of 'written interrogatories' upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word 'questions' for 'interrogatories' throughout this rule."

PAULINE C. CAPPS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM JUNIOR CAPPS II, DECEASED v. BRENDA MONNETT DILLARD AND GWYN AUSTIN DILLARD

No. 7118SC387

(Filed 23 June 1971)

Automobiles § 63— automobile collision with three-year-old child — sufficiency of evidence

Plaintiff's testimony that, when defendant's automobile was four or five car lengths from her three-year-old son, the child was standing in the street, his back against a parked car, and that the child started walking toward the center of the street and was fatally struck by defendant's car, *held* sufficient to support a jury finding of defendant's negligence in striking the child.

APPEAL by plaintiff from *May, S.J.*, 7 December 1970 Session of Superior Court held in GUILFORD County.

This is a civil action to recover damages for the wrongful death of a three-year-old child. At the close of plaintiff's evidence defendants' motion for a directed verdict was allowed. Plaintiff appealed.

Smith and Patterson by Norman B. Smith and Michael K. Curtis for plaintiff appellant.

Perry C. Henson and Thomas C. Duncan for defendant appellees.

VAUGHN, Judge.

The only question presented by this appeal is whether, when all evidence which supports the plaintiff's claim is taken as true and considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference which may be drawn therefrom, and with all contradictions, conflicts and inconsistencies resolved in plaintiff's favor, there was suf-

ficient evidence to survive defendants' motion for a directed verdict.

It was stipulated that the child died as a result of an accident with defendants' automobile which occurred at 2:55 p.m. on 16 October 1965 in a residential area within the city of Greensboro and that the road at the scene was straight, level and dry.

Plaintiff offered evidence from which the jury could have found the following. Plaintiff's intestate lived with his family on the south side of Florida Street in an apartment complex known as Smith Homes. The street runs in a general east-west direction and is straight for several blocks. Several vehicles were lawfully parked on the north side of the street. No parking is permitted on the south side of the street. Two lanes separated by a white line are provided for travel along the street. The child had been playing with his pedal car. Intending to leave for the grocery store, the child's father took the pedal car and the child inside the apartment. After a short interval the father observed that the child was no longer in the apartment and went to look for him. When he got to the door or steps he observed the child standing in the street between the south side of the street and an automobile which was parked on the north side. The child had his back to the parked car and was standing against the car between the door and left front wheel facing south towards the apartment. The father walked approximately nine feet to the curb and looked to his left and right for traffic. He noticed defendants' automobile coming from the east proceeding in a westerly direction. The defendants' car was some four or five car lengths east of the child. The father testified:

> " . . . I told the child to stand where he was. I didn't go across the street because I didn't think I had time to get across.
>
> "After I observed the car coming and saw my son standing there and instructed him to stand still then, he walked toward midway of the street. That is when the car struck him and I don't remember much after that.
>
> "After the car hit the child it rolled on up the street. I believe the left wheel passed over the stomach section of the child."

After defendants' vehicle struck the child, it continued westwardly along Florida Street. People began to scream. Some man ran along side the car screaming for the defendant to stop. Defendant then reversed her direction and started backing up the street. After backing for some distance, the vehicle finally stopped some 100 feet from where the child's body lay. Mrs. Lennins, a witness for plaintiff, testified that she was inside her apartment on the north side of the street when she "heard a compact [*sic*], a loud noise." She heard people screaming. She left her apartment and walked into the street and placed her hand on the hood of defendants' car. "I hollered to the lady, 'Please stop.' Mrs. Dillard was driving the car. The car was moving backwards." Mrs. Lennins testified that the defendant " . . . looked pretty wild to me because her face was pretty flushed and her hair was fuzzy." After defendant got out of her car she "flopped" over on the ground. A strong odor of some alcoholic beverage was detected on the defendant.

The evidence in this case would permit the jury to find that the child was standing in the street in such a position and for such a length of time as to put a reasonably careful motorist on notice of his presence. Having notice of the presence of the child in the street, the defendant had the duty to anticipate that the child might attempt to cross in front of her approaching vehicle. Duties of a motorist upon observing a child on or near a highway are well established:

> "It has been repeatedly declared by this Court that a legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway. [Omitting citations.]
>
> "A motorist must recognize that children have less judgment and capacity to appreciate and avoid danger than adults, and that children are entitled to a care in proportion to their incapacity to foresee, to appreciate and to avoid peril. [Omitting citations.]
>
> "In *Sparks v. Willis, supra,* Devin, J., said for the Court: 'It has been frequently declared by this Court to be the duty of one driving a motor vehicle on a public street who sees, or by the exercise of due care should see, a child on the traveled portion of the street or apparently intend-

ing to cross, to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning to avoid injury, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection.'

"In a particular situation due care may require a motorist to anticipate that a child of tender years, whom he sees on the highway, will attempt to cross in front of an approaching automobile, unmindful of danger." *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706.

We hold that plaintiff's evidence was sufficient to permit but not compel the jury to find that defendant failed to exercise the degree of care which an ordinarily prudent person would exercise under similar circumstances and that such failure was a proximate cause of the accident which resulted in the death of plaintiff's intestate.

Reversed.

Chief Judge MALLARD and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FRANK HUNTER, JR.

No. 7122SC358

(Filed 23 June 1971)

1. **Criminal Law § 23— guilty plea — affirmative showing of voluntariness**

The record affirmatively shows that defendant's plea of guilty was made freely, understandingly and voluntarily as required by the decision of Boykin v. Alabama, 395 U.S. 238.

2. **Criminal Law § 23— acceptance of guilty plea — necessity for admission of guilt**

Contention by defendant that it was error for the court to accept his guilty plea when he had not admitted that he was in fact guilty is without merit.

APPEAL by defendant from *Copeland, Judge,* 4 January 1971 Session, Superior Court of IREDELL County.

The defendant was brought before the 4 January 1971 Session of the Iredell County Superior Court on an indictment charging secret assault. He had earlier been found guilty in district court of driving under the influence and resisting arrest. Defendant's appeal from these two convictions in district court were consolidated with the indictment for secret assault because the charges all arose out of the same incident when defendant allegedly assaulted a North Carolina State Highway Patrolman with a shotgun when the officer had stopped the defendant on suspicion of driving under the influence. Defendant pleaded not guilty to all three charges. During the course of the trial, a bill of information was read to the defendant, charging him with assault with a deadly weapon with intent to kill. Defendant then pleaded guilty to this charge and the two misdemeanors. Defendant formally waived an indictment on the charge of assault with a deadly weapon with intent to kill. Both defendant and his attorneys signed the waiver. The record contains a "Transcript of Plea," signed by the defendant, wherein he indicates that, among other things: he understands what he is charged with; the charge has been explained to him and he is ready for trial; he understands that he has the right to plead not guilty and be tried by a jury; he pleads guilty to all three charges; he has had time to subpoena any witnesses wanted by him; he could be imprisoned for as much as 12 years and 6 months; he is satisfied with his lawyer and he has had time to confer with him; no one has made any promises or threats to get him to plead guilty; he freely, understandingly, and voluntarily authorized his lawyer to enter a plea of guilty in his behalf; he had no further statements to make; and that everything that he had said in this regard was true and correct. The record also contains, by addendum sought by the Attorney General, an "Adjudication" wherein the court found as follows (quoted except where summarized as indicated):

> "The undersigned Presiding Judge hereby finds and adjudges:
>
> I. That the defendant, Frank Hunter, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. (Adjudicating that defendant, represented by privately employed counsel, entered a plea of guilty, and in open court under oath informed the Court as follows):

1. He is and has been fully advised of his rights and the charges against him;

2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads (guilty) (nolo contendere);

3. He is guilty of the offense(s) to which he pleads guilty;

4. He authorizes his attorney to enter a plea of (guilty) (nolo contendere) to said charge(s);

5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;

6. He is ready for trial;

7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of (guilty) (nolo contendere), by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of (guilty) (nolo contendere) be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This 6 day of Jan., 1971."

Attorney General Morgan by Staff Attorney Eatman and Staff Attorney Mitchell for the State.

Thomas K. Spence for defendant appellant.

MORRIS, Judge.

[1, 2] All of defendant's assignments of error essentially contend that the defendant's plea of guilty was not freely, understandingly and voluntarily given according to the federal guidelines set out in *Boykin v. Alabama,* 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709 (1969). In *Boykin,* the Supreme Court set

out three constitutional rights which were forfeited by a plea of guilty: the right not to incriminate one's self; the right to trial by jury; and the right to confront one's accuser. The Court then said: "We cannot presume a waiver of these three important federal rights from a silent record." *Boykin v. Alabama, supra.* This is certainly not the case here. The record is far from silent on this point. Defendant signed a transcript of plea in which he shows that he freely, understandingly and voluntarily pleaded guilty to the offenses with which he was charged. From defendant's answers to the questions propounded, the court found as a fact that defendant freely, understandingly and voluntarily pleaded guilty to the offenses with which he was charged. As to defendant's contention that it was error for the court to accept defendant's plea of guilty when defendant never admitted that he was in fact guilty, see *North Carolina v. Alford,* 400 U.S. 25, 27 L. Ed. 2d 162, 91 S.Ct. 160 (1970), where the Supreme Court said:

> "Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

We have carefully examined all of defendant's assignments of error and find them to be without merit.

In the proceedings in the trial court we find

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. HERMAN WADDELL, JR., AND CLAUDE MAYNARD KNOTTS, JR.

No. 7120SC356

(Filed 23 June 1971)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence**

State's evidence that within two weeks after the theft of merchandise from a filling station the defendants sold much of the merchandise to a person in South Carolina, *held* sufficient to support a jury finding of defendants' guilt of breaking and entering and larceny.

2. **Criminal Law § 102— solicitor's argument to jury — comment on defendants' failure to testify**

Solicitor's argument to the jury, "Now, I'm not commenting on the defendants' failure to testify, I am only asking why . . . they did not produce any witnesses to show where they were," *held* prejudicial error as a comment on the defendants' failure to testify.

3. **Criminal Law § 113— joint trial — instructions on guilt or innocence of each defendant**

Trial court's instructions which permitted the jury to convict both defendants of the offenses charged upon a finding that either of the defendants was guilty, *held* prejudicial error.

APPEAL by defendants from *Long, Judge,* 11 January 1971 Session of Superior Court held in ANSON County for the trial of criminal cases.

The defendants were tried together on one bill of indictment, proper in form, charging them with three felonies, to wit: (1) breaking and entering a building with intent to steal, (2) larceny of property of the value of $1,200 after having broken and entered the building with intent to steal, and (3) receiving stolen goods of the value of $1,200 knowing them to have been stolen.

From judgment of imprisonment upon the verdict of the jury finding each defendant "guilty of breaking and entering and larceny," the defendants appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Price for the State.

Taylor & McLendon by Henry T. Drake for defendant appellants.

MALLARD, Chief Judge.

Defendants contend that the trial judge committed prejudicial error in failing to grant their motion to dismiss at the close of the State's evidence. The defendants offered no evidence.

[1] The evidence, when taken in the light most favorable to the State, tended to show that on 20 July 1970 the service station-grocery store owned by Bill Evans on Highway 74 in Lilesville was broken into and a tool box and tools owned and used by Bill Evans and $2,500 worth of merchandise owned by Bill Evans was stolen therefrom. Two weeks or less thereafter, the defendants sold much of the stolen merchandise including the tool box and used tools to Charles H. Mills, a merchant in Pageland, South Carolina, for $550. We hold that under the principles of law relating to the possession of recently stolen property set forth in *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969), the evidence in the case at bar was sufficient to require submission of the guilt or innocence of the defendants to the jury.

[2] The defendants contend that prejudicial error was committed entitling them to a new trial when the solicitor made the following argument to the jury:

> "Now, ladies and gentlemen of the jury, I ask you why did the defendants not produce any witnesses to explain their activities during the time it is alleged they broke into Mr. Evans' business. Now, I'm not commenting on the defendants' failure to testify, I am only asking why did they not produce an explanation of their events . . . why did they not produce any witnesses to show where they were?"

This argument was improper. *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967). The solicitor may not argue to the jury the failure of a defendant to testify. *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537 (1952); *State v. Farrell,* 223 N.C. 804, 28 S.E. 2d 560 (1944). The solicitor's comments were made in a negative way and specifically pointed to defendants' failure to testify. This was just as harmful as if it had been asserted in a positive manner. The solicitor did not merely comment on the absence of any evidence to contradict the State's witness which was held not to be prejudicial error in the case of *State v.*

Walker, 251 N.C. 465, 112 S.E. 2d 61 (1960), *cert. denied*, 364 U.S. 832, 5 L. Ed. 2d 58, 81 S.Ct. 45. We hold that the solicitor's remarks constitute prejudicial error.

[3] Defendants contend that the trial judge committed prejudicial error "by instructing the jury that it could convict both of the defendants if it found either defendant guilty" and assigns as error, *inter alia*, the following portions of the charge:

> "Members of the jury, in concluding the charge to you, the Court instructs you that if you find from the evidence beyond a reasonable doubt, the burden being upon the State to so satisfy you, that on this day in question the defendant, or either defendant, broke into or entered the building of the witness, Evans, with the felonious intent to commit the crime of larceny, and that either defendant, or that the defendant whose case you are considering at the time, broke into or entered said building without the consent of the owner, or his agent, then it would be your duty to return a verdict of guilty as charged against the defendant.
>
> * * *
>
> As to the charge of larceny, the Court charges you that if you find from the evidence beyond a reasonable doubt, the burden being upon the State, that the defendant, or either of them, feloniously took and carried away the goods and property of the witness, Evans, without his consent and against his will, and that such property was taken and carried away with the felonious intent to deprive the owner of its property permanently and to convert the same to the defendant's use, or to the use of some person other than the owner, and that the value of the property was over $200.00, then it would be your duty to render a verdict of guilty as charged."

[3] Although the evidence against the defendants was the same, each defendant was entitled to have his individual guilt or innocence considered and determined by the jury separate and apart from how the jury should find as to the other defendant. The foregoing instruction fails to accord this right because the jury was told, in substance, that on the first two counts it could convict either or both of the defendants upon a finding that either was guilty. The fact that the judge added to his instructions on the larceny count, "and you will remember that

you must give separate consideration to each of the defendants," does not cure the error. Conflicting instructions upon a material element of the case are prejudicial error. *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969).

The instructions given in this case direct attention to the desirability for the trial judge in criminal cases with multiple defendants to instruct the jury separately as to each defendant on each count submitted as to such defendant in the final mandate to the jury.

We do not deem it necessary to discuss defendants' other assignments of error. Because of the improper argument of the solicitor and error in the instructions to the jury, the defendants are entitled to a new trial.

New trial.

Judges PARKER and VAUGHN concur.

ELIZABETH P. LAMBE v. NEAL SMITH AND WIFE, MAGGIE SMITH

No. 7119SC230

(Filed 23 June 1971)

1. **Appeal and Error § 41— statement of evidence — question and answer form**

Although appellant's statement of the evidence was in question and answer form rather than in narrative form, the Court of Appeals in its discretion considered the appellant's appeal on its merits. Rule of Practice 19(d).

2. **Rules of Civil Procedure § 65— temporary restraining order — preliminary injunction — notice and hearing**

A temporary restraining order may be issued without notice; a preliminary injunction may only be issued after notice to the adverse party and a hearing. G.S. 1A-1, Rule 65(a) and (b).

3. **Rules of Civil Procedure § 65— preliminary injunction — interference with plaintiff's water supply**

Plaintiff who sought a preliminary injunction to keep defendants from interfering with her right to use water from a well located on defendants' land failed to show that the trial court abused its discretion in denying the preliminary injunction.

Lambe v. Smith

APPEAL by plaintiff from *Long, Judge,* 29 October 1970 Civil Session of Superior Court held in RANDOLPH County.

In her verified complaint plaintiff alleges that in 1967 she purchased a tract of land from defendants. The deed granted an easement in these words:

> "The grantors do give, grant and convey herewith to the said Elizabeth P. Lambe a right and easement to use the well on the grantors' property, limited to such period of time as the said Elizabeth P. Lambe, individually, lives on the property herein described."

Plaintiff and defendant Neal Smith dug a ditch and installed a pipe from the well to plaintiff's residence, a mobile home, to convey water. Plaintiff used the water from the well without interference until 20 March 1969 when defendants cut it off for a short time. The water was again cut off in April of 1970 but again was restored and remained so until 13 October 1970 when defendant Neal Smith cut the water off and refused to cut it back on.

Plaintiff sought a permanent injunction to keep defendants from interfering with her right to use water from the well, a temporary restraining order to prevent interference with her right to use the well pending a final hearing, for $2,000 in damages, and asked for a jury trial.

A temporary restraining order was issued without notice under G.S. 1A-1, Rule 65(b), on 14 October 1970 by Judge McConnell, restraining defendants for 10 days *from interfering in any way with plaintiff's right to use the well.* After the temporary restraining order was issued, the pipe extending from the well to plaintiff's residence was reconnected by the defendants. In Judge McConnell's order the parties were ordered to appear before Judge Long at the 19 October 1970 Civil Session of Randolph County Superior Court at 10:00 a.m. "to show cause, if any, why this order should not be continued until the final determination of this action by the issuance of a preliminary injunction under Rule 65(a) of the NCRCP."

After the hearing on plaintiff's motion for a preliminary injunction, Judge Long found facts and entered an order dismissing the temporary restraining order and refusing to issue

a preliminary injunction. From the entering of this order, plaintiff appealed to the Court of Appeals.

Ottway Burton for plaintiff appellant.

Charles H. Dorsett for defendant appellees.

MALLARD, Chief Judge.

[1] Defendant's motion to dismiss this appeal on the grounds that the evidence in the record on appeal is presented in question and answer form rather than by narrative is denied. This court, in its discretion under Rule 19(d) of the Rules of Practice in the Court of Appeals, heard the appeal and considered the matter on its merits.

[2] Under G.S. 1A-1, Rule 65(a) and (b), a distinction is made between a "temporary restraining order" and a "preliminary injunction." The former may be issued without notice under the detailed procedural provisions set forth in Rule 65(b), but the latter may only be issued after notice to the adverse party and a hearing. Both, however, serve the same function as explained in 7 Moore's Federal Practice, § 65.05 (2d Ed. 1970):

> " * * * The ex parte restraining order is * * * subject to definite time limitations, and is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision.
>
> A preliminary or interlocutory injunction, on the other hand, can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf; and usually is not for a fixed, limited period of time, since ordinarily its purpose is to preserve the status quo until the issues are adjudged after a final hearing."

It is interesting to note that the 10-day temporary restraining order was signed by Judge McConnell on 14 October 1970 and expired on 24 October 1970. There is nothing in the record extending the order under Rule 65(b), and yet on 29 October 1970 Judge Long signed an order which decreed "(t)hat the temporary restraining order heretofore granted by the Honorable John D. McConnell, on the 14th day of October, 1970, is dismissed." This dismissal had no effect since the temporary re-

straining order of 14 October 1970 was defunct after the 10-day period.

[3] The decision of the trial judge to grant or deny a preliminary injunction rests in his sound judgment and discretion. *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319 (1953); *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455 (1949); *Register v. Griffin,* 6 N.C. App. 572, 170 S.E. 2d 520 (1969); *Holzer v. U.S.,* 244 F. 2d 562 (8th Cir. 1957); 3 Barron & Holtzoff, Federal Practice & Procedure, § 1433 (Wright Ed. 1958); 7 Moore's Federal Practice, § 65.18(3) (2d Ed. 1970). Plaintiff has not shown an abuse of discretion in the denial of the issuance of a preliminary injunction. We hold that prejudicial error has not been made to appear in this case.

Affirmed.

Judges PARKER and VAUGHN concur.

CHARLES SOUTHARDS, EMPLOYEE v. BYRD MOTOR LINES, INC., EMPLOYER TRANSIT CASUALTY COMPANY, CARRIER

No. 7118IC243

(Filed 23 June 1971)

1. **Master and Servant § 93— workmen's compensation — right to compensation — findings of fact**

   The Industrial Commission is required to make specific findings of fact with respect to the crucial facts upon which the questions of plaintiff's right to compensation depend.

2. **Master and Servant § 55— workmen's compensation — what constitutes an accident**

   Accident within the meaning of the Workmen's Compensation Act involves the interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences. G.S. 97-2(18).

3. **Master and Servant §§ 55, 65— what constitutes an accident — lifting of goods — hernia — findings of fact**

   An "accident" did not arise from the mere fact that on the day of the injury (hernia) the employee, who ordinarily lifted furniture, was lifting cases of canned beans for the first time, that the day was hot, and that the employee was in a hurry.

APPEAL by defendants from the Opinion and Award of the North Carolina Industrial Commission, filed 19 November 1970.

Pursuant to the provisions of the Workmen's Compensation Act, G.S. 97-1 *et seq.*, plaintiff asserted this claim for compensation for injury sustained, on 28 July 1969, while in the employ of defendant Byrd Motor Lines, Inc. On 11 May 1970, a hearing was held before Deputy Commissioner C. A. Dandelake. Plaintiff's evidence tended to show the following. On 28 July 1969, plaintiff was employed by defendant as a dock worker, having been so employed since early June; on the day in question, plaintiff and a helper were unloading cases of canned pork and beans from a truck, each case weighing sixty pounds; plaintiff's usual job was to load or unload whatever was in the trucks, but the day in question was the first time that he had handled anything other than furniture; plaintiff's custom was to have help when lifting items weighing as much as one hundred pounds; on the occasion of his injury, plaintiff and the helper were in a hurry and were working faster than usual, each man handling two cases of beans at a time; plaintiff experienced a sharp pain in his left groin while lifting two cases of beans at once; plaintiff rested for a short time and then began to unload furniture, at which time he felt pain again and, upon investigation, found a knot in his groin; the injury was a left inguinal hernia; plaintiff had had a similar injury surgically repaired in September, 1968.

The Deputy Commissioner denied plaintiff's claim upon the ground that plaintiff had not suffered an injury by accident arising out of and in the course of his employment. The Full Commission vacated the opinion and award of the Deputy Commissioner, and entered an award in favor of plaintiff. Defendants appealed to this Court.

Haworth, Riggs, Kuhn & Haworth, by Don G. Miller, for plaintiff-appellee.

Walser, Brinkley, Walser & McGirt, by Charles H. McGirt, for defendants-appellants.

BROCK, Judge.

[1] Defendants assign as error that the conclusions of law are not supported by the findings of fact. Specific findings of

fact by the Industrial Commission, 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.

[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. *Gray v. Storage, Inc.*, 10 N.C. App. 668, 179 S.E. 2d 883.

[3] The only facts found by the Commission with respect to circumstances existing at the time of plaintiff's injury were that plaintiff was lifting cases of canned goods for the first time, that the load weighed 120 pounds, that it was a hot day, and that he was hurrying. No finding was made as to the weight which plaintiff was accustomed to lifting unassisted. The mere fact that plaintiff was handling a different commodity than usual, without more, and that the weather was hot, are not enough to satisfy the requirement of an "interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences" stated in *Gray, supra.* Nor is the mere fact that plaintiff was in a hurry. See *Rhinehart v. Market,* 271 N.C. 586, 157 S.E. 2d 1. The statement that "[i]n the way and manner set out in finding of fact number two plaintiff sustained an injury by accident arising out of and in the course of his employment resulting in a hernia" was included among both the findings of fact (as finding of fact number three) and, with slightly different wording, the conclusions of law of the Commission. As a purported "finding of fact," the statement is surplusage, because the "way and manner set out in finding of fact number two," to which reference is made in finding of fact number three, does not disclose a compensable accident; as a "conclusion of law," it is unsupported by the findings of fact.

There was evidence in the record from which the Commission could have made the full findings of fact necessary to resolve the controversy, as required by *Morgan, supra.* This the Commission failed to do.

The award is vacated and the cause is remanded to the Industrial Commission for further proceedings as may be appropriate.

Award vacated and cause remanded.

Judges MORRIS and HEDRICK concur.

GLENN IVAN LYLE (MINOR) BY HIS NEXT FRIEND, G. EVANS LYLE AND G. EVANS LYLE v. DIANNE BRAY THURMAN AND JOE MANLEY BRAY

No. 7119SC397

(Filed 23 June 1971)

Automobiles § 57— intersection accident — insufficiency of evidence of negligence

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in this action to recover damages sustained in a collision between plaintiff's motorcycle and defendant's car at an intersection controlled by a traffic signal.

Chief Judge MALLARD concurs in the result.

APPEAL by plaintiffs from *May, Special Judge,* 30 November 1970 Session of Superior Court held in RANDOLPH County.

Action to recover damages resulting from a collision by a motorcycle, operated by plaintiff, with defendant's automobile on 2 August 1965. At the conclusion of plaintiffs' evidence defendants moved for a directed verdict for the reason that plaintiffs had offered no evidence tending to show actionable negligence on the part of defendants. The motion was granted and judgment dismissing the action was entered.

Plaintiffs appealed.

John Randolph Ingram for plaintiff appellants.

Smith and Casper by Archie L. Smith for defendant appellees.

VAUGHN, Judge.

In considering the question of whether plaintiffs' evidence is sufficient to withstand defendants' motion for a directed verdict, we are guided by the well-established principles that prevailed under our former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit. The evidence, in the light most favorable to plaintiffs, tended to show the following. At sometime shortly before the accident, the minor plaintiff was operating his motorcycle in a southerly direction along Elm Street in Asheboro. He does not remember the accident or how he got to the scene of the accident. He last remembers stopping for a stoplight at the intersection of Elm and Brewer Streets, some two blocks from the intersection of Elm and Salisbury where the accident occurred.

Plaintiffs called the defendant operator whose testimony, in the light most favorable to plaintiffs, was as follows: Shortly after 11:00 p.m. she was proceeding in an easterly direction along Salisbury Street, en route from the factory where she worked to her home. As she approached the intersection of Salisbury and Elm Streets, the traffic light changed from red to green. Her headlights were on. There was nothing to obstruct her view of the intersection. She saw no vehicles in the intersection and proceeded into the intersection with the green light at a speed of not more than 20 to 25 miles per hour. After she entered the intersection something hit the left side of her car.

The investigating officer's testimony was to the effect that when he arrived at the scene, the front of defendant's automobile was 123 feet east of the center of the intersection. The traffic light was located in the center of the intersection. The front of plaintiff's motorcycle was lodged between the left front wheel and bumper of defendant's automobile. Plaintiff was lying 73 feet east of the intersection at the edge of the pavement. There were some "pressure marks" on the highway east of the intersection. There was a scrape in the asphalt leading from almost directly under the stoplight to a metal bar on the motorcycle. The defendant operator told him: that she never applied her brakes until after the collision; that after she heard the bump she heard a dragging noise that sounded like metal and she then stopped her vehicle; and that she did not see the motorcycle until after she got out of the car.

This evidence, taken in the light most favorable to plaintiffs, shows an accident in which plaintiff was injured and his motorcycle damaged.

> " ' Negligence is not presumed from the mere fact that plaintiff's intestate was killed in the collision.' *Williamson v. Randall,* 248 N.C. 20, 25, 102 S.E. 2d 381; *Robbins v. Crawford,* 246 N.C. 622, 628, 99 S.E. 2d 852. However, direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances. *Etheridge v. Etheridge,* 222 N.C. 616, 618, 24 S.E. 2d 477. But in a case such as this, the plaintiff must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendants. *Robbins v. Crawford, supra; Whitson v. Frances,* 240 N.C. 733, 737, 83 S.E. 2d 879; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. In *Parker v. Wilson,* 247 N.C. 47, 53, 100 S.E. 2d 258; *Parker, J.,* speaking for the Court said: 'Such inference cannot rest on conjecture or surmise. *Sowers v. Marley, supra.* "The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff." *Whitson v. Frances, supra.* "A cause of action must be something more than a guess." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. A resort to a choice of possibilities is guesswork not decision. *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392. To carry his case to the jury the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.' . . . " *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598.

There being no evidence to support a legitimate inference that plaintiffs' damages were proximately caused by defendants' negligence, a directed verdict for defendants was proper and is affirmed.

Affirmed.

Judge PARKER concurs.

Chief Judge MALLARD concurs in the result.

W. W. BRANSON v. W. C. YORK AND MRS. W. C. YORK

No. 7119SC194

(Filed 23 June 1971)

Trial § 51— jury verdict set aside

The trial court did not abuse its discretion in setting aside a jury verdict in favor of plaintiff in this action on contract.

APPEAL by plaintiff from *Gambill, Judge,* 21 September 1970 Session of Superior Court held in RANDOLPH County.

Civil action on contract. Plaintiff seeks to recover $1,440.50 alleged to be the balance owed him by defendants for services rendered and materials furnished. Defendants denied the debt and counterclaimed for $2,170.47 which they allege to be the reasonable value of various services and property which they allege were furnished to plaintiff. The jury returned verdict in favor of plaintiff in the amount of $800.00. Defendants moved that the court in its discretion set the verdict aside as being contrary to the greater weight of the evidence. From order allowing this motion and directing that the case be restored to the trial docket, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Bell, Ogburn & Redding by John N. Ogburn, Jr., and William W. Ivey for defendant appellees.

PARKER, Judge.

The action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. *Goldston v. Chambers,* 272 N.C. 53, 157 S.E. 2d 676; *City of Randleman v. Hudson,* 2 N.C. App. 404, 163 S.E. 2d 77. The record in this case does not disclose an abuse of discretion by the trial judge; hence, the order setting aside the verdict in this case is not subject to review on appeal.

Appeal dismissed.

Chief Judge MALLARD and Judge VAUGHN concur.

ELVIE M. KEENER v. GLENN M. LITSINGER AND W. R. GRACE & COMPANY, A CORPORATION

No. 7119SC402

(Filed 23 June 1971)

Automobiles § 90— accident case — instructions — proximate cause

The failure of the trial court to give an adequate definition of "proximate cause" in an automobile accident case is reversible error and entitles the appellant to a new trial.

APPEAL by plaintiff from *Gambill, Judge,* 11 January 1971 Session of CABARRUS County Superior Court.

Plaintiff instituted this action seeking to recover for personal injuries sustained when an automobile driven by defendant Glenn M. Litsinger collided with an automobile driven by plaintiff. Evidence offered by plaintiff tended to show that she was stopped on the inside lane of a four-lane highway going south into Charlotte waiting for two cars in front of her to turn left when she was struck in the rear by a car driven by defendant Litsinger, an employee of W. R. Grace & Company. Plaintiff testified that she overheard defendant Litsinger tell the investigating Highway Patrolman that he was traveling at the speed limit of 60 m.p.h. when he glanced away from the highway, and when he looked back, he was on the back of plaintiff's car.

Trooper D. W. Padgett of the Highway Patrol, the investigating officer, called by plaintiff, testified that defendant Litsinger told him that he had been traveling south in the outside lane as he approached a median cross-over. As he approached, a car pulled across the highway in front of him and he veered to the left to avoid it and struck the rear of plaintiff's vehicle. The trooper further testified that his investigation revealed that a car in the inside lane in front of plaintiff's vehicle pulled into the outside lane in front of defendant Litsinger and defendant switched lanes to avoid hitting it.

Defendants did not offer any evidence.

The jury returned a verdict finding no negligence on the part of defendants. From a judgment that plaintiff recover nothing of defendants, plaintiff appeals to this Court.

Bedford W. Black and Clarence E. Horton, Jr., for plaintiff appellant.

K. Michael Koontz for defendant appellees.

CAMPBELL, Judge.

Plaintiff's first assignment of error is directed at the failure of the trial judge to define proximate cause in his charge to the jury. This is a valid assignment of error. Although the trial judge referred to proximate cause several times in the charge, nowhere in the charge do we find a proper definition of proximate cause. The closest that the court came to attempting a definition of proximate cause was when the court stated:

> "Negligence without proximate cause the defendant is not liable, but negligence must be coupled with proximate cause, *the cause without which the injury would not have occurred.*" (Emphasis added.)

It is clear that this short statement did not meet the definition set forth by the Supreme Court in *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1966):

> "Proximate cause is 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' *Mattingly v. R.R.*, 253 N.C. 746, 750, 117 S.E. 2d 844, 847. Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796."

A proper definition of proximate cause is mandatory and a new trial will be ordered where a proper definition is not given. *Barefoot v. Joyner*, 270 N.C. 388, 154 S.E. 2d 543 (1967). Here, the trial judge failed to give the proper definition.

New trial.

Judges BRITT and GRAHAM concur.

W. W. HORTON v. ANNIE E. DAVIS, ROBERT R. DAVIS, PAUL DAVIS AND WIFE, MRS. PAUL DAVIS

No. 7118SC256

(Filed 23 June 1971)

Appeal and error § 39— failure to docket record in apt time

Appeal is dismissed for failure to docket the record on appeal within the 90-day period allowed by Court of Appeals Rule No. 5, no order having been entered extending the time for docketing.

APPEAL from *Martin, Special Judge,* September and October 1970 Sessions, Superior Court of GUILFORD County.

This is an action in ejectment tried by the court without a jury. The court found facts and entered judgment against the plaintiff, who appealed.

Julian C. Franklin for plaintiff appellant.

Morgan, Byerly, Post and Herring, by J. V. Morgan and J. W. Clontz for defendant appellees.

MORRIS, Judge.

Counsel for plaintiff was diligent in obtaining an order extending the time within which appellant was required to serve his case on appeal. However, no motion was made nor order entered for an extension of the time for docketing the record on appeal. The judgment was entered on 23 October 1970. The record on appeal was not docketed in this Court until 19 February 1971—well beyond the 90-day period provided by Rule 5, Rules of Practice in the Court of Appeals. For failure to comply with the Rules of this Court, the appeal is dismissed.

Appeal dismissed.

Judges BROCK and HEDRICK concur.

RUTH ELIZABETH WATSON v. JUNIOR BRAGG KING

— AND —

JUNIOR BRAGG KING v. ELIZABETH RUTH WATSON KING

No. 7119SC338

(Filed 23 June 1971)

APPEAL by plaintiff, Ruth Elizabeth Watson, and defendant, Elizabeth Ruth Watson King, from *Long, J.*, 2 November 1970 Civil Session of Superior Court held in RANDOLPH County.

Ruth Elizabeth Watson, hereinafter called appellant, instituted an action against Junior Bragg King, hereinafter called appellee, seeking damages for assault. Subsequently appellee filed an action against appellant seeking a divorce, alleging among other things "That the plaintiff and the defendant were married to each other on the 23rd (5) day of February (March), 1961 (1961), in Asheboro, North Carolina, and thereafter lived together as husband and wife until on or about the 15th day of February, 1968, when they separated. That since the 15th day of February, 1968, the plaintiff and the defendant have lived continuously separate and apart from each other. That there were three children born of the marriage between the plaintiff and the defendant, to wit: Tracy King, age eight; Nane King, age three; and Ken King, age twenty-two months."

To the latter action appellant filed an answer, further defense and cross action wherein, among other things, in substance, she (1) admitted that the parties had gone through a marriage ceremony but denied that the parties were ever married, contending that the purported marriage was void because it was bigamous on the part of appellee; (2) alleged that the separation of the parties was caused by the assault which was the subject of her original action; and (3) sought damages for the unlawful and deceitful actions of appellee in causing her to rely on appellee's false representation that he was not married when the parties entered into the purported marriage.

Over objections of appellant, the cases were consolidated for trial. In her action for assault, appellant prayed for compensatory damages in the amount of $25,000 and punitive damages in the amount of $25,000. The jury found for appellant in that case but awarded her damages of only $500. In appellee's action for divorce, the jury answered the first issue in favor of appellant by finding that the parties were not lawfully married

as alleged in the complaint. Among others, the following issue was also submitted: "Did the plaintiff, Junior Bragg King, by fraudulent activity, induce the defendant, Elizabeth Ruth Watson King to enter into a bigamous relationship?" This issue was answered "No." From judgments entered on the verdicts, Ruth Elizabeth Watson (King) appealed in each case.

Bell, Ogburn and Redding by John N. Ogburn, Jr., for appellee.

Ottway Burton for appellant.

VAUGHN, Judge.

We have carefully considered each of appellant's 38 exceptions. A number of these were taken to discretionary rulings of the trial judge. No abuse of discretion has been shown. Our review of the proceedings in the trial leads us to conclude that the judgments from which appellant appealed are in conformity with the ultimate rights of the parties. Technical error alone does not compel a reversal. After careful consideration of the entire record and the briefs of the parties, we hold that prejudicial error sufficient to warrant a new trial does not appear.

No error.

Chief Judge MALLARD and Judge PARKER concur.

JAMES E. NORRIS v. TEXACO, INC.

No. 7121SC388

(Filed 23 June 1971)

APPEAL by plaintiff from *Lupton, Judge,* 7 December 1970 Session of Superior Court for the trial of civil cases held in FORSYTH County.

Plaintiff alleged that he sustained damages in the sum of $15,000.00 when the defendant breached its lease with him. Defendant denied that it breached the lease and filed a counterclaim alleging that plaintiff was indebted to it in the amount of $2,915.80.

At the close of all the evidence the court allowed the defendant's motion for a directed verdict on plaintiff's cause of action and submitted one issue to the jury on the defendant's counterclaim. The jury by its verdict found that the plaintiff was indebted to the defendant in the sum of $1,530.10. The plaintiff appealed from the judgment entered that he recover nothing of the defendant and that the defendant recover $1,530.10 of the plaintiff.

White, Crumpler & Pfefferkorn by James G. White and Michael J. Lewis for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., and James C. Frenzel for defendant appellee.

MALLARD, Chief Judge.

After carefully examining all of the assignments of error properly made and brought forward by the plaintiff, we are of the opinion and so hold that no reversible error is made to appear.

No error.

Judges PARKER and VAUGHN concur.

LINDA Y. WINTERS v. STEVIE D. WINTERS

No. 7121DC314

(Filed 23 June 1971)

APPEAL by plaintiff from *Billings, District Judge,* 16 February 1971 Session of District Court held in FORSYTH County.

Barbara C. Westmoreland for plaintiff appellant.

David V. Liner for defendant appellee.

MALLARD, Chief Judge.

On 25 January 1971 the parties consented to a judgment which provided, among other things, for the payment by defendant to appellant's attorney for services rendered for the benefit

of the minor child, Sharon Denise Winters. At the same session of court, 25 January 1971, a motion was heard for additional attorney fees for appellant's attorney. The district judge entered an order on 16 February 1971 holding that counsel fees to said attorney "are denied as a matter of law, based on N.C. G.S. 50-13.6, since the Court finds that the plaintiff is no longer the spouse of the defendant." From this order the plaintiff appealed to this court. The only question sought to be presented on this appeal is not properly presented on this record. The appeal is therefore dismissed.

Appeal dismissed.

Judges PARKER and VAUGHN concur.

DONALD EUGENE LITTLE, BY HIS GENERAL GUARDIAN, DOROTHY P. LITTLE v. COLVIN THEODORE POOLE AND LIFE INSURANCE COMPANY OF VIRGINIA

— AND —

DOROTHY P. LITTLE v. COLVIN THEODORE POOLE AND LIFE INSURANCE COMPANY OF VIRGINIA

No. 7119SC301

(Filed 14 July 1971)

1. **Rules of Civil Procedure § 50— directed verdict in favor of party having burden of proof — issues of negligence and agency**

A directed verdict on the issues of negligence and agency in favor of the party having the burden of proof is error. G.S. 1A-1, Rule 50.

2. **Master and Servant § 3— insurance agent — independent contractor or employee — jury question**

Whether an insurance agent was an independent contractor or an employee of an insurance company at the time of his automobile accident was a question for the jury, especially where there was evidence (1) that the agent's duties included not only the selling of policies but also the collecting of the company's accounts, which was subject to the control and direction of the company, and (2) that the company gave the agent retirement and insurance benefits and deducted income and social security taxes from his commissions.

3. **Master and Servant § 3— independent contractor or employee — the test of control**

The test for determining whether a relationship between parties is that of employer and employee, or that of employer and independent contractor, is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing work, as distinguished from the right merely to require certain definite results conforming to the contract.

4. **Automobiles § 90— accident case — instructions on damaged vehicles**

Although neither plaintiff nor defendant sought recovery for their damaged vehicles, it was error for the trial court to instruct that the jury need not consider the evidence relating to the damaged vehicles, since such evidence tended to support the plaintiff's testimony that he was in his own traffic lane when the vehicles collided.

5. **Rules of Civil Procedure § 51— instructions — expression of opinion**

Trial court's instruction, "I will not attempt to recall all of the evidence, but only so much of it *as the court deems is important* when you come to consider your verdict," was erroneous as an expression of opinion on the importance of the recapitulated evidence. G.S. 1A-1, Rule 51(a).

APPEAL by defendants from *Long, Judge,* September 1970 Civil Session of Superior Court held in ROWAN County.

Little v. Poole

Donald Eugene Little sustained injuries on 7 June 1965 when a pickup truck in which he was a passenger collided almost head-on with a car being operated by defendant Poole. Donald's father, who was driving the pickup truck, was killed.

On 6 June 1968 suits were instituted by the mother and general guardian of Donald. She seeks in one suit to recover damages on behalf of Donald, and in the other, to recover for loss of services and medical expenses resulting from his injuries. The suits were consolidated for trial and are treated in this opinion as a single action.

The complaints allege that at the time of the collision defendant Poole was employed as a salesman for the corporate defendant (Life of Virginia) and that his negligent operation of his automobile, while within the course and scope of his employment, proximately caused the collision and resulting injuries and damages. Poole answered denying negligence but admitting that he was employed by Life of Virginia and acting within the course and scope of his employment at the time of the collision. Life of Virginia answered and denied that Poole was its employee and that he was negligent.

At the conclusion of all the evidence the court allowed plaintiff's motion for a directed verdict on the issue of whether Poole, on the occasion complained of, was acting as the employee and agent of Life of Virginia, in the course and scope of his employment. A ruling was reserved on plaintiff's motion for a directed verdict on the negligence issue and issues of negligence and damages were submitted to the jury. The jury answered the negligence issue "Yes" and awarded substantial damages. After return of the verdict the court granted plaintiff's motion for a directed verdict on the issue of negligence. Defendants appealed.

Rufty & Rufty and Perry C. Henson by Perry C. Henson for plaintiff appellees.

Woodson, Hudson & Busby by Max Busby for defendant appellant Colvin Theodore Poole.

Kluttz and Hamlin by Lewis P. Hamlin, Jr., for defendant appellant Life Insurance Company of Virginia.

GRAHAM, Judge.

[1] We have here the unusual circumstance of a directed verdict having been entered for the plaintiff on the issue of negligence after the jury had returned a verdict answering that very issue in plaintiff's favor. It is contended that the purpose and intended effect of this procedure was to cure any errors in the judge's charge to the jury on that issue. We need not consider whether such a procedure is ever proper under Rule 50 (G.S. 1A-1, Rule 50), because here plaintiff was not entitled to a directed verdict, whenever entered, and the court's judgment to this effect must be reversed. In *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297, Justice Sharp, speaking for the Supreme Court, stated:

> "Rule 50 . . . does not purport to confer upon the judge the power to pass upon the credibility of the evidence and to direct a verdict in favor of the party having the burden of proof. . . .
>
> [T]he judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof 'even though the evidence is uncontradicted.' "

The burden of proof on the issue of negligence was on the plaintiff and it was consequently error for the court to direct a verdict in favor of plaintiff on that issue.

The court's directed verdict for plaintiff on the question of agency must be reversed for like reason. To establish the liability of an employer under the doctrine of Respondeat Superior a plaintiff has the burden of proving, not only that the employee was negligent and that his negligence was the proximate cause of the injury, but also that the relation of master and servant existed between the employer and the employee at the time of and in respect to the very transaction out of which the injury arose. *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757, 17 A.L.R. 2d 881.

[2] Life of Virginia argues that the court erred in denying its motion for a directed verdict on the agency issue, contending that plaintiff's evidence was insufficient to support a finding of employment. Its position is that the evidence established, as a matter of law, that defendant Poole was an independent contractor rather than an employee or agent. We think that question was for the jury.

"[W]here the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, it is a question of law for the court whether one is an employee or an independent contractor, but it is only where a single inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court." 41 Am. Jur. 2d, Independent Contractors, § 53, pp. 828, 829.

Thus, what an agreement was between the parties is ordinarily a question of fact; whereas, what relationship between the parties was created by the contract is ordinarily a question of law. *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515. But where a contract is in parol and its terms not clearly established, it is naturally the function of the jury to draw the necessary deductions therefrom. *Embler v. Lumber Co.*, 167 N.C. 457, 83 S.E. 740. Also see *Lassiter v. Cline*, 222 N.C. 271, 22 S.E. 2d 558.

In the case at hand no employment contract was produced; however, the evidence disclosed that Poole was a licensed insurance agent employed by Life of Virginia to sell insurance and collect premiums. He was eligible for and covered by the company's retirement and insurance plans, including Workmen's Compensation. During a brief training period at the beginning of his employment, Poole received a fixed salary; thereafter he received only commissions based upon his sales and collections. Commissions were paid weekly in a single check from which the company deducted income and social security taxes. Poole was responsible for collecting premiums within a particular territory called a "debit." He was required to account to the company weekly for collections. The company did not furnish Poole with a car, nor did it require that he have one or reimburse him for expenses incurred in the use of his personal car. However, Poole's supervisor, as company associate manager, testified "I would like for him to have a car. . . . I knew at all times that Mr. Poole was using his car in his collection work." As long as Poole serviced his debit, no attempt was made by the company to regulate his hours or the territory he worked. His supervisor stated: "As long as an agent is doing well we do not keep tabs of his interviews and sales. If he is weak we try to find out where and try to help him." Poole spent about twenty hours a week collecting and about twenty-five or thirty hours selling.

On the occasion of the collision Poole was making collection calls in his personal car.

[3] The test for determining whether a relationship between parties is that of employer and employee, or that of employer and independent contractor, is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right to control, it is immaterial whether he actually exercises it. *Pearson v. Flooring Co., supra; Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425.

In the case of *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137, we find listed the following indicia which ordinarily earmark one as an independent contractor rather than an employee:

> "The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time. [Citations omitted.]
>
> "The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee."

The fact that an employee uses his own car and is not reimbursed for expenses does not, standing alone, indicate as a matter of law that he is an independent contractor, or that he is acting outside the scope of his employment. This is particularly true where, as here, the employer knows or should know that the employee is using it. *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. 2d 667; *Davidson v. Telegraph Co.,* 207 N.C. 790, 178 S.E. 603.

Neither is the question determinable, as a matter of law, by the fact that an employee is paid on a commission basis and not on a fixed salary and that he fixes his own hours of work. *Pressley v. Turner,* 249 N.C. 102, 105 S.E. 2d 289.

A life insurance agent who is employed solely to bring about contractual relations between his principal and others on his own initiative, without being subject to the principal's direction as to how he shall accomplish results, is ordinarily held to be an independent contractor. *American Savings L. Ins. Co. v. Riplinger,* 249 Ky. 8, 60 S.W. 2d 115; *Vert v. Metropolitan Life Ins. Co.,* 342 Mo. 629, 117 S.W. 2d 252; *Wesolowski v. Hancock Ins. Co.,* 308 Pa. 117, 162 A. 166, 87 A.L.R. 783; *American Nat. Ins. Co. v. Denke,* 128 Tex. 229, 95 S.W. 2d 370, 107 A.L.R. 409; A.L.I., Restatement of Agency 2d, §§ 220, 250, 251. See also Annot., 36 A.L.R. 2d 261.

[2] Here, however, there was evidence that the relationship of Poole to Life of Virginia was more than that of an independent insurance agent employed solely for the purpose of bringing about contractual relations between his company and others. Poole was also responsible for collecting company accounts within a particular debit or area. Some of these accounts were collectible weekly and reports of collections had to be filed with the company weekly. Certainly the company had the right to control and direct Poole's activities with respect to these collections. Furthermore, the company treated Poole as an employee in extending to him retirement and insurance benefits. It also deducted income and social security taxes. This is evidence tending to negative the independence of the relationship. 41 Am. Jur. 2d, Independent Contractors, §§ 21 and 22, pp. 771, 772, 773.

It is our opinion that the evidence was sufficient to support a finding that the relationship of employee and employer existed. Plaintiff is therefore entitled to have the case submitted to the jury. *Lassiter v. Cline, supra.*

Both defendants assign various errors with respect to the charge. Several of these assignments of error are well taken.

[4] Poole admitted that he had started into a left turn when he saw the pickup truck approaching him over a hill. He pulled back toward his lane of travel. At the trial, Poole argued that he got completely back into his lane of travel before the collision.

The angle at which the vehicles came together, as evidenced by the location of the damages about them, support to some extent Poole's argument that he had straightened his car out on his side of the road before the collision occurred. With respect to this evidence the court charged:

> "Now, he testified as to where the damage was on these vehicles. That is not relative which you need to consider because the damage to the vehicles is not in question."

It is true that no recovery was sought for damages to the vehicles. Nevertheless the location of the damage was competent as tending to show the location of the vehicles when they came together.

[5] Before recapitulating any of the evidence the court charged: "I will not attempt to recall all of the evidence, but only so much of it as the Court deems is important when you come to consider your verdict." Through this statement the court inadvertently expressed an opinion on the facts by stating in effect that the evidence which he was to recapitulate was important; whereas, other evidence presented was not. This constitutes a violation of G.S. 1A-1, Rule 51(a). (The provisions of Rule 51(a) are identical to those of G.S. 1-180 which formerly governed the trial of civil cases as well as criminal cases.)

The judgments entered directing verdicts in favor of plaintiff on the issues of negligence and agency are reversed and a new trial is ordered on all issues.

New trial.

Judges CAMPBELL and BRITT concur.

East v. Smith

THOMAS F. EAST, ADMINISTRATOR OF MANA AGUSTA PERRY, DECEASED v. BETTIE P. SMITH, ET AL, RESPONDENTS; AND ROBERT M. WILLIAMS, JR., AND WIFE, MARIAN WILLIAMS; ANNA W. ALSTON AND HUSBAND, ARCHIE ALSTON; SARAH LEE WILLIAMS SMITH AND HUSBAND, MELVIN SMITH; LUCY C. WILLIAMS, UNMARRIED AND BALDY JUNIOR SMITH; AARON JACOB SMITH; LEWIS AUGUSTUS SMITH; JEANNETTE SMITH TURNER; FANNIE SMITH KINGSBERRY; AND JOHN F. MATTHEWS, COMMISSIONER, MOVANTS-APPELLANTS

No. 719SC419

(Filed 14 July 1971)

Executors and Administrators § 13— payment of debts — order of sale — intestate's undivided interest in realty

The order of sale of an intestate's undivided interest in realty, which is entered for the purpose of paying the debts of the estate, must be supported by a finding that the intestate's personal property was insufficient to pay the debts. G.S. 28-81.

APPEAL by Robert M. Williams, Jr., and wife, Marian Williams; Anna W. Alston and husband, Archie Alston; Sarah Lee W. Smith and husband, Melvin Smith; Lucy C. Williams; Baldy Junior Smith; Aaron Jacob Smith; Lewis Augustus Smith; Jeannette Smith Turner; and Fannie Smith Kingsberry (movants) and John F. Matthews, commissioner (Matthews), from *Hobgood, Judge,* 21 December 1970 Session of Superior Court held in FRANKLIN County.

Thomas F. East, administrator of Mana Agusta (Augusta) Perry, deceased (petitioner), instituted this proceeding on 7 July 1967 alleging that his intestate at the time of her death owned and was in possession of a 1/8th undivided interest, and a 1/6th undivided interest of another 1/8th interest, in a described 168-acre tract of land in Franklinton Township, Franklin County, North Carolina; that this entire 168-acre tract of land had been owned by J. N. Perry (father of Mana Agusta Perry) who died testate on 5 March 1929; that although there was an agreement between the heirs of J. N. Perry in 1947 to partition and divide the land among themselves and to have a map or survey made, "said map or survey and a record of said division has never been recorded in the records of Franklin County or ever confirmed in any way by any court"; that his intestate, Mana Agusta Perry, left no personal estate whatsoever; that the debts of the estate, including funeral expenses and costs of administration, are

approximately $1,500; and that all of the tenants-in-common in the 168 acres of land are parties. The petitioner requested that a guardian *ad litem* be appointed to represent any unknown persons having an interest in the 168-acre tract of land; that an actual partition of the lands be made; and that the portion allotted for Mana Agusta Perry be sold and the proceeds be disposed of as provided by law.

At the September 1969 Session of Superior Court of Franklin County, a trial by jury was waived by the petitioner and the parties then represented by attorney John F. Matthews. After hearing the evidence and considering the stipulations, the court made findings of fact, among which was a finding:

> "This cause coming on to be heard and being heard before the undersigned, C. W. Hall, Judge Presiding over the September, Superior Court, Civil 1969 Session of Franklin County, North Carolina, and the Petitioner, Thomas F. East, Administrator of Mana Agusta Perry, deceased, being represented by E. C. Bulluck, attorney, and several of the respondents being represented by John F. Matthews, Attorney, and upon the call of the case for trial, the parties stipulated, and the Court finds that all respondents and parties interested in the special proceeding were properly served with summons and had been made parties to this proceeding.
>
> That upon motion by E. C. Bulluck, attorney for the Petitioner, and John F. Matthews, attorney for several of the respondents, trial by jury was waived.
>
> The petitioner offered evidence and the respondents offered no evidence, and after due inquiry, the Court finds as a fact from the evidence the following:
>
> (a) That this is a special proceeding, which is before the Superior Court for trial upon the interpretation of the Will of J. N. Perry, deceased, said Will being duly filed for probate in the Office of the Clerk of the Superior Court for Franklin County, North Carolina, and recorded in Will Book W, page 230.
>
> (b) That the Petitioner is the qualified and acting administrator of the Estate of Mana Agusta Perry, deceased, and that the debts of said estate amount to $743.80.

(c) That the lands as described in the petition filed herein are such that an actual partition for division between more than twenty tenants in common owning an interest in said lands is impracticable and that it would be injurious to all tenants in common for said lands to be divided by partition and that said land is rural farm land containing scattered fields and woodland with little other potential; that it is in the best interest of all tenants in common and all parties to this special proceeding that said lands be sold as by law provided for sale of lands for partition and the proceeds, after payment of costs, be divided among the various tenants in common as their interests may appear, as hereinafter set forth."

The court also made findings of fact as to the respective interests of the parties and entered the following order:

"1. That E. C. Bullock and John F. Matthews are hereby by the Court appointed commissioners to sell at public sale as by law provided for sale of lands for partition, the lands described in paragraph six of the petition filed herein, containing 168 acres, more or less, and to report the sale to the Clerk of the Superior Court, Franklin County, North Carolina, for confirmation, who is hereby authorized to carry said sale to conclusion.

2. That E. C. Bulluck and John F. Matthews, Commissioners, after paying all costs of this action and any other costs now accumulated or hereafter accumulated, and taxes and cost of sale, shall disburse the proceeds remaining to the several tenants in common as their interests hereinabove appear.

(3) That E. C. Bullock and John F. Matthews, attorneys, are hereby allowed the sum of $300.00 each as attorneys fees for that portion of this special proceeding which relates to the interpretation of the Will of J. N. Perry, and that this allowance shall in no manner reflect on any amount that they might become entitled to as commissioners in this special proceeding as such, or in the sale of the lands as hereinabove ordered, and that such allowances shall be taxed by the Clerk of the Superior Court as part of the costs of this proceeding.

(4) It is further ordered that this cause is hereby remanded to the Clerk of the Superior Court for Franklin County, North Carolina for such further proceedings and orders as may be necessary to effectuate the same."

There were no objections, exceptions or appeal from this order until 4 May 1970 and 3 June 1970 when all of the movants requested, in writing, that the sale of the lands, as previously ordered by the court and reported to the court, be not confirmed. These motions were denied. Upon motion of petitioner, John F. Matthews was removed by the clerk of superior court as one of the commissioners on 17 June 1970. The clerk ordered that E. C. Bulluck was to continue as commissioner, and he was directed "to promptly proceed to bring this matter to a conclusion as by law provided and as directed by Orders of this Court." On 18 June 1970 movants and Matthews gave notice of appeal to the judge of superior court having jurisdiction.

On 21 September 1970 movants filed a motion alleging they were invoking "Rule 55(d) and Rule 60(b) of the Rules of Civil Procedure (G.S. 1A-1)," asking that the order of Judge Hall, dated 24 September 1969 and ordering the 168-acre tract of land sold, be vacated and set aside on the following grounds:

"1. The said order and judgment for the sale of the entire 168-acre tract of land took us by surprise, in that the petition which we were required to answer asked for an actual partition of the said tract of land in separate tracts or parcels of land as shown by the map of said 168-acre tract made in 1947 by Phil R. Inscoe, Registered Surveyor, which was attached to and made a part of the petition.

2. There is no allegation of facts in the said petition, or in any other pleading served upon us, tending to show that a sale of the entire 168-acre tract was necessary to avoid injury to any of the parties to this proceeding.

3. There was no satisfactory proof of facts before Judge Hall at the September 1969 Civil Session of Superior Court which would tend to show that a sale of the entire 168-acre tract was necessary to avoid injury to any of the parties to this proceeding.

4. There is no sufficient finding of facts in the said order and judgment showing that a sale of the entire

168-acre tract of land was necessary to avoid injury to any of the parties to this proceeding.

5. That in the absence of such allegation, proof and finding of facts showing that a sale of the entire 168-acre tract of land was necessary to avoid injury to any of the parties, the Superior Court was without jurisdiction or authority to order a sale of the entire tract.

6. That as recited in Finding of Fact (a) in the said order and judgment, this special proceeding was before the Superior Court for trial upon the interpretation of the will of J. N. Perry, deceased, and no notice was given to us that the Judge of Superior Court at the September 1969 Civil Session of Franklin County Superior Court would consider any application for sale of the entire 168-acre tract of land.

7. We have a meritorious defense: the 168-acre tract can be divided, and since November 1947 has been divided, into eight parcels as shown on the 1947 Inscoe map attached to the petition, and each parcel respectively has been in exclusive occupation by those entitled to such parcel without injury to or conflict between any of the parties entitled.

8. This motion to set aside and vacate the said order and judgment of 24 September 1969 is made within one year from the date of entry of the same."

Without specifically ruling on the motion to vacate, on 18 December 1970 Judge Brewer, after hearing the appeal of movants and Matthews from the order of the clerk of superior court dated 17 June 1970, entered an order, the pertinent parts being as follows:

"IT IS NOW, ORDERED, that the Order of Ralph S. Knott, Clerk of the Superior Court of Franklin County, North Carolina, dated June 17, 1970, is in all respects, affirmed and that the appeal of the above named respondents and of John F. Matthews, Commissioner, from said Order is overruled and is dismissed.

AND IT IS FURTHER ORDERED that this cause is remanded to the Clerk of the Superior Court of Franklin County for further proceedings, in accordance with law."

Under date of 21 December 1970, the clerk of superior court entered an order of confirmation and directed, among other things, that the sale of the 168-acre tract held on 23 March 1970 by the commissioners for the price of $21,155.00 be approved, ratified and confirmed and ordered that E. C. Bulluck, commissioner, be directed to execute and deliver a deed to the purchaser. The clerk of superior court further ordered that E. C. Bulluck, commissioner, be allowed $3,000 as commissioner's fee. This order of confirmation was approved by Judge Hobgood, the Resident Superior Court Judge of the 9th Judicial District.

On 23 December 1970 the movants appealed the order of confirmation of the clerk of superior court to the "Judge of the Superior Court having jurisdiction."

On 28 December 1970 movants and Matthews served a notice on petitioner of appeal to the Court of Appeals from the order of Judge Brewer dated 18 December 1970.

E. C. Bulluck, and Thomas F. East for petitioner appellee.

John F. Matthews for movants and Matthews, appellants.

MALLARD, Chief Judge.

On 8 June 1971 petitioner filed a motion to dismiss the appeal of movants on the grounds that "this appeal was apparently taken and perfected purely for the purpose of delay." This motion is denied.

Movants contend, among other things, that the judgment ordering the sale should be vacated for fatal defects appearing on the face of the record. When the cause was heard by Judge Hall, jury had been waived and answer had been filed by movants Fannie Smith Kingsberry, Aaron Jacob Smith and Jeannette Smith Turner, together with other alleged tenants in common. John F. Matthews was their attorney. The other movants had not filed answer. After the sale but before confirmation, all movants, represented by John F. Matthews, filed a motion asking that the sale be not confirmed; and thereafter, but before confirmation of the sale, they moved to vacate the order of Judge Hall.

This began as an action by the petitioner under the provisions of G.S. 28-81 for the sale of his intestate's undivided

interest in the real estate described for the purpose of paying the debts of the estate. G.S. 28-81 provides in part:

> "When it is alleged and shown that the real property of the decedent consists in whole or in part of an undivided interest in real property, *and that sale of such undivided interest is necessary to make sufficient assets to pay debts,* including the charges of administration, the personal representative of the decedent may, at the time of applying by petition to sell the real property to make assets, apply by petition for partition of the lands in which the decedent held an undivided interest. Such petition for partition may be joined as a part of the petition to sell the real property, and, when the personal representative petitions for the sale of such undivided interest to make assets, he is a proper party petitioner to the same effect as if he were a joint tenant or tenant in common." (Emphasis added.)

While there was a finding in the order signed by Judge Hall that the debts of the estate of Mana Agusta Perry amounted to $743.80 and that Mana Agusta Perry died owning a 24/1152 undivided interest in the 168-acre tract of land, there is no finding by the judge that the personal estate of Mana Agusta Perry was insufficient to pay all of her debts or that a sale of such undivided interest was necessary to make sufficient assets to pay her debts, including the charges of administration, as required by G.S. 28-81. In the case of *Poindexter v. Bank,* 247 N.C. 606, 101 S.E. 2d 682 (1958), it is said:

> "Moreover, the essential fact *to be found* to enable an administrator to *maintain* a proceeding to sell land to make assets, G.S. 28-81, *et seq.,* is the insufficiency of personal property to pay the debts of the decedent. Therefore there must be definite statements in the petition as to the amount of debts outstanding against the estate, and as to the personal estate, and the application therefore, to enable the court to see that there is such insufficiency of personal property. And the respondents, heirs at law, who are required to be made parties to the proceeding, have the right to plead any defense against a debt for which sale of the lands are to be made." (Emphasis added.)

In the case at bar the petitioner alleged that there were debts of the estate and that there was no personal property

owned by the estate; however, both of these allegations were denied by the answering movants. The issues were thus raised, but the court did not find the essential fact of insufficiency of personal property to pay the debts of the decedent. Absent such a finding, the order of sale for partition was improvidently entered. The motion to vacate the judgment entered 24 September 1969 by Judge Hall should have been allowed.

In view of the foregoing, we do not discuss movants' other assignments of error. The order of Judge Hall dated 24 September 1969 and all subsequent orders entered pursuant thereto are vacated, and this cause is remanded to the Superior Court of Franklin County for further proceedings as provided by law.

Remanded.

Judges CAMPBELL and HEDRICK concur.

IN THE MATTER OF THE CUSTODY OF CYNTHIA DIANE HOPPER, A MINOR CHILD, AND EUGENE THOMAS HOPPER, JR., A MINOR CHILD

— AND —

EUGENE THOMAS HOPPER v. JEANETTE LOMINICK HOPPER MORGAN

No. 7126SC477 and No. 7126SC476

(Filed 14 July 1971)

1. **Courts § 14; Divorce and Alimony § 22— refusal to transfer case from superior to district court**

No abuse of discretion or prejudice has been shown in the refusal of the superior court judge to transfer to the district court a *habeas corpus* proceeding to determine the custody of minor children instituted and pending in the superior court prior to the establishment of district courts in the county. G.S. 7A-260.

2. **Divorce and Alimony § 22— custody proceeding — requirement that father pay attorney fees of mother**

The trial court did not err in requiring the father to pay reasonable attorney fees of the mother in this *habeas corpus* proceeding to determine custody of minor children, where custody of the children had been awarded to the mother by both North Carolina and South Carolina courts, the father's failure to return the children to the mother in South Carolina after a visit in this State forced the mother to come to this State to secure their return, and the father was not providing support for the children as he had been ordered.

3. Divorce and Alimony § 22— dismissal of child custody action — pendency of another action determining custody

Habeas corpus action to obtain custody of minor children instituted by the father in the district court and transferred to the superior court was properly dismissed with prejudice by the superior court judge on the ground that there was pending in the superior court a prior action wherein that court has had jurisdiction of the custody of the children since 1967.

APPEAL in both cases by Eugene Thomas Hopper from *Thornburg, Judge,* 15 March 1971 Session of Superior Court held in MECKLENBURG County.

Both cases were consolidated for argument upon motion of Eugene Thomas Hopper (Hopper) and without objection on the part of Jeanette Lominick Hopper Morgan (Morgan).

Waggoner, Hasty & Kratt by John H. Hasty for Hopper, appellant.

Welling & Miller by Charles M. Welling for Morgan, appellee.

MALLARD, Chief Judge.

CASE NO. 7126SC477

On 10 April 1967 Hopper and Morgan were married to each other but living in a state of separation (Morgan remarried after a divorce). Morgan, the mother, sought custody of the two minor children of the parties on a writ of *habeas corpus* in the superior court. On 25 August 1967 custody was awarded to Morgan with Hopper having visitation rights. Morgan, as a resident of South Carolina, sought and obtained on 19 October 1968 an absolute divorce from Hopper who had been served with process and appeared at the trial. The custody of the two minor children was awarded to Morgan by the South Carolina court with Hopper having visitation rights.

On 6 June 1970, by consent of the parties, the two children came to North Carolina to visit with Hopper. The agreement between the parties was that they were to be returned to South Carolina to the custody of Morgan on 23 June 1970. The children were not returned to the mother at that time.

On 30 June 1970 Hopper filed a motion in the *habeas corpus* proceeding in district court asking that the matter of custody

of the children be reviewed and that he be awarded the custody. From an order of the district court awarding Hopper custody of the two children, Morgan appealed to the Court of Appeals. The *habeas corpus* proceeding had not been transferred to the district court. The order of the district court modifying and changing the order of the superior court was vacated by the Court of Appeals in an opinion in 9 N.C. App. 730, 177 S.E. 2d 326 (1970).

On 30 November 1970 Hopper made a motion in superior court in the *habeas corpus* case asking that it be transferred to the district court. In this motion there appears, among other things, the following:

> "5. That there is presently pending in the District Court Division Case No. 70 CVD 13886 wherein Eugene T. Hopper is Plaintiff and Jeanette Lominick Hopper Morgan is Defendant wherein the Plaintiff seeks custody of the minor children under the provisions of Section 50-13.1 *et seq.*, of the General Statutes of North Carolina;
>
> 6. That it would be in the best interest of all parties and of the minor children herein that whatever remaining jurisdiction the Superior Court might have over the above captioned case be transferred to the District Court Division for hearing and consolidation with the pending District Court case No. 70 CVD 13886."

On 30 November 1970 Morgan filed a motion asking that the cause be retained in superior court, that she be awarded attorney fees, and that the order of Judge Hasty of 25 August 1967 be placed in effect. On 1 December 1970 Hopper filed a motion to dismiss the *habeas corpus* proceeding for lack of jurisdiction, asserting that "the Superior Court of Mecklenburg County under the instant case is without jurisdiction to determine the custody of the minor children or modify said order, and its order of August 25, 1967 has been superseded by further actions taken by the Courts of the State of South Carolina and subsequent pending actions in the District Court of Mecklenburg County, North Carolina, under the provisions of G.S. 50-13.1 *et seq.*"

Hopper filed another motion on 1 December 1970 asking, among other things, that "his original motion removing whatever jurisdiction the Court might have to the District Court

be granted but in lieu thereof should the Court overrule the motion to dismiss for lack of jurisdiction, and to remove this cause to the District Court, that this motion be accepted as a motion in the cause to modify the Court's existing order and to grant custody both temporarily pending the further plenary hearing of this matter and permanently and for cause Eugene T. Hopper asserts that there have been many substantial changes in conditions and circumstances since this Court entered its order on August 25, 1967."

On 3 December 1970 the superior court overruled Hopper's motion to transfer this case to the district court for lack of jurisdiction and entered an order directing that the children be temporarily returned to Morgan and set the matter to be heard in the Superior Court Division.

On 9 December 1970 Morgan, after alleging residence in South Carolina and an order of a South Carolina court awarding custody of the children to her and also a failure of Hopper to make support payments to her for the children as ordered by the courts of North Carolina and South Carolina, moved the court "to dismiss this action for lack of jurisdiction or in the alternative under Section 50-13.5(c) (5) and (6) that this matter be transferred to the Court of Common Pleas for Newberry County, Newberry, South Carolina, and that the respondent be ordered to pay a reasonable attorney fee and expenses to Charles M. Welling for services rendered on behalf of the children."

During the March 1971 Session of Superior Court held in Mecklenburg County, the court again denied a motion of Hopper to dismiss. After a plenary hearing, upon competent evidence and appropriate findings, the court awarded the permanent custody of the children to Morgan with Hopper having visitation rights and ordering Hopper to pay a sum for the support of each child plus a sum for Morgan's attorney. Hopper appealed, assigning error.

Hopper contends that the superior court did not have jurisdiction in the *habeas corpus* proceeding to determine the custody of the minor children.

[1] This *habeas corpus* action was properly instituted and pending in the Superior Court of Mecklenburg County prior to the time of the establishment of district courts there on the first Monday in December 1968. G.S. 7A-131(2). All causes

pending in the superior court at the time of the establishment of the district court remained pending in the superior court unless and until transferred to the district court by proper order. G.S. 7A-259. The motion to transfer the matter to the district court was denied. G.S. 7A-260 provides for review of a failure to transfer a cause. However, it is also provided that " * * * if on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown * * * ." While we do not decide that the failure to transfer the *habeas corpus* proceeding was erroneous, we do hold that no abuse of discretion or prejudice has been shown by the failure to transfer it. Neither did the judge commit error in denying the motions to dismiss it.

[2] Hopper contends that the trial court did not have authority to require him to pay counsel fees and expenses in this proceeding. By failing to abide by his agreement with Morgan to return the children on 23 June 1970, he forced her to come to North Carolina from her South Carolina home to secure the return of the children who had been awarded her by both the North Carolina and South Carolina courts. In addition, Hopper was not providing support for the children as he had been ordered. In *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967), the parties had been divorced, and there was a prior action for alimony without divorce pending. The Supreme Court said with respect to an order requiring the husband to pay attorney fees:

> "Plaintiff's application for a modification of Judge Armstrong's order was necessitated by defendant's refusal to consider plaintiff's request for additional support for the children. Having thus forced her to apply to the court to secure for his children the support to which they are entitled, defendant cannot justly complain at being required to assist in the payment of plaintiff's necessary counsel fees."

In the case at bar we hold that it was not error for the trial judge to require Hopper to pay reasonable attorney fees, and we do not think the amount ordered paid was unreasonable.

CASE No. 7126SC476

This action was filed 20 November 1970 by Hopper against Morgan. In it Hopper alleges, among other things, the former

marriage existing between the parties, the birth of the children, the 1967 order of the Superior Court of Mecklenburg County awarding custody of the two children to Morgan, the divorce of the parties in South Carolina, the custody order entered in South Carolina in October 1968, the motion of Hopper filed on 30 June 1970 in the district court seeking to amend the "existing Superior Court Order and for the custody of the children," and the vacating of the order of the district court judge entered in the *habeas corpus* case in 9 N.C. App. 730, 177 S.E. 2d 326 (1970), in which it was held:

> "This proceeding was pending in the Superior Court of Mecklenburg County when district courts were established in that district. There has been neither an order entered in the superior court transferring it to the district court division pursuant to G.S. 7A-259 nor a motion therefor under G.S. 7A-258. The district court judge was, therefore, without authority to modify the order of the superior court. *Hodge v. Hodge,* 9 N.C. App. 601, 176 S.E. 2d 795 (filed 21 October 1970)."

Hopper also alleged that there had been a change of circumstances and requested the court to award the custody of the two children to him.

On 4 December 1970 Morgan filed a motion saying, among other things:

> "WHEREFORE, the defendant moves the Court that this matter be dismissed (1) because the Court has not acquired jurisdiction of the parties nor of the children, or (2) because there is a prior action pending in the Superior Court Division of the General Court of Justice for the 26th Judicial District wherein the Court has acquired jurisdiction over the children since 1967.
>
> The defendant further moves the Court in the alternative that if this action is not dismissed because of jurisdiction of the Court that it be transferred to the Superior Court Division of the General Court of Justice and consolidated with the prior action pending in the Superior Court Division being captioned In the Matter of the Custody of Cynthia Diane Hopper, a Minor Child, and Eugene Thomas Hopper, Jr., a Minor Child.

WHEREFORE, the defendant in the alternative prays the Court that this matter be transferred from the District Court Division to the Superior Court Division of the General Court of Justice for the 26th Judicial District of the State of North Carolina and consolidated with a prior action pending in said Superior Court Division."

On 19 March 1971 Judge Thornburg issued an order, to which there is no exception in the record (except under the "Statement of Case On Appeal"), directing that this matter be "transferred from the District Court to the Superior Court Division of the General Court of Justice of the 26th Judicial District."

In his brief Hopper has abandoned any objections to the transfer of this matter from the district court to the superior court in the following language:

"No contention is made that the case was improperly transferred to the Superior Court, this being a matter of discretion with the Superior Court Judge and the Appellant is perfectly willing to contest this matter in either forum; however, in view of the Statute (G.S. 7A-244) and the only purpose for transfer being to dismiss the action, it is respectfully submitted that the matter should be reinstated in the District Court."

[3] On 19 March 1971 Judge Thornburg entered an order, to which there is no exception in the record (except under the "Statement of Case on Appeal"), dismissing the action with prejudice "on the grounds that there is a prior action pending in the Superior Court Division of the General Court of Justice for the 26th Judicial District wherein the Court has acquired jurisdiction over the children and has had jurisdiction or the custody of the children since 1967."

We are of the opinion and so hold that under the circumstances of this case, Judge Thornburg properly dismissed the action with prejudice.

The result is: The judgment entered in Case No. 7126SC477 is affirmed. The judgment entered in Case No. 7126SC476 is affirmed.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

JOHN A. BARRINGER v. L. H. WEATHINGTON AND BILLIE WEATHINGTON

No. 7112SC327

(Filed 14 July 1971)

1. **Boundaries § 10— description in deed — insufficiency of description**

Description in a deed which referred to the tract in question as "containing 40 acres entered by Hugh Simpson" was patently ambiguous and could not be aided by parol evidence.

2. **Trial § 3— motion for continuance — failure to make formal motion**

A plaintiff who made no formal motion for continuance cannot complain on appeal that the trial judge failed to grant him a continuance.

3. **Appeal and Error § 30— exclusion of evidence — failure to show what the excluded evidence would have been**

An exception to the exclusion of evidence will not be considered when the record fails to disclose what the excluded evidence would have been.

4. **Rules of Civil Procedure § 50— motion for directed verdict — consideration of evidence**

On a motion for a directed verdict at the close of plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to plaintiff and given the benefit of every reasonable inference, was sufficient to withstand defendants' motion for directed verdict.

5. **Adverse Possession § 17— color of title — fitting description of deed to the boundaries — sufficiency of proof**

The description in the deed under which a plaintiff relies for color of title must fit the boundaries of the land claimed, and the failure to establish the boundaries by sufficient proof merits dismissal of plaintiff's claim.

APPEAL by plaintiff from *Cooper, Judge*, 2 November 1970 Session of CUMBERLAND County Superior Court.

Plaintiff instituted this action seeking damages for trespass and seeking removal of a cloud from his title. Plaintiff alleged that the defendants and their agents entered upon his land without permission, cut and removed timber and stumps from the land, and disced and destroyed the roads and paths of the plaintiff. Plaintiff alleged that the value of the timber and stumps was in excess of $4,000.00 and prays for recovery of double the value of the timber and stumps pursuant to G.S. 1-539.1. Plaintiff also alleged that, upon information and belief, defendants claim title to the land of plaintiff and prays that

the cloud of defendants' adverse claim be removed from his title to the property and that he be declared the owner in fee simple of the property.

Plaintiff asserts title to two contiguous tracts of land in Beaverdam Township, Cumberland County, one tract consisting of forty acres more or less, and the other consisting of fifty acres more or less. As to the forty-acre tract, plaintiff introduced evidence attempting to show title by a record chain of title back to the State and by the adverse possession of one Mary J. Smith and her heirs, plaintiff's predecessors in title, under either the twenty-year statute or the seven-year statute. As to the fifty-acre tract, plaintiff admitted that he could not show title by a record chain of title back to the State but he introduced evidence attempting to show title by the adverse possession of Mary J. Smith and her heirs, plaintiff's predecessors in title.

At the close of plaintiff's evidence, the trial judge directed a verdict in favor of defendants and plaintiff appealed to this Court.

MacRae, Cobb, MacRae & Henley by James C. MacRae for plaintiff appellant.

Williford, Person & Canady by N. H. Person for defendant appellee.

CAMPBELL, Judge.

[1] Plaintiff's first assignment of error is directed at the refusal of the trial judge to admit plaintiff's Exhibit No. 11 into evidence. Plaintiff's Exhibit No. 11 purports to be a deed from one Hugh Simpson to Sarah J. Hales and is essential if plaintiff is to prove a record chain of title back to the State. The purported deed attempts to convey 10 tracts of land to Sarah J. Hales, the eighth tract being the one pertinent to this action and described as follows: "containing 40 acres entered by Hugh Simpson."

A deed or contract to convey land must identify the land or furnish the means of identifying it with certainty by reference to something extrinsic. *Supply Co. v. Nations*, 259 N.C. 681, 131 S.E. 2d 425 (1963). The only requisite as to the certainty of the thing described is that there be no patent am-

biguity in the description. *Norton v. Smith,* 179 N.C. 553, 103 S.E. 14 (1920). There is a patent ambiguity when the terms of the writing leave the subject of the conveyance, the land, in a state of absolute uncertainty, and refer to nothing extrinsic by which it might possibly be identified *with certainty. Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964). When the language is patently ambiguous, parol evidence is not admissible to aid the description. *Lane v. Coe, supra.*

Here, the description, "containing 40 acres entered by Hugh Simpson" neither identifies the land in itself nor does it furnish the means of identifying *with certainty* by reference to something extrinsic. Plaintiff contends that the words "entered by Hugh Simpson" indicate that Hugh Simpson acquired the land by way of a grant from the State and that the land conveyed by the deed is capable of description with certainty by evidence showing that Hugh Simpson received only one forty-acre grant from the State. We disagree. First, the testimony that plaintiff would have given to the jury to show only one forty-acre grant by the State to Hugh Simpson was itself insufficient to accomplish that purpose. In his testimony, taken out of the presence of the jury, plaintiff stated that he found fifteen or twenty grants in the office of the Secretary of State to Hugh Simpson. He also stated: " . . . I found tracts, fifty acres and thirty-eight, or very similar in size." Plaintiff testified that he checked for grants to Hugh Simpson in the period of time from approximately 1719 to 1850. As the deed from Hugh Simpson to Sarah J. Hales was made in 1857, it appears that there was a seven-year period during which Hugh Simpson could have received further grants from the State. Plaintiff did not know the initials of Hugh Simpson and did not check grants to Simpsons with other initials. Plaintiff's testimony was not sufficient to show that Hugh Simpson received only one forty-acre grant from the State.

But even if plaintiff could have shown that Hugh Simpson received only one forty-acre grant from the State, this would not have been sufficient to describe the land with certainty. Hugh Simpson received many other grants of varying sizes. The description given in the purported deed does not preclude the possibility that the 40 acres Hugh Simpson attempted to convey to Sarah J. Hales was a portion of a larger grant entered by Hugh Simpson. As the purported deed was patently ambiguous, the trial judge properly refused to admit it into evidence.

[2] Plaintiff next assigns as error the failure of the court to grant a continuance when one of plaintiff's witnesses was unavailable due to illness. But the record does not reveal a motion on the part of plaintiff for a continuance. The record does reveal the following:

> "Court: [Referring to the sick witness] . . . Now, if his testimony is not going to be available this week, what do you want to do, Mr. Paderick?
>
> Attorney Paderick: I would have to move for a continuance until I could locate someone else that could testify.
>
> . . .
>
> Court: Do you consider his testimony vital to making out the case?
>
> Attorney Paderick: Yes, unless I can find someone else to testify.
>
> Court: I will allow you time to do so. How long do you think it will take to find such a person? . . . "

Plaintiff's attorney never actually moved for a continuance and did not inform the court of the length of time needed to find another witness although the court indicated a willingness to grant additional time. Even had a motion for a continuance been made, the granting or refusing of such a motion is in the sound discretion of the trial judge and his decision will not be disturbed absent a clear abuse of discretion. *Whaley v. Rhodes,* 10 N.C. App. 109, 177 S.E. 2d 735 (1970). No abuse of discretion is shown here.

[3] Plaintiff's third assignment of error is directed at the court's refusal to allow one of plaintiff's witnesses to testify as to who had possession of the Mary J. Smith forty-acre tract of land. The record does not reveal what the witness' answer would have been. An exception to the exclusion of evidence will not be considered when the record fails to disclose what the excluded evidence would have been. *Stith v. Perdue,* 7 N.C. App. 314, 172 S.E. 2d 246 (1970), *cert. denied,* 276 N.C. 498 (1970).

[4] Plaintiff's last assignments of error are directed at the granting of defendants' motion for a directed verdict and at the signing and entry of judgment. On a motion for a directed verdict at the close of plaintiff's evidence, the trial judge must

determine whether the evidence, taken in the light most favorable to plaintiff and giving it the benefit of every reasonable inference, was sufficient to withstand defendants' motion for directed verdict. *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365 (1970), *cert. denied,* 277 N.C. 351 (1970). We are of the opinion that the motion for a directed verdict was properly granted. As previously mentioned, plaintiff was unable to show record title back to the State in regard to the forty-acre tract. Thus, in order to get to the jury, plaintiff had to establish title by other means. He sought to do this by showing that he acquired title to the two tracts of land by adverse possession of himself and of Mary J. Smith and her heirs, plaintiff's predecessors in title.

Adverse possession "consists in actual possession with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit affording unequivocal indication to all persons that he is exercising thereon the dominion of owner." *Price v. Tomrich Corp.,* 275 N.C. 385, 167 S.E. 2d 766 (1969). A party claiming under adverse possession must show possession under known and visible boundaries. G.S. 1-38; G.S. 1-39; *McDaris v. "T" Corporation,* 265 N.C. 298, 144 S.E. 2d 59 (1965).

[5] In order to show that he acquired title by way of adverse possession, plaintiff relied on the testimony of William Hales, Jasper Hales and Fleet Hales. But their testimony was not sufficient to go to the jury. While both William Hales and Fleet Hales, testified that they were familiar with the property and could go around the boundaries of the property by following old chop lines made by old surveys, in no instance were the boundaries described by the witnesses fitted to the description in the deed which plaintiff contends covers the land. When a party offers a deed into evidence which he intends to use as color of title, he must, in order to give legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute. He must not only offer the deed

upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. *McDaris v. "T" Corporation, supra.*

The testimony of the witnesses fails to establish adverse possession for the requisite periods of time under either the seven-year statute under color of title or the twenty-year statute. At most, the witnesses' testimony shows possession of the land and exercise of dominion over it for sporadic periods falling short of the statutory minimums. The only period in which plaintiff's predecessors in title could be construed to be exercising ownership was 1930-34 when Mary J. Smith's sons cut timber from the land.

Fleet Hales testified as to the period around 1907-1908. He testified that he worked turpentine on the forty-acre tract in 1907 and 1908 for Mary J. Smith; that Ashley and Frank Hall worked turpentine for Mary J. Smith for three years prior to that; and that George and Leslie Hall worked turpentine for Mary J. Smith for three years after that. Although this testimony could have been enough to show ownership for seven years under color of title, the witness was unable to relate the boundaries under which he knew the land to the description in the deed which plaintiff introduced to show color of title. Nowhere was any evidence given that would show exercise of acts of dominion over the land for twenty continuous years.

The trial judge correctly granted defendants' motion dismissing plaintiff's action.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

WILLIAM PERRY LONG, ADMINISTRATOR OF THE ESTATE OF LEONARD CARSON LONG v. GEORGE NELSON COBLE, JR., AND JAMES BOYKIN

No. 7113SC242

(Filed 14 July 1971)

1. **Rules of Civil Procedure § 7— form of motions — necessity for statement of rule numbers**

All motions made on or after 1 July 1970 must state the rule number or numbers under which the movant is proceeding. G.S. 1A-1, Rule 6 of the General Rules of Practice for the Superior and District Courts.

2. **Rules of Civil Procedure § 1— date of application**

The Rules of Civil Procedure are applicable to proceedings pending on 1 January 1970.

3. **Rules of Civil Procedure § 17; Death § 3— wrongful death action — real party in interest — ratification of action**

The dismissal of a wrongful death action on the ground that the administrator was not the real party in interest, in that the right of action had passed to the decedent's employer by operation of the Workmen's Compensation law, *held* reversible error where the counsel for the employer and its compensation carrier ratified the commencement of the action within a reasonable time after the motion of dismissal was made. G.S. 1A-1, Rule 17(a); G.S. 97-10.2(d), (h).

4. **Rules of Civil Procedure §§ 12, 56— motion for judgment on pleadings — hearing of extraneous matters — summary judgment**

When matters outside the pleadings are presented and not excluded by the court on a motion for judgment on the pleadings, the motion shall be treated as one for summary judgment. G.S. 1A-1, Rules 12(c) and 56.

5. **Rules of Civil Procedure § 56— summary judgment — notice**

Motion for summary judgment must be served at least 10 days before the time fixed for the hearing on the motion.

APPEAL by plaintiff from *Hobgood, Judge,* 9 November 1970 Session of Superior Court held in BLADEN County.

As administrator of the estate of Leonard Carson Long, plaintiff sought to recover damages of the defendants for the alleged wrongful death of Leonard Carson Long who died intestate on 14 June 1966. Plaintiff alleged that the death of his intestate was proximately caused by the negligence of the defendants in the operation of a truck on a public highway in Bladen County on 14 June 1966. The action was instituted in

Columbus County on 9 January 1968, and summons and complaint were served on defendants on 13 January 1968. On 12 February 1968 defendants filed a motion (allowed by consent on 23 Ferbuary 1968) requesting that the action be transferred to Bladen County for trial.

On 12 February 1968 defendants filed an answer denying the material allegations of the complaint. As a first further answer and defense, defendants alleged the contributory negligence of the plaintiff's intestate. As a third further answer and defense, defendants alleged that the employer of plaintiff's intestate was jointly and concurrently negligent. As a second further answer and defense, and as a plea in bar, the defendants alleged:

> "1. That the plaintiff's intestate was, at the time of the accident complained of, an employee of T. L. Dysard & Son, Inc., and was subject to the Workmen's Compensation Act of the State of North Carolina.
>
> 2. That the employer, through its insurance carrier, Great American Insurance Company, filed with the Industrial Commission a written admission of liability for the benefits provided by the Act.
>
> 3. That more than twelve months had elapsed after the death of plaintiff's intestate before the institution of this action.
>
> 4. That by operation of law, G.S. 97-10.2(c), the rights of the personal representative passed to the employer, or its carrier.
>
> 5. That the complaint does not disclose that the action was instituted in the name of such employee's personal representative by the subrogated employer, or its carrier.
>
> 6. That this action may not be maintained by the personal representative."

By letter dated 1 May 1968 addressed to the clerk of superior court of Bladen County, D. Jack Hooks, attorney for plaintiff (with copy to defendants' attorney), stated that Mr. C. Woodrow Teague of the firm of Teague, Johnson, Patterson, Dilthey & Clay was associated with him in this case and requested that he be shown as counsel of record.

On 29 January 1970 the plaintiff, asserting that the motion was not made for the purpose of delay, moved to be allowed to amend the complaint by adding the following allegations:

> "1A. 'That at the time this accident occurred, Leonard Carson Long, deceased, was employed by T. L. Dysard and Son, Inc.; that as a result of such accident and the resulting death of Leonard Carson Long, deceased, certain workmen's compensation benefits were paid by T. L. Dysard and Son, Inc., and its workmen's compensation insurance carrier, Great American Insurance Company; that this civil action for the wrongful death of Leonard Carson Long, deceased, is being instituted in the name of William Perry Long, administrator of the estate of Leonard Carson Long, deceased, by T. L. Dysard and Son, Inc., Great American Insurance Company and the estate of Leonard Carson Long, as their interests appear as a matter of law.
>
> 6(h). That on the occasion complained of, defendant James Boykin operated said motor vehicle with defective and improper brakes at a time when defendant James Boykin knew, or in the exercise of reasonable care, should have known that such brakes were not operating properly, but despite such knowledge defendant Boykin continued to operate such truck up to and including the moment this accident occurred, knowing the brakes were defective and were not working properly so as to enable defendant Boykin to control the movement of defendant's truck.' "

This motion was signed by D. Jack Hooks and C. Woodrow Teague as attorneys for the plaintiff. In the record on appeal (which was agreed to by the defendants) under the "Statement of Case on Appeal," there appears the following:

> "Attorneys D. Jack Hooks, attorney for plaintiff, and C. Woodrow Teague, attorney for plaintiff's intestate's employer and its subrogated workmen's compensation insurance carrier, filed Motion to amend the Complaint."

Under date of 25 November 1970, the following judgment was entered by Judge Hobgood:

> "THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding at the November 9, 1970, Civil Session of the Superior Court of Bladen

County, upon the motion of plaintiff for leave to amend his complaint, and upon the plea in bar of defendant as set forth in the Second Further Defense contained in the answer.

And the Court having studied the pleadings and heard arguments of counsel for plaintiff and defendant, and D. Jack Hooks, one of the attorneys for the plaintiff, having stated in open Court that when this action was filed on January 8, 1968, he represented only the personal representative of the intestate, and that the cause was not filed in the name of the personal representative by the employee *(sic)* or carrier. And the Court being of the opinion that the motion to amend should be denied and that the plea in bar should be sustained.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the motion of the plaintiff to amend the complaint be, and the same hereby is, denied.

It is further ORDERED, ADJUDGED and DECREED that the plea in bar is sustained and the action dismissed. Costs are taxed against the plaintiff."

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey, and D. Jack Hooks for plaintiff appellant.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellees.

MALLARD, Chief Judge.

Plaintiff contends that the trial judge erred in allowing defendants' "plea in bar" and dismissing the action.

[1] When this case was heard in November of 1970, it was subject to the provisions of G.S. 1A-1, Rule 6 of the General Rules of Practice for the Superior and District Courts, Supplemental to the Rules of Civil Procedure adopted by the Supreme Court on 14 May 1970 to be effective 1 July 1970, which requires that all motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. In this case neither plaintiff nor defendants complied with the provisions of this rule.

[2] Chapter 1A of the General Statutes containing the Rules of Civil Procedure became effective and applicable to proceedings pending on 1 January 1970. *Wickes Corp. v. Hodge,* 7 N.C. App. 529, 172 S.E. 2d 890 (1970). The case at bar was pending on 1 January 1970, and the motion to amend and "plea in bar" were acted upon in November 1970. Therefore, the Rules of Civil Procedure, which became effective 1 January 1970, are applicable. *Gragg v. Burns,* 9 N.C. App. 240, 175 S.E. 2d 774 (1970).

[3] The authority to maintain an action to recover damages for wrongful death in North Carolina is statutory. *Broadfoot v. Everett,* 270 N.C. 429, 154 S.E. 2d 522 (1967). G.S. 28-173 requires that the action be brought by the executor, administrator or collector of the decedent. Under G.S. 97-10.2(d), there is a proviso making the personal representative of a decedent a party plaintiff or defendant if he should refuse to cooperate with an employer in bringing the action under G.S. 97-10.2(c) [which has been amended by Session Laws 1971, ch. 171, effective 1 July 1971]. The action for wrongful death must be brought within two years after the date of the death of the decedent. G.S. 1-53. The personal representative of a decedent, as such, has no beneficial interest in a recovery and is therefore not the real party in interest. *Broadfoot v. Everett, supra.* The amount recovered is not a general asset of the estate, but the personal representative shall dispose of it as provided in G.S. 28-173 and the Intestate Succession Act. G.S. 29-13 provides that "(a)ll the estate of a person dying intestate shall descend and be distributed, subject to the payment of costs of administration and *other lawful claims against the estate,* and subject to the payment by the recipient of State inheritance taxes, as provided in this chapter." (Our italics.) Under the provisions of G.S. 97-10.2, the amounts paid thereunder by an employer and the employer's insurance carrier as compensation or other benefits to a decedent under the Workmen's Compensation Act for disability, disfigurement, or death caused under circumstances creating a liability in some person other than the employer to pay damages therefor, constitute a lien on the amount recovered in a wrongful death action; and this is a lawful claim against the estate.

G.S. 97-10.2 was not enacted to enable a third party tort feasor to defeat a lawful claim. It was enacted to protect the

employee, employer, and the employer's workmen's compensation carrier. This interpretation of the purpose of the act is supported by the provisions of G.S. 97-10.2(h).

When the complaint is construed liberally as is required by the provisions of G.S. 1A-1, Rule 8, we think it constitutes a valid claim for relief. See *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970).

G.S. 1A-1, Rule 17(a), reads as follows:

> "(a) *Real party in interest.*—Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed after objection for ratification of commencement of the action by,* or joinder or substitution of, the real party in interest; and *such ratification,* joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." (Our italics.)

Both the court and the defendants' counsel were notified by letter on 1 May 1968 that C. Woodrow Teague, who was counsel for plaintiff's intestate's employer and its subrogated workmen's compensation insurance carrier, was appearing as counsel of record. When counsel for the employer and his insurance carrier thus participated in the action as counsel for the plaintiff, we hold that this was a ratification of the commencement of the action within a reasonable time after the "plea in bar" had been interposed by the defendants.

[4, 5] We are unable to ascertain from the record whether in entering the judgment the judge was acting under G.S. 1A-1, Rule 12, on a preliminary motion for judgment on the pleadings or under G.S. 1A-1, Rule 56, upon a motion for summary judgment. In order to arrive at the conclusion reached, it is clearly

implied in the judgment that consideration was given to an oral statement of one of the attorneys for the plaintiff which was a matter outside the pleadings. When matters outside the pleadings are presented and not excluded by the court on a motion for judgment on the pleadings, the motion, by the express provisions of G.S. 1A-1, Rule 12(c), shall be treated as one for summary judgment under G.S. 1A-1, Rule 56. The record in this case is devoid of any notice of a motion for summary judgment served on the plaintiff. Under the provisions of G.S. 1A-1, Rule 56, it is required that the motion for summary judgment shall be served at least 10 days before the time fixed for the hearing. See *Ketner v. Rouzer,* 11 N.C. App. 483, 182 S.E. 2d 21 (1971).

We hold that under the factual circumstances of this case and the applicable law, it was error for the trial judge to sustain the "plea in bar" and dismiss the action. See also *Taylor v. Hunt,* 245 N.C. 212, 95 S.E. 2d 589 (1956); *Halladay v. Verschoor,* 381 F. 2d 100 (1967); *E. Brooke Matlack, Inc. v. Walrath,* 24 F.R.D. 263.

We do not deem it necessary to discuss plaintiff's other contentions.

The judgment dismissing the action is reversed.

Reversed.

Judges CAMPBELL and HEDRICK concur.

MRS. SUE W. BASS, WIDOW, ELIZABETH I. NANCE, MOTHER, HORACE G. BASS, FATHER, CARL LEE BASS, DECEASED EMPLOYEE, PLAINTIFFS v. MOORESVILLE MILLS, EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 7122IC234

(Filed 14 July 1971)

1. **Master and Servant § 79— workmen's compensation death benefits — separation agreement — justifiable cause**

A husband and wife are not living separate and apart for "justifiable cause," within the meaning of G.S. 97-2(14), if they are living separate and apart as a result of a mutual agreement evidenced by a legally executed separation agreement.

2. **Master and Servant § 79— workmen's compensation death benefits — separation agreement — misconduct of husband-employee**

In a proceeding to determine the recipient of workmen's compensation death benefits, the deceased employee's wife cannot go behind a legally executed separation agreement in an attempt to show that her separation from the employee-husband at the time of his death was caused by misconduct of the husband.

3. **Husband and Wife § 12— rescission of separation agreement — resumption of conjugal relations**

A separation agreement is rescinded, at least as to the future, by a resumption of conjugal relations.

4. **Master and Servant § 79— workmen's compensation death benefits — separation for justifiable cause**

In this proceeding to determine the recipient of workmen's compensation death benefits, the wife's evidence was sufficient to support a conclusion that she and the employee-husband were living separate and apart for justifiable cause, where it tended to show that they had resumed conjugal relations shortly before his death, that they were living apart only until a female companion of the wife could make arrangements to move so that the husband could move back into the home, and that the companion had made arrangements to move on the weekend following the husband's death and that the husband, had he lived, would have returned to the home at that time.

5. **Master and Servant § 79— workmen's compensation death benefits — separation for justifiable cause**

While "justifiable cause" is usually equated to some form of marital misconduct, it is also applicable where the separation is not intended by the parties to be permanent, the temporary living apart being merely for reasons of convenience.

APPEAL by Elizabeth I. Nance from North Carolina Industrial Commission, opinion and award of 13 November 1970.

Carl Lee Bass died 26 November 1969 as a result of an accident arising out of and in the course of his employment. Mr. Dandelake, Deputy Commissioner, held a hearing for the sole purpose of determining whether the decedent's widow, Sue W. Bass, or his mother, Elizabeth I. Nance, was entitled to the benefits payable under the provisions of the Workmen's Compensation Act. In an order filed 30 June 1970, Mr. Dandelake found, among other things: (1) Decedent and his wife were living separate and apart at the time of his death due to the deceased beating his wife's child by a former marriage. (2) They had been separated since 15 July 1969, after filing a separation agreement. (3) The widow of decedent was living separate and apart from deceased for justifiable cause. (4) No one, other than decedent's wife, was either wholly or partially dependent upon him for support. Based upon these findings, benefits were ordered paid to the wife.

The mother, Mrs. Nance, appealed to the Full Commission. The Full Commission adopted as its own the findings of fact and conclusions made by Mr. Dandelake and affirmed the award. The mother appealed to this Court.

Hugh M. McAulay and J. C. Sedberry for plaintiff appellee Mrs. Sue Wright Bass.

Collier, Harris & Homesley by Walter H. Jones, Jr., for petitioner appellant.

GRAHAM, Judge.

The decedent's mother, as the sole "next of kin," is entitled to the benefits payable under the Workmen's Compensation Act if her son left no dependents within the meaning of the Act. G.S. 97-40. The wife was not actually dependent for her support upon deceased, but under the Act she is nevertheless conclusively presumed to have been fully dependent if she qualifies as a widow within the meaning of that term as defined in the Act. G.S. 97-39.

The term "widow," as defined in G.S. 97-2(14), includes "only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

The mother contends that her son and his wife were living separate and apart pursuant to the terms of a mutual agree-

ment of separation in which the wife had waived any right for maintenance and support. This, she argues, does not constitute living apart for "justifiable cause" within the meaning of G.S. 97-2(14). It was admitted, and the Commission found, that the parties executed such an agreement on 15 July 1969. The Commission made no finding that the agreement was thereafter rescinded, modified or voided for any reason. Thus two questions are raised: (1) Are a husband and wife living separate and apart for justifiable cause, within the meaning of G.S. 97-2(14), if they are living separate and apart as a result of a mutual agreement evidenced by a legally executed separation agreement? (2) Can the wife go behind a legally executed separation agreement in an attempt to show that the separation, though mutually agreed upon, was caused by the misconduct of the husband? We answer both questions in the negative.

[1] Neither question appears to have been previously dealt with by any court decision in this State. As to the first question, there is authority in other jurisdictions to the effect that "justifiable cause," as that term is employed in statutory provisions similar to our G.S. 97-2(14), may not be interpreted as applicable to separations by mutual consent. *Weeks v. Behrend,* 135 F. 2d 258 (D.C. Cir. 1943); *Milton v. Long-Bell Lumber Co.,* 165 La. 336, 115 So. 582; Newman's Case, 222 Mass. 563, 111 N.E. 359; *Olson v. Dahlin Jones Electric Co.,* 190 Minn. 426, 252 N.W. 78; 99 C.J.S., Workmen's Compensation, § 140(3)(c), pp. 474, 475, 476, and cases there cited.

We think the authorities cited above are sound. The beneficial intent of the Workmen's Compensation Act is to grant certain and speedy relief to employees, or, in the case of death, to their dependents. *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N.C. 176, 162 S.E. 223. The legislature, in its wisdom, has made it difficult for widows, widowers and children to be precluded from benefits under the Act by providing in G.S. 97-39 that they shall be conclusively presumed to be dependents. This provision is sound public policy. By the definition of "Widow" as contained in G.S. 97-2(14), however, the legislature has also made it clear that only widows who come within that definition are entitled to this presumption. This is also sound public policy because certainly there is no reason why a separated wife who has surrendered all right to look to the husband for support while he is living, should upon his death, receive benefits that

are intended to replace in part the support which the husband was providing, or should have been providing.

[2] As to the second question, we see no reason why the answer should not be governed by the following well established rule which is set forth in *Jones v. Jones,* 261 N.C. 612, 135 S.E. 2d 554:

> "When a husband and wife execute a valid deed of separation and thereafter live apart, such separation exists by mutual consent from the date of the execution of the instrument. *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525. As long as the deed stands unimpeached, neither party can attack the legality of the separation on account of the misconduct of the other prior to its execution."

In accord: *Edmisten v. Edmisten,* 265 N.C. 488, 144 S.E. 2d 404; *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235.

If the separation agreement, entered 15 July 1969, was in full force and effect at the time of the employee's death, the employee and his wife were, as a matter of law, living separate and apart by mutual consent, and evidence of the husband's prior conduct toward the wife's child by a former marriage would be incompetent and should not be considered.

[4] For the reasons set forth, the opinion and award of the Commission cannot be sustained. However, there was evidence before the Commission which if found to be true would entitle the wife to the benefits claimed. The case must therefore be remanded for consideration of this evidence and a determination of the crucial issues which it raises.

[3] The wife testified that she and her husband had resumed conjugal relations shortly before his death. A separation agreement is rescinded, at least as to the future, by a resumption of conjugal relations. *Tilley v. Tilley,* 268 N.C. 630, 151 S.E. 2d 592; *Hutchins v. Hutchins,* 260 N.C. 628, 133 S.E. 2d 459; *Turner v. Turner,* 242 N.C. 533, 89 S.E. 2d 245. The wife also testified that she and her husband were living apart only until a female companion of the wife, who had been living in the home with the wife during the separation, could make arrangements to move so that the husband could move back into the home. There was evidence tending to show that the companion

had made arrangements to move on the weekend following the decedent's death and that the decedent, had he lived, would have returned to the home at that time.

[4, 5] It is our opinion that the wife's evidence, if found to be true, would support a conclusion that the parties were living apart for justifiable cause. While justifiable cause is usually equated to some form of marital misconduct, it would also seem to be applicable where the separation is not intended by the parties to be permanent, the temporary living apart being merely for reasons of convenience. In some cases a separation of this type is said not to preclude a finding that the wife was living with the husband "at the time of his death" within the terms of the statute, and hence not to preclude the conclusive presumption that she was fully dependent on her husband for support. *Wisconsin Bridge & Iron Co. v. Krueger,* 104 Ind. App. 152, 10 N.E. 2d 423; *Samp. v. Industrial Comm.,* 240 Wis. 559, 3 N.W. 2d 371. "If the living apart of the husband and wife is merely for the mutual convenience or the joint advantage of the parties and the obligation of the husband to support her is recognized, the right of the wife to compensation exists as though they were living together." 99 C.J.S., Workmen's Compensation, § 140(3), pp. 471, 472.

It is clear from the wife's evidence that her theory at the hearing was that the separation agreement had been rescinded and that the fact she and her husband had not resumed cohabitating under the same roof at the time of his death did not constitute a "living separate and apart" within the meaning of G.S. 97-2(14); or, if it did constitute living "separate and apart," it was for justifiable cause arising from the fact the husband could not move back into the home until the wife's female companion moved out.

Evidence about the husband's mistreatment of the child was injected into the hearing in response to questions propounded to the wife by the Deputy Commissioner as to why the separation occurred. While this evidence might have some bearing on the question of why the parties originally separated, it has nothing to do with the essential question of why they were living separate and apart at the time of the husband's death. Furthermore, this evidence is in conflict with all of the evidence directed toward this crucial question. The wife's evidence was that she and her husband were living separate and apart only

because the companion had not moved from the home. The mother's evidence was that they were living separate and apart under the terms of a valid contract of separation.

The case is remanded and the Industrial Commission is directed to make new findings of fact, based on the competent evidence in the record and determinative of the questions at issue.

Error and remanded.

Judges CAMPBELL and BRITT concur.

RAYMOND W. COAKLEY v. FORD MOTOR COMPANY AND GROVER SHUGART MOTORS

No. 7121SC279

(Filed 14 July 1971)

1. **Rules of Civil Procedure § 56— summary judgment — genuine issue for trial**

A party against whom the motion for summary judgment is made may not rest upon the allegations or denials of his pleading, but must demonstrate that there is a genuine issue for trial. G.S. 1A-1, Rule 56(e).

2. **Rules of Civil Procedure § 56— summary judgment**

On motion for summary judgment, the test is whether the moving party presents materials which would require a directed verdict in his favor if offered as evidence at trial.

3. **Automobiles § 6; Sales § 22— defect in car brakes — action against dealer — issue of negligence**

In an automobile owner's action against an automobile dealer for damages allegedly resulting from a latent defect in the master brake cylinder, the owner's failure to show that the dealer could have uncovered the defect by reasonable inspection of the car either prior to the sale of the car or at the time of its 6000 mile checkup warrants the entry of summary judgment in favor of the dealer on the issue of negligence.

4. **Automobiles § 6; Sales § 22— defect in car brakes — action against manufacturer — issue of negligence**

In an automobile owner's action against the manufacturer of the automobile for damages allegedly resulting from a latent defect in the master brake cylinder, plaintiff's evidence that the master cylinder assembly was found to be damaged after the collision complained

of was insufficient to withstand the manufacturer's motion for a directed verdict on the issue of negligence, there being no evidence of any defect existing prior to the time of the accident, or of any negligence by the manufacturer in the selection of materials, in the process of assembly, or in inspection.

5. Negligence § 26— presumption from injury or accident

Negligence is never presumed from the mere fact of an accident or injury, except in the narrow class of cases to which the doctrine of *res ipsa loquitur* is applicable.

APPEAL by plaintiff from *Lupton, Judge,* 19 October 1970 Session of Superior Court held in FORSYTH County.

Plaintiff instituted this action to recover for personal injuries and property damage sustained when plaintiff's automobile, manufactured by defendant Ford Motor Company (hereinafter called "Ford") and sold to plaintiff by defendant Grover Shugart Motors (hereinafter called "Shugart"), collided on 8 August 1966 with an automobile driven by one Coleman in the State of Virginia, due to an alleged malfunction in the braking system of plaintiff's automobile. Plaintiff asserted claims against both defendants for alleged negligence, in various particulars, and breach of warranty. Defendant Shugart denied the material allegations of the complaint, and alleged that there was no brake failure, but that plaintiff's failure to yield the right of way to Coleman caused the accident, or, in the alternative, that plaintiff was contributorily negligent. Defendant Ford likewise denied the material allegations of the complaint and alleged that plaintiff's negligence, in various particulars, was the sole proximate cause of the accident, or, in the alternative, that plaintiff was contributorily negligent. As against the cause of action for breach of warranty, defendant Ford alleged that plaintiff's negligence was the sole proximate cause, or "at least one of the proximate causes of the accident," that plaintiff had waived any warranty, and that plaintiff's action was barred by the terms of the written warranty, which allegedly negated any other warranties. Defendant Shugart instituted a cross-action against defendant Ford for indemnity, in the event that it should be held liable to plaintiff.

On 19 October 1970 summary judgment was entered in favor of defendant Shugart as to both of plaintiff's causes of action, and in favor of defendant Ford as to the cause of action for breach of warranty. The cause came on for trial on the cause of action for negligence as against defendant Ford.

Plaintiff's evidence, insofar as it is relevant to the questions raised on this appeal, tended to show the following. Plaintiff purchased the automobile in question, a 1966 model Ford Mustang, from defendant Shugart on 1 March 1966. At some time thereafter, but prior to the accident, defendant Shugart performed a "6,000-mile checkup" on the Mustang. On 8 August 1966, plaintiff was proceeding north on U.S. Highway 258 in Isle of Wight County, Virginia. At the point where the accident occurred, U.S. Highway 258 intersects U.S. Highway 17 in a "T" intersection, the latter forming the crossbar of the "T," and running in a general east-west direction. Traffic on Highway 258 is directed to yield the right of way to traffic on Highway 17. Plaintiff's intention was to turn left onto Highway 17. Plaintiff brought his automobile to a complete stop, without difficulty, at a point 100-150 feet from the point of collision. Plaintiff then proceeded toward the "yield" sign at a speed of 8-10 miles per hour, observing that all of the east-bound traffic on Highway 17 was turning right (southwardly) onto Highway 258. When plaintiff observed that the automobile operated by Coleman was going to continue straight on Highway 17, rather than turning right onto Highway 258, plaintiff applied his brakes sharply, at a point approximately 20 feet from the Coleman vehicle. The pedal gave slight resistance to plaintiff's foot, and then went all the way to the floor, and the automobile's progress was retarded only very slightly thereby, if at all. The Coleman vehicle, which had come to a stop in the east-bound lane of Highway 17, was struck by plaintiff's automobile on its right front fender and bumper. Plaintiff's speed at the point of impact was 4-7 miles per hour. There were marks of plaintiff's tires approximately 20 feet long leading to the point of impact; however, they were not skid marks, but actual indentions in the soft pavement. Plaintiff had had no trouble with his brakes prior to this occasion, which was his first emergency stop in the Mustang. After the collision, plaintiff's automobile was taken to a nearby garage, where it was found that the master cylinder had separated from the firewall by 2-3 inches on one side, and that the threads of one of the bolts which held the master cylinder in place were partially stripped. The master cylinder was then replaced in position against the firewall, thereby partially restoring the braking power. There was no damage to the firewall in the vicinity of the master cylinder, other than the separation of the master cylinder from the firewall, as described.

The motion of defendant Ford for a directed verdict, made at the close of plaintiff's evidence and renewed at the close of all the evidence, was granted. Plaintiff appealed to this Court.

White, Crumpler & Pfefferkorn, by James G. White and Michael J. Lewis, for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by R. M. Stockton, Jr. and J. Robert Elster, for defendant-appellee, Ford Motor Company.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant-appellee, Grover Shugart Motors.

BROCK, Judge.

The only exceptions which are preserved on appeal are to the entry of summary judgment in favor of defendant Shugart as to the cause of action grounded on negligence, and the allowance of the motion of defendant Ford for directed verdict in the cause of action grounded on negligence. Thus, we are not presented with any question relating to any alleged breach of warranty.

Summary Judgment for Shugart:

In *Veach v. American Corp.*, 266 N.C. 542, 146 S.E. 2d 793, the Court said:

> "As to the seller of a chattel known to have been manufactured by another, the rule has been stated as follows: 'A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use.' [citation]. Under this rule, liability depends upon whether such seller, by the exercise of reasonable care, could have discovered the dangerous character or condition of the chattel. [citations].
>
> "If, under the indicated circumstances, the seller knows or should have discovered a latent defect in the chattel of such nature that he, by the exercise of due care, could reasonably foresee it was likely to cause injury in the ordinary use thereof, and the seller fails to warn the buyer of

such defect, the seller is liable to a buyer who, without any negligence of his own, makes ordinary use thereof and is injured on account of such defect. [citations]."

In support of his contention that it was error to grant the motion of defendant Shugart for summary judgment on the cause of action for negligence, plaintiff contends that the jury should have been allowed to determine whether Shugart, in the exercise of reasonable care, could have discovered the alleged defect, which the complaint acknowledged to be latent.

[1-3] In resistance to a motion for summary judgment, properly supported, the party against whom the motion is made may not rest upon the allegations or denials of his pleading, but must demonstrate that there is a genuine issue for trial. G.S. 1A-1, Rule 56(e). In support of its motion, defendant Shugart offered the affidavit of Alex Simmons, defendant's service manager, which tended to show that "the usual 6,000-mile checkup does not include inspection of latent defects such as determining whether any of the bolts in the master cylinder are improperly threaded." Plaintiff offered no evidence to the contrary. On motion for summary judgment, the test is whether the moving party presents materials which would require a directed verdict in his favor if offered as evidence at trial. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865. In order to withstand a motion for nonsuit (or for directed verdict, under present practice), a plaintiff must offer evidence tending to show each element of actionable negligence. *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661. Assuming that the brake failure was caused by a defective master cylinder assembly, plaintiff has offered no evidence as to whether a reasonable inspection, either prior to the sale or at the time of the 6,000-mile checkup, would have disclosed the defect. The question may not be left for conjecture. Summary judgment was properly entered in the action against Shugart.

Directed Verdict for Ford:

There was evidence, consisting of testimony by plaintiff, upon which the jury could have found that plaintiff's brakes failed to function, and that such failure was the proximate cause of the collision. Defendant contends that the evidence discloses that plaintiff was contributorily negligent as a matter of law. In our opinion the evidence does not show that negligence of plaintiff proximately caused the collision.

[4] The question remains whether there was evidence upon which the jury could have found that the brake failure was a proximate result of negligence of defendant Ford.

In the case of *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302, relied upon by plaintiff, there was testimony of a pre-existing defect in the master cylinder assembly of plaintiff's automobile, which could have caused the brakes to malfunction as alleged, and the case is distinguishable for that reason. In *Dupree v. Batts*, 276 N.C. 68, 170 S.E. 2d 918, also cited by plaintiff, it was shown that the cause of the accident was the defendant manufacturer's use of an inferior grade of steel in the wheel of plaintiff's automobile.

[5] In the present case, there was no evidence of any defect existing prior to the time of the accident, or of any negligence on the part of defendant Ford in selection of materials, in the process of assembly, or in inspection. All that is shown with regard to any alleged defect is that the master cylinder assembly was found to be damaged after the collision. For all that appears, this could as well have been a result of the collision. Even if the evidence would support an inference that the master cylinder assembly became separated from the firewall prior to the collision, and that the brake failure was caused thereby, there is no evidence of negligence on the part of defendant Ford. Negligence is never presumed from the mere fact of an accident or injury, except in the narrow class of cases to which the doctrine of *res ipsa loquitur* is applicable. The plaintiff has the burden of establishing not only negligence, but also that such negligence was the proximate cause of his injury. Evidence which merely takes the matter into the realm of conjecture is insufficient. Plaintiff's evidence fails to show actionable negligence or any causal relation between the condition of the automobile when it was purchased and the accident resulting in his injury. cf. *Harward v. General Motors Corp.*, 235 N.C. 88, 68 S.E. 2d 855. Directed verdict was properly granted.

Plaintiff also assigns as error the exclusion of certain testimony relating to the working of automobile brakes. To the extent that the testimony is made to appear in the record, it would not, even if admitted, have cured the fundamental defect in plaintiff's case, to wit, the failure to show actionable negli-

gence on the part of defendant Ford. Therefore, the exclusion was, at most, harmless error.

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE SCOTT

No. 7114SC456

(Filed 14 July 1971)

1. **Receiving Stolen Goods § 1— proof of guilty knowledge**

In order to sustain a conviction of receiving stolen property, it must be shown that defendant knew the goods had been stolen; however, guilty knowledge need not be shown by direct proof of actual knowledge, but may be implied from evidence of circumstances surrounding the receipt of the goods.

2. **Receiving Stolen Goods § 5— guilty knowledge — sufficiency of evidence**

The State's evidence was sufficient for the jury to find that defendant knew goods he received had been stolen where it showed that defendant knew the goods did not belong to the person from whom he received them, that when the goods were discovered by the police, defendant acknowledged that they had been stolen, and that defendant bought the goods for only a small fraction of their value.

3. **Receiving Stolen Goods § 5— nonfelonious receiving — variance between indictment and proof of portion of property**

In this prosecution for receiving stolen property, variance between the indictment and proof as to the ownership of part of the stolen property allegedly received by defendant was not fatal where the court submitted only the issue of nonfelonious receiving, thereby removing any issue as to the value of the property, and the evidence showed that some of the stolen property was owned by the person named in the indictment.

4. **Receiving Stolen Goods § 1— felonious receiving without regard to value of the property**

In order for the crime of receiving stolen property to be rendered a felony by G.S. 14-72(c) without regard to the value of the property, the defendant must have known not only that the property was stolen, but also that the theft was accomplished under circumstances enumerated in G.S. 14-72(b).

5. **Receiving Stolen Goods § 6— goods stolen by breaking and entering — submission of nonfelonious receiving**

The trial court did not err in submitting to the jury the issue of nonfelonious receiving where there was no evidence that defendant

knew that theft of the property had been accomplished by breaking and entering.

6. **Criminal Law § 84; Searches and Seizures § 4— search warrant for narcotics — seizure of stolen property**

Police officers lawfully seized items of stolen property where the officers were on the premises pursuant to a valid warrant to search for narcotics, the officers observed the items, which were in plain sight, and suspected they were stolen, and defendant freely acknowledged that the items were stolen prior to their seizure.

7. **Receiving Stolen Goods § 6— instructions on guilty knowledge**

In this prosecution for receiving stolen goods, the trial court erred in instructing the jury that the test of guilty knowledge is whether a reasonable man would or should have known or suspected that the goods were stolen, the test being whether defendant did know them to be stolen, either by proof of actual knowledge or because, under the circumstances, he must have known the goods were stolen.

APPEAL from *Hobgood, Judge,* 4 January 1971 Session of Superior Court held in DURHAM County.

Defendant was charged in an indictment with feloniously receiving stolen goods, consisting of one Sears turntable, one Singer portable electric typewriter, and one Zenith television set, of the value of $538.00, allegedly stolen from one Glenn Peterson.

The facts, insofar as they are material to the issues raised on this appeal, may be summarized as follows. On 29 October 1970, Officer Ronald Cooper of the Durham Police Department obtained a search warrant to search the premises described as 116 Bond Street in the City of Durham, for certain narcotic drugs believed to be in the possession of one Joyce Glenn. Officer Cooper went to that location in the company of several other officers, at approximately 8:00 p.m. on 29 October 1970. The search warrant was read to Joyce Glenn, whereupon the officers commenced the search. While conducting the search, he noticed a typewriter and a turntable which he believed to be stolen because similar items were listed on the "hot sheet" (a list of stolen property which is circulated to law enforcement officers). The defendant stated that Joyce Glenn "had nothing to do with it; that he was responsible for anything in the house." Officer Cooper then advised the defendant of his rights. The defendant was prohibited from leaving the house, but was not arrested, nor was his movement within the house impeded.

The defendant pointed out to the officers certain items in the house which were stolen property. The officers seized two pistols, a hypodermic needle and syringe and approximately $3,000 worth of stolen property, including the typewriter and turntable in question. The television set has not been recovered. At the officers' request, defendant accompanied them to the police station. The following afternoon, defendant was interviewed at the police station by Detective Cameron, at which time defendant admitted having had the turntable, typewriter, and television set, but that he had given the television set to a man who was out of town. He stated that he had received the property from three members of a band called the Dorvells. Detective Cameron informed defendant that he was not charged with any offense at that time. Defendant was never formally charged until 23 November 1970, when the indictment was returned by the grand jury. The three items of property named in the indictment were stolen from an apartment in Durham which was shared by Glenn Peterson and Lamar W. Sessoms, Jr., on 26 October 1970, by one Terence Little, who gained entry to the apartment by unlocking and climbing through a window. The turntable was valued at about $199.88, and was the property of Sessoms. The television set was valued at about $159.00, and was the property of Peterson. The typewriter was valued at about $129.00, and was owned jointly by the two. Little took the items to the defendant, from whom he had purchased heroin on prior occasions, in the hope of trading them for drugs. The defendant offered $5.00 for the typewriter, $10.00 for the televison set, and $10.00 for the turntable. Little then traded the items for drugs and left. Defendant solicited and received permission from Little to tell the police or anyone else that he had received the items from Little.

The Court submitted to the jury only the offense of non-felonious receiving. From a verdict of guilty and judgment of imprisonment entered thereupon, defendant appealed to this Court.

Attorney General Morgan, by Staff Attorney League, for the State.

Kenneth B. Spaulding and Norman E. Williams for defendant-appellant.

BROCK, Judge.

I.

Defendant assigns as error the denial of his motion for judgment as of nonsuit for the reasons that (1) the evidence was insufficient for the jury to find that defendant knew the goods to have been stolen, (2) that there was a fatal variance between the indictment and the proof with regard to the ownership of the stolen property, and (3) that the facts of the case would not permit a verdict of guilty of nonfelonious receiving and that, therefore, the court having nonsuited the felony, nothing remained for the jury to consider.

[1, 2] (1) In order to sustain a conviction, it must be shown that defendant knew the goods to have been stolen. However, guilty knowledge need not be shown by direct proof of actual knowledge, as by proof that defendant witnessed the theft, or that such theft was acknowledged to him by the person from whom he received the goods; rather, such knowledge may be implied by evidence of circumstances surrounding the receipt of the goods. *State v. Miller,* 212 N.C. 361, 193 S.E. 388. The test is whether defendant knew, *or must have known,* that the goods were stolen. *State v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814. In the case at bar, it was shown that defendant knew the goods did not belong to Little at the time defendant received them from Little; that, when the goods were discovered by police, defendant acknowledged that they had been stolen; and that defendant offered Little only a small fraction of the value of the goods. It must be acknowledged that there was certain evidence which tended to negate the requisite of guilty knowledge. However, considering the evidence in the light most favorable to the State, as we must upon a motion for nonsuit, we hold that there was sufficient evidence for the jury to find that the defendant knew that the goods had been stolen.

[3] (2) The indictment charges defendant with receiving the three items in question, being the property of Glenn Peterson, and having a total value of $538.00, whereas the evidence shows that Peterson owned one of the items himself, that Sessoms owned another, and that the third was owned by Peterson and Sessoms jointly. This, contends defendant, was a fatal variance requiring nonsuit. However, there was evidence that certain of the property described in the bill of indictment was owned by

Peterson, was stolen by Little, and was received by defendant. The Court having submitted to the jury only the offense of nonfelonious receiving, thereby removing from consideration any issue as to the value of the property, defendant was not prejudiced.

[4, 5] (3) Defendant contends that, under G.S. 14-72(c), the crime of receiving stolen property, knowing it to be stolen, is rendered felonious in all cases in which the theft was accomplished under any of the circumstances enumerated under G.S. 14-72(b) and that, therefore, the Court having granted his motion for nonsuit as to felonious receiving, it was error to submit the misdemeanor to the jury. We think it obvious that G.S. 14-72(c) requires knowledge on the part of defendant, not only that the property was stolen, but also that such theft was within the ambit of G.S. 14-72(b). There is no evidence to show that defendant knew that the theft by Little was accomplished by breaking and entering; hence G.S. 14-72(c) has no application to this case. The Court was of the opinion that the evidence as to the value of the property was insufficient for the jury to find defendant guilty of receiving stolen property of a value in excess of $200.00, and the correctness of that determination is not before us on this appeal. The Court properly submitted to the jury the offense of nonfelonious receiving.

II.

[6] Defendant assigns as error the admission of the evidence obtained during the search, upon the ground that the search and seizure were in violation of the Fourteenth Amendment to the United States Constitution. It appears from the record that the sequence of events was as follows. The officers entered the premises and read the search warrant to Joyce Glenn. During the course of the search, they noticed the turntable and typewriter and, suspecting that these might be the items listed on the "hot sheet" as stolen, asked Joyce Glenn if the items were hers. The defendant, at that point, interjected that Joyce Glenn had nothing to do with it, and that he was responsible for anything in the house. There was no conversation between the officers and the defendant prior to that time. After being advised of his rights, the defendant then pointed out to the officers a number of items as being stolen property, including the turnable and typewriter in question. It is conceded that the officers were lawfully present upon the premises, pursuant to

a valid search warrant. "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. Simmons,* 10 N.C. App. 259, 178 S.E. 2d 90. Defendant contends that the foregoing rule has no application to this case for the reason that the typewriter and turntable, although they were in plain sight, were indistinguishable from other similar articles, that the illegality of their possession by defendant was not obvious, and that, therefore, there was no probable cause for their seizure. The stolen articles were not seized until after defendant had freely acknowledged that they were stolen and after this acknowledgment there was ample probable cause.

This assignment of error is overruled.

III.

[7] Defendant assigns as error the portion of the Court's charge to the jury in which the element of guilty knowledge was defined. The relevant portion of the charge is as follows:

> " . . . The Court instructs you that the existence of guilty knowledge is to be regarded as established when the circumstances surrounding the receipt of the property were such as would charge a reasonable man with notice or knowledge or would put a reasonable man upon inquiry, which, if pursued, would disclose that conclusion."

In *State v. Stathos,* 208 N.C. 456, 181 S.E. 273, an instruction of similar import was held to constitute reversible error. The test is not whether a reasonable man would or should have known or suspected that the goods had been stolen. Rather, it is whether the defendant *did* know them to be stolen, either by proof of actual knowledge or because, under the circumstances, it can be said that he must have known that the goods were stolen. See *State v. Miller* and *State v. Oxendine, supra.* We hold that the portion of the charge above quoted constitutes prejudicial error, for which defendant is entitled to a new trial.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DAVID ARVEL PARKER

No. 7115SC366

(Filed 14 July 1971)

1. **Arrest and Bail § 3; Searches and Seizures § 1— arrest without warrant — search of the person — possession of LSD — validity of the arrest and search**

The warrantless arrest of defendant for the felonious possession of LSD and the subsequent warrantless searches of his person were lawful, where (1) the arresting officer received information from a reliable informant that two unknown persons, accompanied by the defendant, were on a certain street and that the two unknown persons had narcotic drugs in their possession; (2) the officer briefly observed the three suspects walking on the sidewalk; (3) the officer arrested the defendant on the street for the possession of narcotic drugs, but the search of defendant's person at that time uncovered no drugs; and (4) a subsequent "strip search" at the police station resulted in the finding of 13 LSD tablets in defendant's clothing. G.S. 15-41.

2. **Searches and Seizures § 1— search without warrant — conflicting testimony on voir dire**

Trial court's finding of fact that the arresting officer had placed the defendant under arrest prior to his search of the defendant's person was supported by the arresting officer's own testimony on *voir dire*, although there was tape-recorded evidence of the officer's statement at the preliminary hearing that the defendant was not placed under arrest until after LSD was found on his person at the police station.

3. **Narcotics § 1— possession of LSD**

It is a felony to possess LSD in any quantity for any purpose in the absence of proof that the possession was lawful under the provisions of the Narcotic Drug Act.

APPEAL by defendant from *Bickett, Judge,* at the 14 January 1971 Criminal Session of ORANGE Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging that on 10 December 1970 he did unlawfully, wilfully and feloniously have in his possession a quantity of narcotic drugs, to wit: Lysergic Acid Diethylamide (LSD) for the purpose of sale. The jury returned a verdict of guilty and the court imposed a prison term of not less than three nor more than five years. It appearing to the court that defendant was AWOL from the Army and had not attained age 21, it was ordered that defendant be committed to a camp for youthful offenders "but not as a committed youthful offender." From the judgment imposed, defendant appealed.

Attorney General Robert Morgan by Walter E. Ricks III, Associate Attorney, for the State.

Graham & Cheshire by Lucius M. Cheshire for defendant appellant.

BRITT, Judge.

[1] All of defendant's assignments of error relate to the admission of testimony by Chapel Hill police officers to the effect that pursuant to a search of defendant's person and clothing they found 13 tablets of LSD. Prior to the introduction of evidence, defendant moved to suppress the evidence pertaining to the LSD. The court conducted a *voir dire* after which it declared the evidence admissible.

It is undisputed that the arrest of defendant and the searches of his person were without an arrest warrant or a search warrant. The evidence of Chapel Hill police given at the *voir dire* is summarized in pertinent part as follows: Around 3:00 p.m. on 10 December 1970, Lt. Pendergrass of the Chapel Hill Police Department received information from a source that had provided police with reliable information in the past, that two persons, whose names were unknown, accompanied by a third person known to Chapel Hill police, were on the south side of Franklin Street in Chapel Hill near the Methodist Church and that the two unknown persons had narcotic drugs in their possession. As a result of this information, Lt. Pendergrass and two other police officers went by car from the police station to East Franklin Street where they saw the three suspects walking on the sidewalk. After observing them for a brief period of time, the police approached the suspects; Officer Allison testified that he arrested defendant, telling defendant that he was under arrest for possession of narcotics. A subsequent search of the defendant on Franklin Street failed to reveal any narcotics. Thereafter defendant and the other men were carried to the police station where they were "strip searched"; as a result of this search 13 tablets of LSD were found in defendant's clothing. Thereafter police obtained a warrant for defendant charging him with felonious possession of narcotic drugs.

Defendant testified on *voir dire,* stating that he was not placed under arrest until after he was searched at the police station and the LSD was found. Defendant introduced into evi-

dence a tape recording of the testimony of Lt. Pendergrass given at the preliminary hearing in district court; this testimony included a statement to the effect that it was after the LSD was found that defendant was placed under arrest.

Following the *voir dire,* the trial judge found as a fact that the Chapel Hill police had reliable information that a felony was being committed, that they had reasonable grounds to believe that a felony was being committed by defendant, and that they had a right to arrest without a warrant; "that the search made at the scene on Franklin Street was lawful and a lawful incident of the arrest and that the defendant was carried to the Chapel Hill Police Department under arrest and that he was under lawful arrest and that a more private search could be made at the jail than could be made on Franklin Street, and that the search of Mr. Parker (defendant) in the jail by the detectives in which they discovered 13 * * * (LSD) pills was lawful; that all arrests, searches and seizures were lawful and that said evidence is competent to be admitted into trial."

[2] We hold that the searches of defendant were not unlawful and that the 13 LSD pills found in defendant's clothing were properly admitted into evidence. Although evidence presented by defendant at the *voir dire* indicated that he was not arrested until after the LSD was discovered, there was evidence to the contrary which the trial judge elected to believe and which was sufficient to support his finding that defendant was placed under arrest prior to any search.

[3] A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544 (1965). In the course of such search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof; if such article is otherwise competent, it may properly be introduced in evidence by the State. *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1969). It is a felony to possess LSD in any quantity for any purpose, in the absence of proof that the possession was lawful under the provisions of the Narcotic Drug Act. *State v. Roberts, supra.*

The right of a police officer to arrest a person without a warrant is set forth in G.S. 15-41, which reads as follows:

"*When Officer May Arrest Without Warrant.*—A peace officer may without warrant arrest a person:

"(1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence;

"(2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

We hold that the police officers in the instant case had reasonable ground to believe that defendant was committing a felony in their presence, and that defendant would evade arrest if not taken into custody immediately.

Defendant strenuously contends that the search at the police station was unreasonable and violated his constitutional rights. We do not agree and refer to the well written opinion by Judge Vaughn in *State v. Jones,* 9 N.C. App. 661, 177 S.E. 2d 335 (1970); we think the opinion and authorities cited in that case fully support our conclusion in the instant case.

For the reasons stated, we find

No error.

Judges CAMPBELL and GRAHAM concur.

APPALACHIAN SOUTH, INC. v. CONSTRUCTION MORTGAGE CORPORATION

No. 7124SC371

(Filed 14 July 1971)

1. Usury § 1— transactions usurious — construction loan commitment

A construction loan commitment which charged an annual interest of 7¾%, plus a "service fee" of ½% per month on the outstanding balance, the loan to be paid within one year, was usurious. G.S. 24-8

2. Usury § 1— application of usury laws — loan on realty in this State

A loan secured by real estate located in North Carolina is subject to the laws of North Carolina relating to interest and usury.

APPEAL by plaintiff from *Froneberger, Judge,* 12 December 1970 Session of Superior Court held in WATAUGA County.

Plaintiff alleges that it is a North Carolina corporation with offices in Boone, North Carolina, and that on or about 27 May 1968 defendant, a Virginia corporation qualified to do business in North Carolina, agreed to loan plaintiff the sum of $375,000.00 for the construction of certain apartment houses, consisting of dwelling units for more than four families in the aggregate for each apartment house for a total of 76 family dwelling units, upon plaintiff's real estate at 827 Faculty Street, Boone, North Carolina. The loan was to bear "interest" at the rate of 7¾ per cent per annum and a "service fee" of one-half of one per cent per month with a maturity date of 30 May 1969. Defendant disbursed certain sums of money to plaintiff as agreed but retained ten per cent out of each disbursement. For the use of the money loaned, defendant charged and plaintiff paid the sum of $20,130.22 in "interest," $15,566.72 in "service charges," and $1,450.00 in "inspection fees," for a total of $37,146.94. The maximum amount the defendant was permitted to charge under the law for the use of the money was $14,567.00, and the collection of more than was allowed by law was usury.

In its answer defendant denied the material allegations of the complaint and by way of further defense alleged that the contract for the loan was made in the Commonwealth of Virginia and under the laws thereof is not usurious.

After interrogatories were answered and requests for admissions were complied with, plaintiff made two motions: One for summary judgment pursuant to G.S. 1A-1, Rule 56, and the other for judgment on the pleadings under G.S. 1A-1, Rule 12(c), and on 7 October 1970 served notice of these motions by mail on defendant. On 9 November 1970 the parties stipulated as follows:

> "1. On or after May 31, 1968, the plaintiff and defendant entered into an Agreement (Loan Commitment) by the terms of which defendant agreed to lend plaintiff certain sums of money for the construction of an apartment complex consisting of dwelling units for more than four families in the aggregate for each apartment house, on land owned by plaintiff in Boone, Watauga County, North Carolina.

2. The terms of the construction loan commitment from the defendant to the plaintiff were in the form of a letter from Mr. J. R. Wood, Vice President of the defendant Corporation, dated May 27, 1968, to Mr. Larry Maher, of the plaintiff Corporation. The verbatim terms of said loan commitment, as accepted, are set forth in Exhibit A attached to the plaintiff's Request for Admissions.

3. The construction loan from the defendant to the plaintiff was evidenced by a Promissory Note executed by the plaintiff to the defendant in the face amount of $375,000.00, dated June 14, 1968, and personally endorsed by Larry W. Maher and wife, Garnett L. Maher, an exact copy of said Note being attached to plaintiff's Request for Admissions as Exhibit B.

4. The construction loan Note was secured by a Deed of Trust from plaintiff to J. W. Keith, Jr., and James R. Wood, Trustees, dated June 14, 1968, wherein plaintiff conveyed certain real estate located in the County of Watauga, State of North Carolina. Said Deed of Trust was filed for recording in the Register of Deeds' Office for Watauga County, North Carolina, on June 24, 1968, at 3:45 o'clock p.m., and was duly recorded in Deed Book 116 at page 443, in said office. A copy of said Deed of Trust setting forth the verbatim terms thereof and certified by the Register of Deeds for Watauga County, North Carolina, is attached to the plaintiff's Request for Admissions as Exhibit C.

5. The defendant disbursed certain sums of money to plaintiff pursuant to the construction loan over the period from June, 1968, through February, 1969.

6. Mr. John Bingham, attorney at law, Boone, North Carolina, performed a title examination of the real estate constituting the security for the loan from the defendant to the plaintiff. However, some of the other legal matters incident to this construction loan were handled by defendant's counsel.

7. The rate of interest which defendant charged plaintiff for the construction loan was 7¾%. The total amount of money that defendant charged plaintiff for 'interest' in connection with the construction loan was $20,220.22.

8. The percentage rate that defendant charged plaintiff as service charges in connection with the construction loan was ½ of 1% per month on the unpaid balance. The total amount of money that defendant charged plaintiff for 'service fees' in connection with the construction loan was $15,637.74.

9. The defendant made certain inspections of the apartment complex as construction progressed and charged plaintiff $75.00 for each inspection. The total amount of money that defendant charged plaintiff for 'inspection fees' was $1,450.00. Most of the inspections were made by Mr. M. F. Brooks of Kingsport, Tennessee.

10. The plaintiff repaid the principal of the loan to defendant, together with the sum of $37,307.96 to defendant as 'interest', 'inspection fees', and 'service charges.' The construction loan Note and Deed of Trust were marked paid on May 14, 1969, by defendant and the Deed of Trust was cancelled of record in the office of the Register of Deeds for Watauga County, North Carolina, as reflected on Exhibits B and C, respectively, which are attached to the plaintiff's Request for Admissions."

The deed of trust referred to in paragraph 4 of these stipulations was cancelled on 14 May 1969. The note referred to in paragraph 3 of these stipulations was dated 14 June 1968 and reads, in pertinent part:

"FOR VALUE RECEIVED, the undersigned promises to pay to the order of CONSTRUCTION MORTGAGE CORPORATION in lawful money of the United States of America the principal sum of THREE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS ($375,000.00) and interest thereon on the unpaid balance at the annual rate of one percent above the prime rate prevailing from time to time in the Federal Reserve District in which the property is located, provided, however, that in no event shall the rate exceed the contract interest rate permitted in the jurisdiction wherein the property is located. Interest only to be paid on the first day of each month beginning with the first day of each month following the date hereof, and the entire indebtedness, unless sooner paid, shall be due on May 30, 1969."

When the cause came on for a hearing, the parties stipulated "that the Court may hear the evidence, find the facts and make its conclusions of law, either in term or out of term."

Plaintiff and defendant both offered evidence. The trial judge, without specifically ruling on the plaintiff's motion for summary judgment and judgment on the pleadings, made findings of fact and conclusions of law and entered a judgment that plaintiff recover nothing.

Plaintiff appealed, assigning error.

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

Adams, Kleemeier, Hagan, Hannah & Fouts by Walter L. Hannah and Joseph W. Moss for defendant appellee.

MALLARD, Chief Judge.

[1, 2] The loan commitment referred to in paragraph 2 of the stipulations provided that interest would be charged on the outstanding balance due on the loan at the rate of 7¾% per annum, plus a "service fee" of one-half of one percent per month payable monthly on the outstanding balance. The note, by its terms, was not usurious; however, under Chapter 24 of the General Statutes in effect at the time the loan involved herein was made, the loan commitment, which was made a part of the stipulations, provided on its face for the extracting of more than the specified legal rate for the hire of money allowed at the time and under the circumstances and conditions of this loan.

The statutes against usury forbid the extraction or reception of more than the specified legal rate for the hire of money. At the time this loan was made and paid, the provisions of G.S. 24-8 allowing a corporation to charge as much as 8 per cent interest, under certain circumstances, was not applicable to this transaction because the loan matured within less than five years from the date thereof by the terms of the note.

Where the loan is secured by real estate located in North Carolina, the loan is subject to the laws of North Carolina relating to interest and usury. *Meroney v. B. and L. Assn.*, 116 N.C. 882, 21 S.E. 924 (1895).

It is said in *Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971), that:

> "In an action for usury plaintiff must show (1) that there was a loan, (2) that there was an understanding that the money lent would be returned, (3) that for the loan a greater rate of interest than allowed by law was paid, and (4) that there was corrupt intent to take more than the legal rate for the use of the money. (citations omitted) The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. (citations omitted) Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. (citations omitted) And where there is no dispute as to the facts, the court may declare a transaction usurious as a matter of law. (citation omitted)"

The stipulations by the parties judicially admitted: There was a loan of money from defendant to plaintiff; it was to be repaid; the money was for a construction loan on real property situated in Watauga County and secured by a deed of trust thereon; it was due and was repaid within a year after the date thereof; a greater rate of interest than allowed by law was charged and collected; and the interest was charged and collected intentionally.

We hold that the trial judge committed error in failing to allow plaintiff's motion for summary judgment. *Kessing v. National Mortgage Corporation, supra.* The judgment of the superior court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges CAMPBELL and HEDRICK concur.

Price v. Price

RALPH CLAY PRICE AND FIRST CITIZENS BANK AND TRUST COMPANY, AS TRUSTEES OF "TRUST ONE" UNDER THE LAST WILL AND TESTAMENT OF ETHEL CLAY PRICE, DECEASED v. RALPH CLAY PRICE, INDIVIDUALLY; RALPH CLAY PRICE, AS EXECUTOR OF RALPH CLAY PRICE, JR., DECEASED; JULIAN PRICE II; RACHEL ILENE PRICE, A MINOR, LOUISE GARNER PRICE SMITH; THE UNBORN CHILDREN OF RALPH CLAY PRICE; THE UNBORN ISSUE OF JULIAN PRICE II; THE UNBORN ISSUE OF LOUISE GARNER PRICE SMITH; THE UNBORN ISSUE OF UNBORN CHILDREN OF RALPH CLAY PRICE; KATHLEEN PRICE BRYAN; JOSEPH McKINLEY, JR., NANCY ANN BRYAN FAIRCLOTH, KATHLEEN BRYAN EDWARDS; RAY HOWARD TAYLOR, A MINOR, JOSEPH McKINLEY BRYAN TAYLOR, A MINOR, KATHLEEN CLAY TAYLOR, A MINOR, JOHN GUEST TAYLOR, A MINOR, MELANIE ANN TAYLOR, A MINOR, MARY PRICE TAYLOR, A MINOR, SUSAN JARRELL EDWARDS, A MINOR, LAURA DE BOISFEUILLET EDWARDS, A MINOR; THE UNBORN ISSUE OF KATHLEEN PRICE BRYAN; ANY OTHER HEIRS OF ETHEL CLAY PRICE, DECEASED, THAN THE OTHER DEFENDANTS TO THIS ACTION, WHO MAY BE IN EXISTENCE AT THE TERMINATION OF "TRUST ONE" UNDER THE WILL OF ETHEL CLAY PRICE, DECEASED

No. 7118SC257

(Filed 14 July 1971)

1. Wills § 28— intent of testator

The intention of the testator, as gathered from a consideration of the will from its four corners, is the guiding principle in the interpretation of a will, and such intention will prevail where not contrary to law or public policy.

2. Wills § 28—construction of will

Where the intent of the testator is clearly expressed in plain and unambiguous language, there is no need to resort to the general rules of construction, and the will is to be given effect according to its obvious intent.

3. Trusts § 8— testamentary trust — persons entitled to income

Where a testamentary trust provided that the trust income should be paid to testatrix' son, that each of the son's children should receive 20% of the trust income after attaining the age of 21, and that all of the remaining net income from the trust "not so paid" to the son's children from and after each of them have attained the age of 21 should be paid to testatrix' son, and one of the son's children died after he had been receiving income under the provisions of the trust, *held*, the 20% share of the son's deceased child is income "not so paid" and should be paid to testatrix' son.

Judge MORRIS dissents.

Price v. Price

APPEAL by defendants, guardians *ad litem,* from *Thornburg, Judge,* 7 December 1970 Civil Session of Superior Court held in GUILFORD County.

This is a civil action instituted pursuant to G.S. 1-253, *et seq.,* seeking an interpretation of the last will and testament and codicil of Ethel Clay Price.

The will and codicil, both dated 9 April 1943, were duly probated in Guilford County following the death of Mrs. Price on 26 October 1943. The administration and settlement of the estate is complete. This action involves the interpretation of a trust created by the will. The pertinent provisions of the will are as follows:

"ITEM FOUR

"All the rest and residue of my property, of every kind and description, both real and personal, which is left after carrying out the provisions of the preceding items of this will, I hereby will, bequeath and devise unto the Security National Bank of Greensboro, Greensboro, North Carolina, its successor or successors in office, and my husband, Julian Price, his successor or successors in office, as trustees, to be by said trustees held, managed and disposed of in the manner and for the uses and purposes hereinafter set out. . . . As promptly as may be after the trust estate has been delivered to my said trustees, they shall divide said trust estate into two equal shares. . . . With respect to each of said shares my will is as follows:

"TRUST ONE

"(a) To pay the net income from one of said shares, including accumulated net income, if any, in as nearly equal monthly installments as possible, to my son, Ralph C. Price, until his oldest living child shall have actually attained the age of twenty-one (21) years, whereupon my trustees shall pay twenty per cent (20%) of the net income from the aforesaid one share of my trust estate to my said son's oldest child, in as nearly equal monthly installments as possible, during the continuance of this trust. As each of the children of my son, Ralph C. Price, actually attains the age of twenty-one (21) years there shall be paid to each of them from and after the date each attains his or her ma-

jority twenty per cent (20%) of the net income from this trust estate during the continuance of this trust, as nearly as possible in equal monthly installments. All of the remaining net income from the aforesaid one share of this trust estate not so paid to the children of my son, Ralph C. Price, from and after they and each of them have attained the age of twenty-one (21) years, shall be paid, in as nearly equal monthly installments as possible, to my son, Ralph C. Price, so long as he shall live. In the event of the death of my son, Ralph C. Price, before the termination of this trust, I direct that said remaining net income from the aforesaid one share not so paid to the children of my said son and which he would have received if living shall be added to the principal or corpus of the aforesaid one share of the trust estate."

To date, Ralph Clay Price, Sr., has had four children: (1) An unnamed male infant born 19 April 1967 whose birth and death do not affect this action; (2) Louise Garner Price Smith, born 9 June 1943; (3) Julian Price II, born 4 June 1941; and (4) Ralph Clay Price, Jr., who was born on 10 November 1938, and died 23 May 1966.

Immediately prior to 23 May 1966, under the provisions of Trust One, Ralph Clay Price, Sr., was receiving forty percent of the net income from Trust One, while his children, Ralph Clay Price, Jr., Louise Garner Price Smith, and Julian Price II, each having reached the age of 21 years, were each receiving twenty percent of the Trust One income. The death of Ralph Clay Price, Jr., on 23 May 1966 gives rise to the question presented by this action: What disposition is to be had of the twenty percent share of the trust income that was being received by Ralph Clay Price, Jr., prior to his death.

Judge Thornburg, sitting without a jury, found as a fact that the primary intention of the testatrix, as expressed in her will, was to provide for her son, Ralph Clay Price, Sr. Based on this finding, Judge Thornburg concluded as a matter of law that Ralph Clay Price, Sr., subject to the provisions of the will should he have another child to reach the age of 21, was entitled to the twenty percent share of the trust income that was being received by Ralph Clay Price, Jr., prior to his death.

Defendants, Thomas E. Wagg III, guardian *ad litem* for the living and unborn children of Julian Price II; Harry J. O'Connor, Jr., guardian *ad litem* for the unborn children of Louise Garner Price Smith; Perry N. Walker, guardian *ad litem* for the unborn issue of the unborn children of Ralph Clay Price, Sr.; and Richard L. Wharton, guardian *ad litem* for the minor children of Kathleen Bryan Edwards; Ann Bryan Faircloth, the unborn issue of Kathleen Price Bryan, and any other heirs of the testatrix who may be in existence at the termination of "Trust One," excepted to the findings and conclusions of Judge Thornburg, and appealed to this Court.

Joseph B. Cheshire, Jr., for Ralph Clay Price and First-Citizens Bank and Trust Company, as Trustees, plaintiff appellees.

Adams, Kleemeier, Hagan, Hannah & Fouts by John A. Kleemeier, Jr., for Ralph Clay Price, Individually, and Ralph Clay Price as Executor of Ralph Clay Price, Jr., defendant appellees.

Womble, Carlyle, Sandridge & Rice by Charles F. Vance, Jr., and Kenneth A. Moser for Louise Garner Price Smith and Julian Price II, defendant appellees.

Harry J. O'Connor, Jr., Perry N. Walker, Richard L. Wharton, Thomas E. Wagg III, and Donald K. Speckhard for defendant appellants.

HEDRICK, Judge.

[1, 2] It is an elementary rule of construction that the intention of the testator or testatrix is the guiding principle to be used in the interpretation of wills, and such intention shall prevail where not contrary to law or public policy. *Olive v. Biggs,* 276 N.C. 445, 173 S.E. 2d 301 (1970); *Clark v. Connor,* 253 N.C. 515, 117 S.E. 2d 465 (1960). This intent is to be gathered from a consideration of the will from its four corners. *McWhirter v. Downs,* 8 N.C. App. 50, 173 S.E. 2d 587 (1970); *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857 (1965), and cases cited therein. However, where the intent of the testator is clearly expressed in plain and unambiguous language there is no need to resort to the general rules of construction for an interpretation. Rather, the will is to be given effect according to its obvious intent. *Trust Co. v. Whitfield,* 238 N.C. 69, 76

S.E. 2d 334 (1953); *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17 (1945).

[3] In the instant case the testatrix, in the questioned portion of her will, expressed the intent that her son, Ralph C. Price, Sr., was to receive the income from Trust One. She then expressed the intent that the children of Ralph C. Price, Sr., were each to receive up to twenty percent of the income upon reaching the age of 21, with the proviso that under no circumstances was Ralph C. Price, Sr., ever to receive less than twenty percent of the income. The testatrix then by clear and unambiguous language made her intention known that "[a]ll of the remaining net income from the aforesaid one share of this trust *not so paid* to the children of my son, Ralph C. Price [Sr.], *from and after* they and each of them have attained the age of twenty-one (21) years, shall be paid, in as nearly equal monthly installments as possible, to my son, Ralph C. Price [Sr.], so long as he shall live."

Ralph C. Price, Jr., died *after* having reached the age of 21 and *after* he had been receiving income under the provisions of the trust. His death defeats the twenty percent share he had been receiving. Hence, this share falls within the clear language of the testatrix as income *"not so paid,"* and as such is to be paid to Ralph C. Price, Sr. The judgment of the Superior Court is affirmed.

Affirmed.

Judge BROCK concurs.

Judge MORRIS dissents.

DON'S PLUMBING COMPANY, INC. v. UNION SUPPLY COMPANY OF DURHAM, INC., AND DAVID McDONALD

No. 7114SC349

(Filed 14 July 1971)

1. **Trial § 33— instruction not supported by the evidence**

An instruction which assumed, in the absence of supporting evidence, that a named person was acting as an agent of the corporate defendant when he approved the burning of debris on the company's property, *held* erroneous.

2. **Trial § 35— instruction on the greater weight of the evidence**

An instruction that the greater weight of the evidence is "such evidence as when compared with that opposed to it has more convincing force" was erroneous in a case in which the defendant offered no evidence, since the jury could have inferred that the plaintiff's introduction of some evidence constituted the greater weight of the evidence.

APPEAL by defendant Union Supply Company of Durham, Inc., from *Godwin, Judge,* 16 November 1970 Civil Session of Superior Court held in DURHAM County.

Plaintiff instituted this action seeking to recover of the defendants for damages to its property as a result of a fire. Plaintiff alleged that David McDonald (McDonald) undertook to demolish a building on the lot of Union Supply Company of Durham, Inc. (Supply Company); that McDonald intentionally and negligently started a fire thereon and negligently permitted it to escape, damaging plaintiff's property on adjoining premises leased by plaintiff and used by it for storage; and that the negligence of McDonald was imputed to Supply Company. Supply Company answered and denied the material allegations of the complaint. McDonald did not answer. The parties stipulated as to the contents of the record on appeal. In the "Statement of Case on Appeal" appears the following: "(T)he Court upon motion of plaintiff entered a directed verdict against the defendant McDonald upon the issue of his negligence prior to submission of the case to the jury."

McDonald testified as a witness for plaintiff that he contracted with a Mr. Ira Handsel to take down an old house on Supply Company's lot for $300 and that while he was working on the house, he got a water hose from Handsel or from somebody. He further testified:

"As to whether I ever had an occasion to see Mr. Handsel while I was taking the building down and accumulating these piles, yes. I would have discussions with him when I wanted something or wanted to see him. The tools that I had, a truck, a crowbar, a sledge hammer, were all mine. As to whether I had anything that I got from anybody else, I don't know, sir, I don't remember. I might have, but I knew I got a water hose from somebody.

I did not ask Mr. Handsel to help me tear the house down.

On the 7th day of April, 1967, I discussed the starting of this fire with Mr. Handsel. * * * Well, we—when I talked to him, I asked him would it be all right to burn any of this stuff on the outside, inside the fence, and he told me, yes, it would.

So, I went then and got me some water hose. As to where I got it, if I'm not mistaken, I think I got one from him and then I went and borrowed some more. By him, I mean Mr. Handsel. I took the water hose and I run the line up to the pile of trash where I was going to burn from the front of his place, where he had his outside spigot. It was a garden hose. I think we had a nozzle on it.

I did not go to Don's Plumbing Company and tell them that I was about to start the fire and to my knowledge neither did Mr. Handsel or any other employee of Union Supply Company. At the time I started the fire the only equipment I had there to control the fire was a water hose."

On cross-examination, McDonald testified:

"The agreement had been that I would not only take the house down but I had to get rid of it. I could have it if I wanted it and if I didn't want it I had to take the stuff away and dispose of it."

It was stipulated that there was sufficient evidence on the question of damages to "support the jury's verdict on that issue."

At the conclusion of the evidence (the defendants offered none), the following occurred:

"At the close of all evidence the defendant Union Supply Company renewed its motion to the court for a

directed verdict in its favor and nonsuit and dismissal of plaintiff's case for failure of proof of negligence. Motion overruled; Exception.

THIS IS APPELLANT'S EXCEPTION NO. 5.

The defendant did not present any evidence in the case.

Plaintiff moved for summary judgment in its favor as to the negligence of the individual defendant, David McDonald, which motion was allowed by the court."

The court submitted two issues to the jury, one as to the negligence of Supply Company and the other as to the amount of damages. The jury, by its verdict, found that Supply Company was actionably negligent and that plaintiff had sustained ten thousand dollars damages. After the verdict Supply Company moved, among other things, to set aside the answer to the negligence issue and for judgment notwithstanding the verdict. The motions were overruled and upon the entry of the judgment upon the verdict, Supply Company appealed.

Bryant, Lipton, Bryant & Battle by James B. Maxwell for plaintiff appellee.

Cockman, Alvis & Aldridge by Jerry S. Alvis for defendant appellant.

MALLARD, Chief Judge.

The movants did not state the rule number under which they were proceeding in any of the motions. See Rule 6 of the "General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure," as adopted by the Supreme Court with effective date of 1 July 1970. In one place in the record it is stated that a directed verdict was entered on the negligence issue against McDonald while in another place it is stated that summary judgment was allowed in favor of plaintiff as to the negligence of McDonald. All of this indicates the necessity for the rule requiring the movants to state the number of the rule under which the motion is made.

[1] Supply Company contends that the trial judge committed error in charging the jury concerning the evidence of the plaintiff as follows:

"That he (McDonald) went to the corporate defendants and inquired of the corporate—I say corporate defendants—went to the corporate defendant and inquired of it, if it would be all right to burn that pile of debris; and that the corporate defendant agreed that the pile of debris might be burned."

Although there is an inference that Mr. Ira Handsel was an employee of Supply Company, there is no admission and no evidence that Mr. Handsel was authorized and acted as agent for Supply Company when he told McDonald that it would "be all right to burn any of this stuff on the outside, inside the fence." Neither is there any direct evidence that the "I. S. Handsel" who verified the defendant's answer as Vice President is the same person that McDonald referred to as "Mr. Ira Handsel." It was error for the trial judge to draw the conclusion that Mr. Ira Handsel was the agent of the corporate defendant and emphasize it by implying in the above-quoted portion of the charge that what McDonald said to Mr. Handsel was said to the "corporate defendant."

[2] Defendant Supply Company also contends that the trial judge committed prejudicial error in charging the jury on the greater weight of the evidence, as follows:

"The term, greater weight of the evidence, does not refer to the volume of testimony you have heard. It does not refer to the number of witnesses that you have heard. The term, greater weight of the evidence, refers to the quality or convincing force of the evidence.

The greater weight of the evidence *is such evidence as when compared with that opposed to it* has more convincing force." (Emphasis added.)

In some civil cases the intensity of proof is by evidence that is clear, strong and convincing. See Stansbury, N. C. Evidence 2d, § 213. However, the intensity of proof in the ordinary civil action (which is applicable here) is by the greater weight or preponderance of the evidence or to the satisfaction of the jury. "A jury is not justified in finding any fact unless the evidence is sufficient to satisfy their minds of its truth, or, what is equivalent and practically the same thing, creates in their minds a belief that the fact alleged is true." *Perry v. Insurance*

Co., 137 N.C. 402, 49 S.E. 889 (1905). In Stansbury, N. C. Evidence 2d, § 212, p. 545, there appears the following:

> "If there is *some* evidence in the plaintiff's favor and none in the defendant's favor, surely the former has the greater weight; still it is settled that in this situation it is for the jury to say which party shall win. There would seem to be great merit in the suggestion that what is meant by the formula is that the jury should be satisfied of the *greater probability* of the proposition advanced by the party having the burden of persuasion—*i.e.*, that it is more probably true than not."

The error in the instruction complained of appears in the last sentence. In this case there was no conflicting evidence or no *evidence* "opposed to" the evidence offered by the plaintiff; therefore, the jury could, under this instruction, have inferred that when "some evidence" was introduced, such constituted the greater weight of the evidence. We think that this was prejudicial error.

Defendant Supply Company has other assignments of error to the charge and to the admission of evidence which we do not deem necessary to discuss.

The defendant Supply Company is entitled to a new trial.

New trial.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. CHARLES DWIGHT WALLER

No. 7114SC391

(Filed 14 July 1971)

Larceny § 5— recent possession doctrine — theft of old coins — lapse of 10 days between theft and discovery

The lapse of ten days between the theft of old coins and the finding of the coins on defendant's person was not so long as to exclude the application of the recent possession doctrine, where the coins consisted of such distinctive items as Indian head pennies, a bent 1854 dime, and a Stone Mountain 1925 memorial half dollar that was enclosed in a container.

State v. Waller

ON *certiorari* to review order of *Ragsdale, Special Judge,* 27 April 1970 Session of Superior Court of DURHAM County.

Defendant was charged, in a proper bill of indictment, with felonious breaking and entering and larceny. He entered a plea of not guilty and was found by the jury to be guilty as charged. From judgment entered on the verdict, defendant appeals.

Attorney General Morgan by Assistant Attorney General Hafer for the State.

Pearson, Malone, Johnson & DeJarmon, by C. C. Malone, Jr., for defendant appellant.

MORRIS, Judge.

We note at the outset that judgment was entered on 27 April 1970. Defendant gave notice of appeal. The appeal was not perfected, and petition for writ of *certiorari* was filed in April 1971 and allowed by this Court on 22 April 1971. Counsel gives as the reason for a year's delay his involvement in the trial of other matters and the solicitor's delay in agreeing to the case on appeal. The record does not include determination of indigency nor order appointing counsel. In the record, however, defendant is referred to as an indigent. We, therefore, assume that counsel is court appointed. Though defendant may not have been counsel's client by choice, he was, nevertheless, entitled to have his appeal perfected by his court-appointed counsel without the apparently unjustified delay of a year in putting machinery in motion to obtain appellate review of his trial.

Defendant's only assignment of error is to the failure of the court to grant his motion for nonsuit at the close of the evidence presented.

It is a familiar principle of law that in a criminal action upon a motion for judgment as of nonsuit the evidence must be interpreted in the light most favorable to the State and all reasonable inference favorable to the State must be drawn from it. *State v. Miller,* 270 N.C. 726, 154 S.E. 2d 902 (1967), and cases there cited.

In this case, all the evidence presented came from the State. It tended to establish the following facts: The prosecuting wit-

ness, Ira Cecil Miller, left his residence at 1207 Alma Street in Durham, about 7:00 p.m. on Tuesday, 12 January 1970. All doors and windows were locked. Upon his return to his home around 9:00 p.m., the rear door was standing open, the glass nearest the door knob having been broken out. It is possible to open the door without a key from the inside. The house was in disarray, dresser drawers had been emptied into the floor, and several items were missing—a table model color TV set, transistor radio, and some old coins. The coins missing were some Indian head pennies, a bent 1854 dime, and a memorial half dollar which had two men on horseback and is enclosed in a container so it can be placed on a key chain. This half dollar bore the notation "Stone Mountain, 1925." Approximately two weeks after the break-in, witness was called to the police station and there identified the missing coins. The memorial half dollar and the 1854 dime were identified by him at trial as coins left by him in his home in a dresser drawer on 12 January 1970, and missing when he returned to his home later that night. As to the Indian head pennies, witness stated they were exactly like the ones he had in his drawer and all of them were missing after the break-in.

A police officer testified that on 23 January 1970, about 8:00 p.m. he went to a certain location in the city of Durham in response to a radioed prowler call. He saw and arrested defendant about a block away from the residence of the prosecuting witness in this case. He searched defendant and found on his person the coins identified by prosecuting witness.

By his assignment of error defendant raises the question whether, on the facts in this case, the time which elapsed from the date of the theft until the property was found in the possession of defendant was too great for the doctrine of possession of recently stolen property to apply.

Conditions for application of the doctrine of possession of recently stolen property were set out by Chief Justice Parker in *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966). If these conditions are met, *i.e.,* (1) if the property found in his possession had been stolen, (2) if this property is the same property which was stolen at the time and place that the property listed in the bill of indictment was stolen, and (3) if this property was found in his possession sufficiently soon after the theft to give rise to the presumption; and where, as in the case

before us, there is sufficient evidence that the building has been broken into and entered and the property stolen therefrom, there a question of *fact* arises that the possessor of the stolen property is guilty of both the breaking and entering and the larceny.

No criterion is to be found in the decided cases for ascertaining just what possession is to be regarded as recent and therefore of presumptive evidentiary value.

> "Whether the time elapsed between the theft and the moment when the defendant is found in possession of the stolen goods is too great for the doctrine to apply depends upon the facts and circumstances of each case. Among the relevant circumstances to be considered is the nature of the particular property involved. Obviously if the stolen article is of a type normally and frequently traded in lawful channels, then only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely. On the other hand, if the stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer time interval. In either case the circumstances must be such as to manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defendant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief. (Citations omitted.) The question is ordinarily a question of fact for the jury. *State v. White,* 196 N.C. 1, 144 S.E. 299." *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969).

We are of the opinion that the question was properly presented to the jury in the case before us. These were not ordinary coins one might receive in change. While it might not be unusual to receive one or more Indian head pennies as change or even the 1854 bent dime, it is highly unlikely that one would ever receive the 1925 Stone Mountain half dollar in its container in the ordinary exchange of money. Also it is highly unlikely that defendant would have received *all* these distinctive coins in the ordinary exchange of money. We think the circumstances are such as to exclude the intervening agency of others, and

that this possession is of a kind which manifests that the stolen goods came into the defendant's possession by his own acts. Therefore, the defendant's possession afforded presumptive evidence that he was the thief.

In *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725 (1943), Chief Justice Stacy quoted with approval the language of Justice Ashe in *State v. Rights,* 82 N.C. 675 (1880) :

> "Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the *law* does not infer his guilt, but leaves that question to the jury under the consideration of all the circumstances."

We find no error in the court's submitting the question to the jury.

The coins sent up with the appeal as exhibits are ordered returned to the Clerk of the Superior Court of Durham County for delivery to the owner thereof, Mr. Ira Cecil Miller.

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEWIS EDWARD TURNER

No. 717SC369

(Filed 14 July 1971)

1. **Constitutional Law § 31— accused's right to be present at trial**

The accused in a criminal prosecution has a right to be present at the trial unless he waives that right.

2. **Constitutional Law § 31— waiver of right to be present at criminal trial**

Where defendant voluntarily absents himself from the courtroom, and especially when he has fled the court, such conduct may be considered and construed as a waiver of his right to be present at the trial, and the presence of defendant is not essential to a valid trial and conviction.

3. **Constitutional Law § 31— waiver of right to be present at criminal trial — failure to appear for second day of trial**

Where defendant failed to appear for the second day of his trial, but had his wife deliver a letter to his attorney stating that he had gone looking for a witness, and defendant again failed to appear the following day, the trial court properly construed defendant's extended absence as a waiver of his right to be present for the remainder of the trial.

4. **Constitutional Law § 31; Criminal Law § 119— failure to instruct on right of defendant to waive presence**

The trial court did not err in failing to instruct the jury that defendant had a right to waive his right to be present at his trial and that his absence should not be considered with regard to his guilt or innocence absent a request for such instructions.

APPEAL by defendant from *Cohoon, Judge,* 5 October 1970 Criminal Session, NASH County Superior Court; and *May, Judge,* 16 November 1970 Criminal Session, NASH County Superior Court.

Defendant was charged in a proper bill of indictment with breaking and entering and larceny. Evidence for the State tended to show that Ralph Harrison Lane observed defendant coming out of a dwelling owned by Lane. The dwelling had previously been occupied but was now used only for storage. The windows had been boarded up and the doors padlocked. Lane went to the dwelling and observed a car parked nearby with several pieces of power equipment belonging to Lane in the trunk with more items belonging to him in the back seat. After Lane procured a firearm and shot into the ceiling of the building, defendant came out with a screwdriver in his hand. The hasp of the lock on the door to the dwelling had been taken loose, and two other doors had been unlatched from the inside. All doors had been locked earlier that morning and defendant did not have permission to be in the building. The value of the goods taken from the building was between $1,200.00 and $1,500.00. Officers were called to the scene and a search of the automobile, after defendant produced the key to the trunk, revealed the equipment belonging to Lane.

The defendant testified that he was interested in the architecture of the building and had merely stopped by to look at it; when he arrived, the front door was standing open and no one was present; he did not take anything from the house although he did pick up a roll of tape and a rake that he found

in the yard; he did not have any equipment or anything else belonging to Lane in his car.

Following the completion of his testimony on Monday, 5 October 1970, the court recessed until the next morning. At the opening of court the next morning, Tuesday, 6 October 1970, defendant was not present and counsel for defendant did not know of his whereabouts. After a considerable delay, the wife of defendant gave defendant's lawyer a letter from defendant stating that he had left home to look for a witness that he needed. The wife told the judge that she understood the witness to be the father of the defendant. A capias was issued but defendant was not found. The jury was then informed that there would be some delay in the trial because a witness had to be located. The jury was sent home and returned at 2:30 p.m. but defendant had still not appeared, so the jury was sent home until the following day. Upon the opening of court the following day, Wednesday, 7 October 1970, defendant was still not present and could not be found; and the trial judge entered an order finding that defendant had absented himself from the trial without lawful excuse, had caused the court considerable delay, and could not be found. The trial judge found that defendant absented himself from the court deliberately and for the purpose of not being present during the remainder of the trial and in an apparent effort to trifle with the administration of justice, and that this constituted a waiver of his right and privilege to be present for the remainder of the trial. All proceedings regarding the absence of defendant from the trial were conducted out of the presence of the jury and the jury was not informed as to the reason that defendant was not present.

The court, in the meantime, had sent an officer to Raleigh to locate and bring the father of the defendant to court. This was done, and the father testified on behalf of the defendant.

The jury returned a verdict of guilty as charged and, the defendant still being absent, the trial judge entered an order continuing prayer for judgment until the next session of court or until such session thereafter when defendant had been apprehended. The defendant was taken into custody on 28 October 1970. More than three weeks had elapsed since he left court on 5 October 1970.

State v. Turner

At the 16 November 1970 Session of Nash County Superior Court, defendant, in the presence of the court, was sentenced to a term of ten years, both counts having been consolidated for judgment. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and T. Buie Costen for the State.

Thorp, Etheridge & Culbreth by William D. Etheridge and W. O. Rosser for defendant appellant.

CAMPBELL, Judge.

[1, 2] Defendant assigns as error the actions of the trial judge in finding that defendant, by his absence from trial, waived his right to be present and in proceeding with the trial in defendant's absence. In a criminal prosecution it is the right of the accused to be present at the trial, *unless he waives that right. State v. Pope,* 257 N.C. 326, 126 S.E. 2d 126 (1962). But where the defendant voluntarily absents himself from the courtroom, and especially when he has fled the court, such conduct may be considered and construed as a waiver, and the presence of the defendant is not considered as essential to a valid trial and conviction. *State v. Cherry,* 154 N.C. 624, 70 S.E. 294 (1911).

[3] Here, defendant did not appear in court when court reconvened the next morning but he did send a letter through his wife explaining that he had gone looking for a witness. There was nothing to indicate, as there was in *State v. Cherry, supra,* that defendant had fled. The court, accordingly, gave defendant the benefit of the doubt and waited for over a day for defendant to reappear. It was only after defendant had been given ample opportunity to return to the courtroom that the trial judge entered an order finding that defendant had waived his right to be present for the remainder of the trial. Further, all proceedings concerning the absence of defendant from the trial were conducted out of the presence of the jury thus preventing any possibility of prejudice to the defendant in the eyes of the jury. We are of the opinion that the trial judge properly construed defendant's extended absence from the courtroom as a waiver of his right to be present for the remainder of the trial.

[4] Defendant also assigns as error the failure of the trial judge to instruct the jury of defendant's right to waive his

right to be present at the trial and that his absence should not be considered with regard to his guilt or innocence. However, the record does not reveal that counsel for defendant requested the court to charge the jury regarding defendant's absence. " '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 . . . to aptly tender a request therefor.' " *Mode v. Mode,* 8 N.C. App. 209, 174 S.E. 2d 30 (1970); 7 Strong, North Carolina Index 2d, Trial, § 33 (1968).

We have reviewed defendant's other assignments of error and find no merit in any of them. In the trial below, we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE HOLLINGSWORTH

No. 7112SC447

(Filed 14 July 1971)

1. Jury § 7— special jurors — challenge to the array — racial discrimination

Defendant's challenge to the array of special jurors on the grounds that the six jurors summoned by the sheriff were white and that the defendant was a Negro was properly denied by the trial judge. G.S. 9-11(a) and (b).

2. Jury § 7— challenge for cause — jurors doing business with witness

Trial court properly denied defendant's challenge for cause of two prospective jurors who had had business dealings with some of the State's witnesses.

3. Criminal Law § 99— remarks of trial court — expression of opinion

Trial judge's statement that the question put to the witness had been previously answered did not amount to an expression of opinion on the evidence. G.S. 1-180.

4. Criminal Law § 99— remarks of trial court

Trial court's remarks made out of the presence of the jury could not have prejudiced the defendant's cause.

5. Criminal Law § 99— remarks of trial court — what constitutes prejudicial error

A defendant who contends that the trial court's remarks amount to an expression of opinion in the presence of the jury must show more than the possibility of unfair influence; it must appear with ordinary certainty that the court's language, when fairly interpreted, was likely to convey an opinion to the jury and could reasonably have had an appreciable effect on the result of the trial.

APPEAL by defendant from *Bailey, Judge,* 25 January 1971 Session of Superior Court held in HOKE County.

The defendant George Hollingsworth was charged in valid warrants with resisting, delaying, and obstructing an officer in the performance of his duties, and with simple assault with his fists upon the same officer, in violation of G.S. 14-223 and G.S. 14-33. Upon the defendant's plea of not guilty, evidence was offered tending to show that at approximately 8:00 p.m. on 9 November 1969, Highway Patrolman J. E. Stanley was investigating an automobile accident on U.S. Highway 401 Bypass north of Raeford. The officer had observed a Mr. Holt lying in one of the automobiles and observed that he had a laceration on his head but was conscious. The rescue squad arrived at the scene, and the highway patrolman was assisting in getting other injured persons, a Mrs. King, who was pregnant, and two children, on stretchers when he was approached by the defendant who requested him to look in Mr. Holt's automobile. The officer went back to the Holt automobile, got Mr. Holt up, and found that he was drunk. When he started to go back to assist the injured members of the King family, the defendant asked him if he was going to help Mr. Holt. The officer told the defendant to leave him alone; whereupon, the defendant grabbed the officer by the shirt and pushed him up against the Holt automobile and told him, "You are going to help this person." The patrolman seized the defendant, pushed him across the highway and told him that he could consider himself under arrest for interfering with an officer. The patrolman started to walk away and was again seized by the defendant. Responding to the patrolman's call for assistance, Deputies Sheriff Harvey Young and Robert Locklear pulled the defendant off the patrolman who then succeeded in getting one handcuff on

the defendant's wrist. The defendant then broke away from the deputies and struck the patrolman on the side of the head with the handcuffs, inflicting a minor cut. The defendant continued to curse and fight and the officer testified that he struck the defendant in the mouth with his fist.

The defendant testified that he came to the scene of the accident and was looking in the Holt automobile when the highway patrolman struck him in the chest and told him to move back. Later, the patrolman came back to the Holt automobile and told the defendant he was under arrest and put the handcuffs on him. According to the defendant's testimony, the patrolman then struck the defendant with his fist and that was when the defendant started scuffling. The defendant stated that it "[w]asn't too long before Mr. Young and Mr. Robert Locklear came up and they just brutalized over me." The defendant testified that the two deputies held him and the patrolman struck him in the mouth with the flashlight.

The jury found the defendant guilty as charged in the warrants, and from a judgment of imprisonment of six months on the charge of interfering with an officer, and a judgment of imprisonment of thirty days on the charge of assault, the defendant appealed to this Court.

Attorney General Robert Morgan and Staff Attorney Russell G. Walker, Jr., for the State.

Moses & Diehl by Philip A. Diehl for defendant appellant.

HEDRICK, Judge.

[1] The defendant first assigns as error the court's denial of his motion to challenge the array of six special jurors summoned by the sheriff pursuant to the order of the judge. The record reveals that prior to the completion of the selection of the petit jury to try this case, the regularly summoned jury panel had been exhausted and only eight jurors had been selected to serve. The defendant "moved to challenge the array of special jurors upon the grounds that the 6 jurors summonsed [*sic*] by the Sheriff of Hoke County were all of the white race and that the Defendant was Negro." The motion was denied, and after the petit jury had been selected and empaneled, the trial court made the following entry in the record: "Due to

the challenge of the Defendant as to the race or color of the jury, this jury was sworn and empaneled consisting of 4 Negro, 7 white and 1 Indian jurors."

G.S. 9-11(a) and (b) provides for the selection of supplemental jurors and gives the presiding judge the right to call for such additional jurors as shall be necessary to conduct the business of the court. The judge may direct the jurors be drawn from the regular jury list or may allow the sheriff to select the additional jurors from the body of the county. The court may also require some person other than the sheriff to make the selection of the special jurors if, in his discretion, he believes the sheriff is not suitable because of a direct or indirect interest in the action to be tried.

The defendant's motion challenges only the fact that the six supplemental jurors summoned by the sheriff to serve were members of the white race, and the defendant was a Negro. The defendant's motion does not challenge the order of the court directing the sheriff to select six supplemental jurors, nor does it challenge the action of the sheriff in selecting the jurors, nor does the defendant by his motion contend that members of the Negro race were systematically excluded by the sheriff in his selection of the six jurors. This assignment of error is overruled.

[2] Next, the defendant contends the court committed prejudicial error in not allowing his challenge for cause of two prospective jurors who had had business dealings with some of the State's witnesses. The question of the competency of any juror challenged for cause rests largely in the discretion of the trial judge, and is not reviewable on appeal in the absence of a showing of an abuse of discretion. *State v. Blount,* 4 N.C. App. 561, 167 S.E. 2d 444. This assignment of error is without merit.

[3-5] By his third assignment of error, based on numerous exceptions in the record, the defendant asserts that the trial judge violated the prohibition of G.S. 1-180 by expressing an opinion upon the evidence in the presence of the jury to the prejudice of the defendant. We do not agree. Exceptions Nos. 5 and 9 were simply statements that the question put to the witness had been previously answered and are not considered expressions of opinion. *State v. Mansell,* 192 N.C. 20, 133 S.E. 190 (1926). The remarks identified by Exception No. 7 were made

out of the presence of the jury and could not have prejudiced defendant's cause. With regard to the other instances of questions and remarks brought forward by defendant, it has long been the rule in North Carolina that a showing of a possibility of unfair influence is not sufficient. It must appear with ordinary certainty that the court's language, when fairly interpreted, was likely to convey an opinion to the jury and could reasonably have had an appreciable effect on the result of the trial. *State v. Jones,* 67 N.C. 285 (1872); *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950). The defendant has failed to show that he was prejudiced in any way by the remarks of the judge. This assignment of error is overruled.

We have carefully examined all of the assignments of error brought forward and argued in the defendant's brief and conclude that the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

DORIS WOMACK ADAMS v. STATE CAPITAL LIFE INSURANCE COMPANY

No. 7110SC311

(Filed 14 July 1971)

1. **Rules of Civil Procedure § 56— summary judgment — applicability**

Summary judgment is the correct procedure in the absence of any genuine issue as to any material fact. G.S. 1A-1, Rule 56.

2. **Insurance § 13— life insurance — application of insured — offer — acceptance**

An application for insurance is a mere offer, which must be accepted before a contract of insurance can come into existence.

3. **Contracts § 2— acceptance — silence and inaction**

Silence and inaction do not amount to any acceptance of an offer.

4. **Insurance § 13— insurer's acceptance of the application — delay or inaction — presumption**

No inference or presumption of acceptance can be drawn from mere delay or inaction by the insurer in passing on the application of insurance in the absence of additional circumstances.

5. Insurance § 13— life insurance — conditional payment of initial premium — death of insured — rejection by insurer

The payment of the initial premium of a life insurance policy some three days before the death of the prospective insured was subject to the terms of the conditional receipt providing for acceptance by the company upon its unconditional approval of the insured's application; and where the undisputed evidence was that the company rejected the application twelve days after the death of the prospective insured, and that the company did not act unreasonably, arbitrarily, or in bad faith, the policy never became effective.

APPEAL by plaintiff from *Clark, Superior Court Judge,* 4 January 1971 Session of WAKE Superior Court.

This is an action to recover $20,000 alleged to be due plaintiff as beneficiary on a contract of life insurance.

On 2 February 1968 the nineteen-year-old son of plaintiff, Tony Wayne Adams, (Tony) made written application for a $10,000 life insurance policy with accidental double indemnity. The application was made to Stephen W. Dunn, authorized agent for the defendant.

Just above the date and signature of Tony, the application contained the following:

> "It is agreed that upon acceptance and retention of a policy with plan, additional benefits, premiums, amount, beneficiary, rights or income settlement other than applied for, this application shall be for such modified policy and for such number of policies as may be issued. It is further agreed that any policy issued on this application may contain provisions regarding Aviation under which the liability of the Company is limited.
>
> All the statements and answers in this application including those made in Part II below (and the statements and answers which may be made to the Medical Examiner in conjunction with any examination that may be required for the issuance of the policy applied for) are made to induce the Company to issue the policy and are true. The policy shall not take effect unless and until it is delivered to the Insured and the first premium is paid during the Insured's lifetime, except as may be otherwise provided in any conditional receipt issued. All later premiums shall be due on the dates specified in the policy. No agent or

other person, except the President, a Vice-President, Secretary or Assistant Secretary of the Company has the authority to accept any representations or information not contained in this application or to modify, or enlarge, any contract of insurance or to waive any requirement in the application or in the contract of insurance."

At the time of making the application, no premium was paid. The agent Dunn made two return trips to the home of Tony for the purpose of collecting the first premium on the proposed policy. On the second trip, on February 13, 1968, the plaintiff, mother of Tony, gave Dunn her personal check in the amount of $11.70 for the first premium. At this time she requested Dunn to give her a conditional receipt. Dunn informed her that the conditional receipt was attached to the original application, and it had been sent to the defendant and therefore he could not give her a conditional receipt but told her that the "bank draft tendered to him would serve as a conditional receipt."

On 14 February 1968 the defendant had not issued its policy of insurance but prepared an amendment to the application which contained an additional question reading:

"Have you had a physical examination to enter military service?

Yes _____ No _____

If 'Yes,' were any abnormalities noted?

Yes _____ No _____"

This amendment to the application was sent by defendant to its agent Dunn to procure the consideration and signature of Tony.

On 15 February 1968 the check given by plaintiff on behalf of Tony for the first premium was deposited by the defendant and credited to its "application cash in suspense" account.

At approximately 8:00 o'clock p.m. on 16 February 1968, Tony was accidentally killed as a result of a train-car collision.

On 17 February 1968 Agent Dunn returned to the home of Tony to submit the proposed amendment to the application for his consideration and signature. At that time, Dunn saw a

wreath on the door and left his card attached to the front screen door. Dunn returned to the home on 19 February 1968, and at that time learned that Tony was dead.

On 28 February 1968 the defendant issued its check in the amount of $11.70 representing refund of application cash submitted by the plaintiff for the first premium. The following day, 29 February 1968, Agent Dunn, together with another agent of the defendant, Larry Gibson, returned to the home of plaintiff and informed the plaintiff that he had been there previously and thereupon left with the plaintiff the check for $11.70; that at no time up to and including 29 February 1968, did the defendant make any reference to the plaintiff concerning the amended application form.

The defendant made a motion for summary judgment. This motion was allowed, and the action was dismissed on its merits. The plaintiff appealed.

William T. McCuiston for plaintiff appellant.

Young, Moore & Henderson by B. T. Henderson II, for defendant appellee.

CAMPBELL, Judge.

[1] There was no dispute as to the facts involved, and since there was not presented any genuine issue as to any material fact, summary judgment was the correct procedure. G.S. 1A-1, Rule 56.

[2-4] An application for insurance is a mere offer, which must be accepted before a contract of insurance can come into existence. Silence and inaction do not amount to an acceptance of an offer. No inference or presumption of acceptance can be drawn from mere delay or inaction by the insurer in passing on the application in the absence of additional circumstances. *Bryant v. Insurance Co.*, 253 N.C. 565, 117 S.E. 2d 435 (1960).

[5] At most the evidence on behalf of the plaintiff shows a conditional payment of the first premium. This would not constitute a contract of insurance. The conditional receipt attached to the original application and which Agent Dunn referred to when he told the plaintiff that her check would serve as a conditional receipt stated:

" . . . If the application be unconditionally approved by the Company at its Home Office on the plan, for the amount and at the premium rate applied for, and if also the applicant at the date of the application or the medical examination whichever is the later date, is an acceptable insurable risk under the Company's rules, the insurance so applied for shall be effective from such later date. . . . "

In *Cheek v. Insurance Co.*, 215 N.C. 36, 1 S.E. 2d 115 (1939), it was held that a receipt does not of itself constitute a contract of insurance. " ' . . . If the application is not accepted in the proper exercise of the company's right, and the insurance, therefore, is refused, the binding slip ceases *eo instanti* to have any effect. It does not insure of itself, but is merely a provision against any illness supervening it, if there is afterwards an acceptance of the application, upon which it depends for its vitality.' The contract of insurance becomes effective upon approval of the application at the home office and the delivery of the policy is not a prerequisite." The undisputed evidence in this case established the fact that the application was never accepted by the defendant, and there was no evidence that in making the determination not to accept the application, the defendant company acted unreasonably, arbitrarily, or in bad faith. See *McLean v. Life of Virginia,* 11 N.C. App. 87, 180 S.E. 2d 431 (1971).

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. HELEN DELORES JACKSON, ALIAS PATTIE JACKSON

No. 7114SC383

(Filed 14 July 1971)

1. Searches and Seizures § 1; Criminal Law § 84— admissibility of evidence — heroin found in warrantless search

The heroin found on defendant's person as the result of a warrantless search in jail was properly admitted in evidence where the trial court made findings, supported by evidence, that the search was incident to a lawful arrest for the possession of heroin for purpose of sale.

2. Arrest and Bail § 3— arrest without warrant — possession of narcotics for sale

Police officer had reasonable grounds to arrest defendant without a warrant for the felony of possessing heroin for purpose of sale, where a person suffering from a narcotics overdose told him that the defendant had administered hypodermically narcotic drugs to her and that the defendant had narcotic drugs on her person. G.S. 15-41.

3. Arrest and Bail § 3— finding of fact of "arrest"

A finding that defendant was "taken into custody" was tantamount to a finding that defendant was "under arrest."

APPEAL by defendant from *Bickett, Judge,* at the 30 November 1970 Session, DURHAM Superior Court.

Defendant was tried on a bill of indictment charging that on 15 February 1970 she did unlawfully, wilfully, and feloniously have in her possession a quantity of narcotic drugs, to wit: heroin, for the purpose of sale. She pleaded not guilty, the jury found her guilty as charged and from judgment imposing prison sentence of not less than three nor more than five years, she appealed.

Attorney General Robert Morgan by William Lewis Sauls, Staff Attorney, for the State.

Joe C. Weatherspoon and Jerry B. Clayton for defendant appellant.

BRITT, Judge.

[1, 2] Defendant's sole assignment of error relates to the denial of defendant's motion to suppress evidence with respect to 13 bindles of heroin found on defendant's person as the result of a search made without a warrant after she was taken into custody. Defendant contends that her rights guaranteed by the Fourth and Fourteenth Amendments to the U.S. Constitution were violated, rendering the evidence inadmissible.

The principles of law involved in this case are somewhat similar to those in *State v. David Arvel Parker,* No. 7115SC366, decided by us this day. To avoid needless repetition, we merely refer to applicable statutes and opinions quoted and cited in that case.

Before admitting any evidence in the instant case, the trial judge conducted a *voir dire* with respect to the challenged testi-

mony. His findings of fact and conclusions of law are as follows:

"Motion is overruled to suppress the evidence. Let the record show that out of the presence of the jury, the witnesses having been examined, the court finds as a fact that on or about the 15th day of February, 1970, an officer of the Police Department of the City of Durham, to wit: Mr. Joyner, went to investigate a person who was suffering from an overdose of narcotics by the name of Christiana Thompson; and that Christiana Thompson advised him that the defendant in this case, Helen Delores Jackson, alias Pattie Jackson, had administered hypodermically narcotic drugs to her and that the defendant had on her person narcotic drugs.

The court further finds as a fact that as a result of the information the officer had reasonable grounds to believe that a felony had been committed, and that unless an apprehension of the defendant were made she might escape and destroy any narcotic drugs she had on her person; that the officer took her into custody and carried her to the Durham County jail where she remained about thirty minutes in the presence of at least two officers at all times, and at all times she was in custody for investigation; that thereafter a matron of the jail, Mrs. McFarland, came to the jail and stated to Helen Delores Jackson, alias Pattie Jackson, that she had to search her, and that the defendant replied, 'Go ahead and search me, but I don't have anything.'

The officer had reasonable grounds to believe a felony had been committed and was being committed, and that the defendant, Helen Delores Jackson, alias Pattie Jackson, had committed the felony of possession and administering narcotic drugs, and that said police officers had reasonable grounds to believe unless an arrest was made immediately that the defendant would escape, and that said search was legal both at the incident of taking the defendant in custody and by her consent to search."

We hold that the evidence presented at the *voir dire* fully supports the findings of fact, that the findings of fact support the conclusion that the search was legal as an incident to the arrest of defendant, and that the heroin found on defendant

was admissible in evidence. We deem it unnecessary to pass upon the question regarding defendant's consent to be searched.

A police officer in North Carolina may without warrant arrest a person when the officer has reasonable ground to believe that the person to be arrested (1) has committed a felony or misdemeanor in his presence or (2) has committed a felony and will evade arrest if not immediately taken into custody. G.S. 15-41. A police officer may search the person of a prisoner lawfully arrested as an incident to such arrest, may lawfully take from the prisoner any property which he has about him which is connected with the crime charged or which may be required as evidence, and, if otherwise competent, such property may be introduced as evidence by the State. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967) and case therein cited.

Defendant contends that she was not "arrested" until after she was taken into custody, carried to the jail, searched, and the heroin found on her person; that this contention is supported by testimony to that effect by the police officer. In 5 Am. Jur. 2d, Arrest, § 1, p. 695, it is said: "An arrest is the taking, seizing, or detaining of the person of another, (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested."

In *State v. Tippett, supra,* p. 596, we find: "A formal declaration of arrest by the officer is not a prerequisite to the making of an arrest. 5 Am. Jur. 2d, Arrest, § 1. The officer's testimony that the defendant was or was not under arrest at a given time is not conclusive. In *Henry v. United States,* 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d, 134, it was said that an arrest was complete when federal officers, without a warrant, stopped an automobile, 'interrupted' the two men therein and 'restricted their liberty of movement.' "

[3] We hold that the trial judge's finding and conclusion in the instant case that defendant was "taken into custody" was tantamount to finding and concluding that defendant was "under arrest" at the time of the search.

In our opinion, defendant had a fair trial, free from prejudicial error, and the sentence imposed was within the limits provided by statute.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES C. ROBERTS

No. 7114SC355

(Filed 14 July 1971)

1. **Arrest and Bail § 3; Criminal Law § 84— arrest by ABC officers without warrant**

Where ABC officers, upon stopping a car in which defendant and his two companions were riding, observed three cases of taxpaid liquor on the back seat and, with the driver's consent, searched the trunk and found seven more cases of taxpaid liquor, the officers lawfully arrested defendant without a warrant, the possession of more than one gallon of spiritous liquors being in itself *prima facie* evidence of a violation of G.S. 18-32; consequently, in a trial of defendant for receiving stolen property, the court properly denied defendant's motion to suppress on the ground of illegal arrest evidence concerning the liquor found in the car and statements made by defendant to officers after his arrest. G.S. 18-39.2(a); G.S. 18-45(15).

2. **Receiving Stolen Goods § 5— receiving stolen taxpaid liquor — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of feloniously receiving taxpaid liquor knowing it to have been stolen.

3. **Receiving Stolen Goods § 6— instructions on guilty knowledge**

In this prosecution for receiving stolen property, the trial court erred in instructing the jury that the test of guilty knowledge is whether a reasonable man would or should have known or suspected that the goods were stolen, the test being whether the defendant knew them to be stolen, which may be established either by direct proof of actual knowledge or by showing such circumstances that the jury could reasonably conclude that defendant must have known the goods were stolen.

APPEAL by defendant from *Hobgood, Judge,* 4 January 1971 Session of Superior Court held in DURHAM County.

Defendant, James C. Roberts, and two others, Michael Anthony Karagelen and Jimmy Lee Perkins, were charged in

an indictment with: (1) felonious breaking and entering the building occupied by Alcoholic Beverage Control Store No. 7, 1616 S. Miami Blvd., Durham, N. C.; (2) felonious larceny therefrom of 30 cases of tax paid whiskey; and (3) receiving such whiskey knowing the same to have been feloniously stolen. Defendant Roberts pleaded not guilty. The State introduced evidence to show:

On the morning of 1 October 1970 the manager of Durham County ABC Store No. 7 discovered that 30 cases of whiskey were missing from the store's stockroom. The missing items included: four cases of Early Times, four cases of Old Taylor, three cases of Calverts, and six cases of Seagram's Seven, all in pints. The wholesale value of the 30 cases was $1,482.92 and all cases had been priced and marked with Durham County ABC Store Stamp No. 7.

On 12 October 1970 three ABC law enforcement officers stopped an automobile which was being driven on U.S. Highway 64 near its intersection with highway 55. Jimmy Lee Perkins was the driver of the automobile and Michael Anthony Karagelen and the defendant, James C. Roberts, were passengers in the front seat. On approaching the car, Officer L. B. Council noticed three cases of whiskey on the back seat. The top of the cases had been cut and the lid was up so that the whiskey bottles were visible. The whiskey had the Durham County ABC Store No. 7 stamp, code number, and a price. After advising the driver, Jimmy Lee Perkins, of his constitutional rights, Officer Council asked Perkins if there was any more whiskey in the car. Perkins gave Officer Council the keys to the trunk and consented to a search of the car. Seven more cases of whiskey were found in the trunk, bringing the total number of cases found in the automobile to ten, consisting of the following: two cases of Early Times, one case of Old Taylor, two cases of Calverts, and five cases of Seagram's Seven, all in pints. The wholesale value of the whiskey found in the car was $461.41.

The officers took all three defendants to the police station in Apex. After defendant Roberts was advised of his rights, he told the officers that he had $100.00 invested in the liquor in the car and was expecting $100.00 profit in return, but that he would rather not tell who he gave the $100.00 to. Prior to making this statement, and on first getting out of the car, defendant

Roberts had denied any knowledge of any whiskey in the automobile, saying he had been picked up by the other two defendants.

At the close of the evidence the court allowed defendant's motion for nonsuit as to the first two counts in the bill of indictment. Karagelen and Perkins pleaded guilty to the charge of receiving stolen property knowing the same to have been stolen. The jury returned a verdict finding defendant Roberts guilty of feloniously receiving stolen property knowing it to have been stolen, and from judgment imposing a prison sentence, defendant Roberts appealed.

Attorney General Robert Morgan and Associate Attorney Walter E. Ricks III for the State.

Thomas F. Loflin III for defendant appellant.

PARKER, Judge.

[1] Appellant contends that his arrest was illegal and that therefore his motion to suppress all evidence concerning the whiskey found in the automobile and concerning his statements made to the officers following his arrest should have been allowed. This contention is without merit. By statute, ABC law enforcement officers "have the same powers and authorities within their respective counties as other peace officers," G.S. 18-45(15), and by G.S. 18-39.2(a) such officers are given the power to arrest without warrant any person violating in their presence any of the provisions of G.S. Chapter 18. Appellant and his two companions were found by the officers to be in possession of more than one gallon of spiritous liquors, which in itself constituted *prima facie* evidence of violation of G.S. 18-32. Three cases of whiskey were observed by the officers in plain view in the back of the car, and the trial judge found as a fact, based on competent evidence after a *voir dire* examination, that the driver of the automobile voluntarily consented to a search of the car's trunk. The record does not show that appellant made any objection to the evidence concerning the statement which he made to the officers that he had invested $100.00 in the whiskey, and he does not contend on this appeal that such statement was other than voluntarily made after he had fully been advised of his rights.

[2] Appellant's contention that his motion for nonsuit should have been allowed is also without merit. In our opinion there was sufficient evidence as to the charge contained in the third count in the indictment to require submission of that charge to the jury.

[3] Finally, appellant assigns as error the following portion of the court's instructions to the jury:

> "The essential elements of the offense of receiving stolen goods are that the receiving of goods which have been feloniously stolen by some other person other than the accused with knowledge of the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention and possession of such goods was for felonious intent or with a dishonest motive. The existence of guilty knowledge is to be regarded as established when the circumstances surrounding the receipt of the property were such as would charge a reasonable man with notice or knowledge or would put a reasonable man upon inquiry which, if pursued, would disclose that conclusion."

This assignment of error must be sustained. *State v. Stathos*, 208 N.C. 456, 181 S.E. 273. The test is not whether a reasonable man would or should have known or suspected that the goods were stolen. Rather, it is whether the *defendant* knew them to be stolen. This may be established either by direct proof of actual knowledge on the part of the defendant or by showing such circumstances that the jury could reasonably conclude that he must have known that the goods were stolen. See *State v. Scott*, 11 N.C. App. 642, decided 14 July 1971. For the error in the charge, defendant is entitled to a

New trial.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES WILDER

No. 7114SC395

(Filed 14 July 1971)

Larceny § 7— felonious larceny — insufficiency of evidence

The State's evidence was insufficient to support a verdict of guilty of the felony of larceny of property having a value in excess of $200.

ON *certiorari* as a substitute for an appeal by defendant from *Bickett, Judge,* 28 September 1970 Session of Superior Court held in DURHAM County.

The defendant, Willie James Wilder, was charged in a bill of indictment, proper in form, with felonious larceny of one auto tape player, twenty-four tapes and a dress, of the value of $230.21, the property of Jewel Dianne Davis. Upon the defendant's plea of not guilty, the State offered evidence tending to show that on 12 May 1970 Jewel Dianne Davis parked her 1962 blue Galaxie Ford automobile in the White Optical Laboratories parking lot at about 12:30 p.m. She locked her automobile and returned to her place of employment. Miss Davis testified: "There was a dress, a tape player, and a tape case which I think holds 24 tapes." Miss Davis returned after work, at about 5:00 o'clock. She discovered the lock on the door to her automobile broken and the dress, the tape player, the case and the tapes were missing. Miss Davis reported the matter to the Durham police and went to the police station where she saw several tape players and identified her tape player, case and tapes. The witness, in court, identified her tape case with a variety of tapes inside which was introduced as State's Exhibit 1. She also identified her tape player, by serial number 0147, which was introduced into evidence as State's Exhibit 2. The dress was never recovered. With respect to the value of the property, the witness testified: "The tape player is worth $90.00 and each tape is worth $5.88 except for two worth $16.00; the case is worth $10.00."

Joseph Kafina testified that from an office on the fifth floor of the rear of the Snow Building he observed the defendant and three other persons in a parking lot. The defendant tried unsuccessfully to get into a white Chevrolet. The witness saw the defendant get into a green and white Chevrolet. When

the four persons observed by the witness left the parking lot and went into some woods, the defendant was carrying "an armful (a couple) of tape players." The witness testified that he saw a juvenile hand a tape player to the defendant. Mr. Kafina called the police and directed them to the woods and observed them come out of the woods with the four persons he had seen in the parking lot, including the defendant. He later went to the police station where he identified them. Mr. Kafina testified that he was able to identify the defendant and the other three persons from their clothes but that he could not identify them from their facial features.

Durham Police Officer Earl Francis testified that on 12 May 1970 he saw the defendant in a wooded area approximately 500 feet from the White Optical Company's parking lot. The defendant and three other persons were standing with their backs to the witness watching another policeman. The defendant, along with the others was ordered out of the woods by the witness and turned over to another officer. Officer Francis testified: "I went into the wooded area where I found the case (State's Exhibit 1), SEVERAL TAPE PLAYERS **SIMILAR** TO STATE'S EXHIBIT 2, an umbrella and some loose tapes."

At the close of the State's evidence the defendant's motion for judgment as of nonsuit was denied. The defendant offered no evidence. The jury returned a verdict of guilty as charged in the bill of indictment, and from a judgment of imprisonment of not less than five nor more than seven years, the defendant appealed.

Attorney General Robert Morgan and Staff Attorney William Lewis Sauls for the State.

A. H. Borland for defendant appellant.

HEDRICK, Judge.

By an exception to the denial of his motion for judgment as of nonsuit, the defendant contends that the evidence, when considered in the light most favorable to the State, is not sufficient to be submitted to the jury on the charge of larceny of property having a value in excess of $200.

The bill of indictment charged the defendant with the theft of an auto tape player, twenty-four tapes, and a dress,

having an aggregate value of $230.21. The evidence tended to show that the dress had a value of $25, but there is no evidence whatsoever connecting the defendant with the theft of the dress. The auto tape player was described in the bill of indictment as having serial number CE 1084. The tape player identified and introduced into evidence at the trial as State's Exhibit 2 was valued by its owner at $90; however, according to the testimony of the owner it bore serial number 0147.

The officer testified that he found several tape players in the wooded area "similar" to State's Exhibit 2.

In his brief defendant states:

> "Thus, while there was evidence sufficient to allow a finding of guilty of the lesser offense, there was no evidence to sustain that the value was in excess of $200.00; and as to that charge, a motion as of nonsuit should have been allowed."

The evidence, when considered in the light most favorable to the State, would allow the jury to find that the defendant took a variety of tapes from the automobile of the prosecuting witness. These tapes, together with the case in which they were kept, were identified and introduced into evidence as State's Exhibit 1. State's Exhibit 1, together with several tape players and some loose tapes, was recovered by the police from the wooded area where the defendant and his companions were found and taken into custody. There is no evidence that the variety of tapes, State's Exhibit 1, had a value in excess of $200.

The court correctly denied the defendant's motion for judgment as of nonsuit, but the court should have submitted the case to the jury only as to the larceny of the variety of tapes, for there is no evidence in the record tending to show that the defendant stole the dress or the tape player.

The evidence will not support a verdict of guilty of felonious larceny. For error in submitting the case to the jury on the charge of larceny of property having a value in excess of $200, the defendant is entitled to a new trial on the charge of the larceny of the tapes described in the bill of indictment, and having a value of less than $200.

New trial.

Judges BROCK and MORRIS concur.

ANNIE J. BLACKWELL v. WILLIS E. BLACKWELL

No. 7110DC423

(Filed 14 July 1971)

1. **Divorce and Alimony § 16— wife as dependent spouse — ability of husband to provide support — sufficiency of findings**

In this action for alimony without divorce, the trial court found sufficient facts to establish plaintiff wife as the dependent spouse and defendant husband as the supporting spouse and the need of plaintiff for support and the ability of the defendant to provide support.

2. **Divorce and Alimony § 16— alimony without divorce — requirement that husband convey entirety property to wife**

In an action for alimony without divorce, the court was without authority to order the husband to convey to the wife all of his right, title and interest in real estate owned by the parties as tenants by the entirety.

APPEAL by defendant from *Preston, District Court Judge,* 15 February 1971 Session District Court Division, General Court of Justice, WAKE County.

Plaintiff instituted this action for alimony without a divorce, alimony *pendente lite* and attorney's fees.

On 28 October 1970 District Court Judge Winborne entered an order allowing plaintiff $50.00 a month alimony *pendente lite* and her attorney $150.00 as reasonable fee. Thereafter, under date of 15 February 1971, District Judge Preston entered a consent order duly signed by both the plaintiff and the defendant and their respective attorneys. In this order it was adjudicated that plaintiff has been a resident of the State of North Carolina for more than six months next preceding the institution of the action; that plaintiff and defendant were married on 23 September 1945; that the defendant abandoned the plaintiff without any just or lawful provocation; and that the cause was retained for the purpose of the court hearing the evidence and entering such orders as the court might deem appropriate upon the question of support and manner in which the support should be paid and attorney's fees.

Thereafter, and at the same session of court, the parties proceeded to introduce evidence consisting for the most part that the four children born of the marriage are all of age or self-supporting; that the plaintiff is receiving medical treatment for a heart condition and this necessitates a limitation

of her activities; that the parties own a three-acre tract of land in Wake County as an estate by the entireties and there is located on that tract of land a building containing a small grocery store and living quarters for the plaintiff; that this property has a fair market value of $16,000.00 and an indebtedness thereon in the amount of $12,314.20 which is secured by a deed of trust held by Central Carolina Bank; that the grocery store inventory has a fair market value of $3,000.00. The plaintiff further introduced evidence as to her outstanding obligations, her income and an itemized list of her monthly expenses. The defendant introduced in evidence an itemized list of his income and expenses; this list showed a gross income by way of salary in the amount of $368.80 every two weeks, and, after tax and retirement reductions, a net monthly income of $614.90. The defendant showed living expenses of $388.32, and insurance costs in the amount of $119.72, leaving a net monthly surplus of $106.86.

Based upon the consent order of 15 February 1971, Judge Preston entered an order on 18 February 1971 to the effect that defendant abandoned plaintiff; plaintiff is a dependent spouse and defendant is a supporting spouse; plaintiff has outstanding obligations of $14,739.63; plaintiff has monthly expenses of $493.84; that the parties owned as tenants by the entirety a tract of land containing 3.1 acres on which is located a store; that the parties prior to separation operated a country store on the premises; that since the separation plaintiff has continued to operate the store; that plaintiff's net profit from the store operation in 1970 was $4,207.52 which did not include any income tax or mortgage payments; that plaintiff's health is poor, and she is required to rest a great deal and was confined in the hospital in the Spring of 1970; that defendant is employed by the Federal Aviation Authority and is paid $368.80 gross pay each two weeks. Based upon these findings, Judge Preston ordered the defendant to pay alimony of $200.00 a month and attorney's fees of $175.00 to plaintiff's attorney, and that the defendant convey to the plaintiff all of his right, title and interest in and to the 3.1-acre tract of land.

Defendant appealed from this order.

Jack P. Gulley and Lester Owens for plaintiff appellee.

Emanuel and Thompson by W. Hugh Thompson for defendant appellant.

CAMPBELL, Judge.

Appellant presents two questions: (1) Did the trial court make sufficient findings of fact, and (2) Did the trial court have the power and authority to order defendant to convey the real estate?

[1] In the light of the consent order of 15 February 1971, which established residence, marital status and unlawful abandonment of the plaintiff by the defendant, we think the order of 18 February 1971 of Judge Preston found sufficient facts to establish the plaintiff as the dependent spouse and the defendant as the supporting spouse and the need of the plaintiff for support and the ability of the defendant to provide support. The findings were supported by the evidence as well as the ability of the defendant to make the payments awarded. The order entered by Judge Preston was in accordance with the holding in *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971).

[2] With regard to the second question presented by this appeal, we are of the opinion that the trial judge committed error in ordering the defendant to convey to the plaintiff all of his right, title and interest in and to the land in question.

It is to be noted that in the complaint plaintiff did not seek a conveyance of the land in question but only sought that the defendant be required to secure the payment of any alimony "by means of a bond, mortgage or deed of trust."

An estate by the entireties has many peculiarities, and the properties and incidents thereof are summarized in the oft-cited case of *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566 (1924).

As stated in *Highway Commission v. Myers,* 270 N.C. 258, 154 S.E. 2d 87 (1967),

> "Although the rents and profits therefrom and the actual possession thereof may be made available for the support of the wife, the court does not have the power to order the sale of land owned by husband and wife as tenants by the entirety in order to procure funds to pay alimony to the wife or to pay her counsel fees. . . . "

This is supported by *Holton v. Holton,* 186 N.C. 355, 119 S.E. 751 (1923) and *Porter v. Bank,* 251 N.C. 573, 111 S.E. 2d 904 (1960).

This cause is remanded to the District Court for the entry of a proper order pertaining to the real estate here involved.

Chief Judge MALLARD and Judge HEDRICK concur.

EDITH A. ADAMS, PLAINTIFF v. RONALD PAUL CURTIS AND GERALD A. CURTIS, DEFENDANTS AND THIRD-PARTY PLAINTIFF, AND EDDIE L. ADAMS, THIRD-PARTY DEFENDANT

No. 714DC386

(Filed 14 July 1971)

Automobiles § 50— automobile accident — directed verdict — sufficiency of evidence — negligence of defendant

Plaintiff's evidence which showed only that his automobile was struck by defendant's automobile in an intersection, without any evidence to show that the defendant was negligent, is insufficient to survive defendant's motions for directed verdict and for judgment notwithstanding the verdict.

APPEAL by defendant from *Lanier, District Court Judge,* 1 February 1971 Session of ONSLOW County, the General Court of Justice, District Court Division.

Plaintiff instituted this action seeking to recover damages for personal injuries sustained in an automobile accident allegedly caused by the negligence of defendant Ronald Paul Curtis as operator of a family purpose automobile owned by defendant Gerald A. Curtis. Defendants denied all allegations of negligence and impleaded Eddie L. Adams as a third-party defendant alleging that if defendants are found to have been negligent then third-party defendant Adams was also negligent in the operation of the vehicle in which plaintiff was a passenger.

Evidence for plaintiff tended to show that she was a passenger in an automobile driven by her husband, Eddie L. Adams, who was proceeding down Highway 24 from Jacksonville. They approached the intersection of Highway 24 and Holcomb Boulevard where a traffic light was flashing. Mr. Adams stopped and then proceeded through the intersection and was struck in the right side by defendant Ronald Paul Curtis' automobile.

At the conclusion of plaintiff's evidence, the trial judge dismissed the action as against defendant Gerald A. Curtis.

Defendant's evidence was to the effect that he slowed down as he approached the intersection. The traffic light was flashing yellow for him and red for Adams. Defendant observed the Adams' car braking or slowing down. He was approximately a car length away from them and started to proceed through the intersection when the Adams' car came on through the intersection. Defendant put on his brakes and had almost stopped when the collision occurred.

The jury returned a verdict finding that plaintiff was injured by the negligence of defendant; that the negligence of the third-party defendant, Eddie L. Adams, contributed to the injuries sustained by the plaintiff; and that plaintiff is entitled to recover $4,500.00 in damages. Defendant appealed.

Ellis, Hooper, Warlick and Waters by William J. Morgan and John D. Warlick, Jr., for plaintiff appellee.

Joseph C. Olschner for defendant appellant.

CAMPBELL, Judge.

Defendant assigns as error the failure of the trial judge to grant his motions for directed verdict and judgment notwithstanding the verdict. Both of these motions test the sufficiency of the evidence to go to the jury and the same test applies for each. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971). In determining the sufficiency of the evidence to go to the jury, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to her, giving her the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in her favor. *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). Viewing the evidence in this light, we are of the opinion that the evidence was insufficient to go to the jury and the trial judge erred in denying defendant's motions.

Plaintiff and her husband were the only witnesses to testify for her as to the accident itself. Eddie L. Adams, plaintiff's husband, testified:

> "I drove up to the intersection. I stopped and then I started off and he comes from the Main Gate. A man by the name of Curtis was driving the other car and he hit me."

Plaintiff then introduced a diagram of the accident scene and, with the use of the diagram, Mr. Adams pointed out the positions of both vehicles at the time of impact, showing the front portion of his vehicle to be through the intersection in the right-hand, eastbound lane and the rear portion to be in the east side of the intersection. Mr. Adams stated that the Curtis vehicle was in the right-hand, northbound lane and that only the front of this vehicle had entered the intersection when it struck the right rear of the Adams car.

Mr. Adams then testified further:

"I was in the right lane and after I stopped, I proceeded on and was struck by a 1964 Chrysler automobile. After my car was struck, it turned around two or three times and then stopped.

. . .

As I proceeded down Highway 24, I could see the Guard Shack and traffic coming out on Holcomb Boulevard. I had a clear, unobstructed view of the traffic coming down this road. I have been traveling this area for 27 years. I am unable to estimate the distance from the intersection back to the Guard Shack on Holcomb Boulevard. I am unable to estimate distances. When I brought my car to a complete stop, I don't know how far the other car was from the intersection. I know that the traffic lights were flashing yellow for me and Mr. Curtis, therefore, I stopped. There is not any speed limit at this particular area, but I was traveling 15 to 20 miles per hour when I arrived at the intersection. . . .

The front of my car was out of the intersection and beyond the red light before I was struck."

Plaintiff, herself, stated:

" . . . When I arrived at the intersection in front of the Main Gate I was involved in a collision. I was going east on Highway 24 towards Swansboro, and the other car was a 1964 Chrysler which was coming from the Main Gate on Holcomb Boulevard. It was not dark at the time of the accident. My husband, Eddie, when he arrived at the intersection, all four wheels stopped and he looked in all directions and as he pulled out and got almost across the

intersection, he was struck from the right-hand side by Curtis, and I was thrown all around the car and hurt my neck and back."

Plaintiff's evidence, taken in the light most favorable to plaintiff, shows only that an accident occurred. No act of negligence on the part of defendant is shown by the testimony and the mere fact that an accident occurred is not enough to infer negligence. Defendant's motions for directed verdict and judgment notwithstanding the verdict should have been allowed. The judgment of the trial court is reversed with instructions to enter judgment for defendant.

Reversed.

Chief Judge MALLARD and Judge HEDRICK concur.

CARRIE LUCILLE TURNER v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 718SC396

(Filed 14 July 1971)

Insurance § 69— uninsured motorist insurance — other coverage available to injured person

Where plaintiff automobile passenger procured a judgment of $22,500 against an uninsured motorist whose automobile collided with the vehicle in which plaintiff was riding and whose negligence was the sole proximate cause of the collision, and plaintiff has available to her a total of $9,250 under uninsured motorist provisions in liability policies issued to plaintiff and to the owner of the vehicle in which plaintiff was riding, the insurer of the driver of the vehicle in which plaintiff was riding cannot under the uninsured motorist provisions of its policy or under its "other insurance" clauses deny coverage to plaintiff on the ground that plaintiff has other similar insurance available to her, since plaintiff's judgment exceeds the uninsured motorist coverage available to her.

APPEAL by defendant from *Cohoon, Judge,* 2 March 1971 Regular Civil Session of Superior Court held in WAYNE County.

Braswell, Strickland, Merritt & Rouse by Roland C. Braswell for plaintiff appellee.

Robert R. Gardner, and Smith, Anderson, Dorsett, Blount & Ragsdale by Willis Smith, Jr., for defendant appellant.

MALLARD, Chief Judge.

When this cause came on for trial, a jury trial was waived and the facts were stipulated. Among the stipulated facts appear the following:

"1. That the plaintiff, Carrie Lucille Turner, on May 8, 1966, at or about 12:30 a.m., was a passenger in a 1961 Ford automobile which was being driven in a southerly direction on U. S. Highway No. 117 by Oscar Linwood Sutton and was approaching a point near the Wayne-Wilson County, North Carolina line, when it was involved in an accident with a 1953 Chevrolet automobile which was at that time being operated in an easterly direction upon a rural paved road which intersects U. S. Highway 117 at or near the Wayne-Wilson County, North Carolina, line, resulting in personal injuries to the plaintiff.

* * *

4. That Nationwide Insurance Company issued its assigned risk policy No. 61-683-687 to Oscar Linwood Sutton for the policy period from March 26, 1966, to March 26, 1967; that said policy contained an uninsured motorist endorsement, being endorsement No. 644; that said policy including the uninsured motorist endorsement was in full force and effect at all times complained of in this matter.

* * *

6. That Danny Ray Barnes was the operator of the 1953 Chevrolet automobile at the time referred to in the complaint; that Danny Ray Barnes did not have liability insurance which covered him or protected him at the time of the operation of said automobile and that said automobile was an uninsured motor vehicle as that term is defined in the policy provisions of the insurance policy No. 61-683-687 issued by the defendant hereinabove referred to and that Danny Ray Barnes was an uninsured motorist as that term is defined in said policy.

7. That the 1961 Ford automobile in which the plaintiff was a passenger and which was being driven by Oscar Linwood Sutton was not owned by him but was in fact owned by James Thomas Hargrove; that Oscar Linwood Sutton was operating the same with the consent of James

Thomas Hargrove and said automobile was covered by a liability policy issued by Great American Insurance Company, the same being Policy No. 4-49-01-27 UF, and that said policy contained an endorsement providing protection against uninsured motorists in the limits of liability in the amount of $5,000.00 each person and $10,000 each accident.

8. That the said collision and the injuries sustained by the plaintiff resulted and arose solely and exclusively from and were proximately caused and produced by the negligent operation of the 1953 Chevrolet automobile operated by Danny Ray Barnes.

9. That a jury awarded damages to the plaintiff, Carrie Lucille Turner, in the sum of $22,500.00.

10. That the plaintiff has made demands upon the defendant herein in the amount of $5,000.00, which said claims has *(sic)* been denied, on the grounds that the policy did not cover plaintiff's claim.

11. That the plaintiff has complied with all conditions precedent to the bringing of this action as set out in the policy or said provisions have been waived by the defendant.

12. That the plaintiff, Carrie Lucille Turner, was an insured under the uninsured motorist coverage endorsement according to the terms of Great American Insurance Company's policy No. 4-49-01-27 UF, which said Great American Insurance Company issued to James Thomas Hargrove covering the 1961 Ford automobile being driven by Oscar Linwood Sutton at the time complained of herein.

13. That South Carolina Insurance Company caused its Policy No. FCS 15133 to be issued to the plaintiff, Carrie Lucille Turner, covering an automobile owned by her but not involved in this accident which resulted in her injuries, which contained an endorsement providing protection against uninsured motorists with policy limits therein of $5,000.00, each person, and $10,000.00 each accident, and plaintiff was an insured under the uninsured motorist coverage endorsement or coverage of such policy.

14. That the plaintiff, Carrie Lucille Turner, was the named insured in South Carolina Insurance Company Policy No. FCS 15133 hereinabove referred to.

15. That Great American Insurance Company under the provisions of its Policy No. 4-49-01-27 UF has paid to the plaintiff, Carrie Lucille Turner, the sum of $5,000.00; that South Carolina Insurance Company under the provisions of its policy No. FCS 15133 has paid to the plaintiff Carrie Lucille Turner the sum of $4,250.00.

16. That if the plaintiff, Carrie Lucille Turner is entitled to recover against the defendant under the terms of said policy, then she is entitled to recover the sum of $4,562.50 on account of the cause of action set out in Count One of the plaintiff's complaint.

17. That the only matter in controversy in this action is whether the uninsured motorists endorsements in the defendant's Policy No. 61-683-687 issued to Oscar Linwood Sutton provides any insurance coverage to the plaintiff, Carrie Lucille Turner.

18. The parties agree that this action shall be determined upon these stipulations, plus the insurance policies and the endorsements attached thereto above referred to, and without the introduction of any other or additional evidence."

Upon the stipulated facts, the trial judge made conclusions of law and entered judgment as follows:

"1. That all parties are properly before the Court; that the Court has jurisdiction of the subject matter; that trial by jury has been waived.

2. That the plaintiff, Carrie Lucille Turner, is an insured under the terms of the policy issued by the defendant to its insured, Oscar Linwood Sutton, the same being its assigned risk Policy No. 61-683-687, and that said policy was in full force and effect at all times complained of in this matter including the uninsured motorist endorsement No. 644.

3. That the uninsured motorist endorsement No. 644 in the defendant's policy No. 61-683-687 issued to Oscar Linwood Sutton provided insurance coverage to the plaintiff, Carrie Lucille Turner.

4. That the defendant cannot under the uninsured motorist provisions of its policy nor under its 'other insur-

ance' clauses, deny coverage to plaintiff on the ground that the insured (plaintiff) had other similar insurance available to her and paid to her, plaintiff's judgment being in excess of the uninsured motorist coverage available to her as such would be contrary to the intent and provisions of General Statute 20-279.21.

5. That Carrie Lucille Turner is entitled to cover *(sic)* of the defendant the sum of $4,250.00.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of $4,250.00 together with the cost of this action which is to be taxed by the Clerk."

The pertinent provisions of the uninsured motorist endorsement of the assigned risk policy issued by Nationwide, as stipulated, are identical to the provisions of the Hartford Accident and Indemnity Company's policy quoted on pages 553 and 554 in the case of *Moore v. Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967).

Under the principles of law set forth in *Moore v. Insurance Co., supra,* we hold that the trial judge made proper conclusions of law based upon the stipulated facts, and the judgment entered thereon is proper and is therefore affirmed.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

BETTE F. WALLACE v. PEARL R. JOHNSON, ADMINISTRATRIX OF THE ESTATE OF MILTON LEE JOHNSON, AND FREE WILL BAPTIST CHILDREN'S HOME

No. 717SC414

(Filed 14 July 1971)

1. Automobiles § 21; Negligence § 4— sudden incapacitation of motorist

A motorist who becomes suddenly stricken by a fainting spell or other sudden and unforeseeable incapacitation, and is, by reason of such unforeseen disability, unable to control the vehicle, is not chargeable with negligence.

2. **Automobiles § 21— sudden unconsciousness — burden of proof**

A motorist who relies upon a sudden unconsciousness to relieve him from liability must show that the accident was caused by reason of such sudden incapacity.

3. **Automobiles §§ 21, 90— instructions — sudden disability — negligence in driving with knowledge of physical impairment**

In this action to recover damages for injuries sustained by plaintiff when defendant's intestate drove his automobile into the rear of plaintiff's vehicle, the trial court's instructions sufficiently apprised the jury that plaintiff was relying on alleged conduct of defendant's intestate in operating his vehicle after he suffered a stroke and with knowledge of his physical impairment as a specific act of negligence and not merely to rebut defendant's affirmative defense of sudden disability.

4. **Automobiles § 91— issues submitted — defense of sudden disability**

The trial court did not place on plaintiff the burden of disproving defendant's affirmative defense of sudden disability by submitting only one general issue as to negligence and refusing to submit a separate issue as to the negligence of defendant's intestate in operating his automobile with knowledge of his disability.

5. **Automobiles § 91; Negligence § 37— issues — various acts of negligence**

It is neither necessary nor appropriate to submit separate issues as to every act of negligence alleged by plaintiff.

APPEAL by plaintiff from *Cohoon, J.*, 7 December 1970 Civil Session of Superior Court held in NASH County.

Plaintiff instituted this action seeking damages for injuries sustained in an automobile accident. Plaintiff alleged and defendants admitted that plaintiff was operating an automobile in a careful and prudent manner along N. C. Highway No. 58; that defendant's intestate was also operating a vehicle owned by the corporate defendant along the same highway behind the plaintiff and drove said vehicle into the rear of plaintiff's vehicle. Defendants denied negligence and alleged that at the time of the accident defendant's intestate suddenly and unexpectedly suffered a cerebral vascular thrombosis, a stroke or brain clot, and that his mental and physical condition was such that he was not capable of sense perception; that prior to the accident he was in excellent health. Plaintiff filed a reply in which she denied the affirmative matters set up in defendants' answer and alleged that if defendant's intestate suffered a stroke the same occurred prior to the time that he began operating the vehicle and that defendant was negligent in operating the vehi-

cle after he had become aware of his physical impairment. The first issue (Was the plaintiff injured by the negligence of the defendants as alleged by the plaintiff?) was answered "No." The only other issue submitted, that of damages, was not reached. Plaintiff appealed.

Dill and Fountain by Richard T. Fountain for plaintiff appellant.

Battle, Winslow, Scott and Wiley by Robert Spencer for defendant appellees.

VAUGHN, Judge.

Defendants having admitted that defendant Johnson drove his automobile into the rear of plaintiff's automobile as plaintiff was proceeding along Highway 58 in a careful and prudent manner, defendants offered evidence which, if believed by the jury, was sufficient to permit, but not require, the jury to find that at the time defendant's intestate drove his automobile into the rear of plaintiff's automobile he was unable to control the vehicle because of being stricken with an unforeseen cerebral vascular thrombosis. There was other evidence which would have permitted, but did not require, the jury to infer that the alleged stroke affected only the speech of defendant's intestate or that prior to the occurrence of the accident he could reasonably have been aware of and foreseen such disability as he might have had.

[1-3] By the great weight of authority the operator of a motor vehicle who becomes suddenly stricken by a fainting spell or other sudden and unforeseeable incapacitation, and is, by reason of such unforeseen disability, unable to control the vehicle, is not chargeable with negligence. Annot., 28 A.L.R. 2d 12, and cases cited. "But one who relies upon such a sudden unconsciousness to relieve him from liability must show that the accident was caused by reason of this sudden incapacity." 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 693, p. 245. In her reply plaintiff alleged that if defendant's intestate suffered a stroke, he suffered it prior to the time he entered his vehicle and that he operated the vehicle with knowledge of his physical impairment. On appeal plaintiff argues that the court did not make it clear to the jury that plaintiff was relying on that alleged conduct of the defendant's intestate as a specific act of negli-

gence and not merely to rebut defendants' defense which was based on sudden disability. Generally, objections to a statement of a party's contentions should be called to the attention of the court. *Sherrill v. Hood,* 208 N.C. 472, 181 S.E. 330. Moreover, in this case the judge specifically instructed the jury:

> "Whether or not an individual has knowledge of physical defects or infirmities or an approaching incapacitation rendering it dangerous for him to operate a motor vehicle as a reasonably prudent person would operate under the same or similar circumstances, is of importance in determining his liability. One who knows or has reason to believe that his physical or mental faculties are becoming appreciably impaired and that he is physically unfit to operate a motor vehicle upon the highway and fails to stop and cease driving when he has an opportunity to do so, and as a reasonably prudent person would do under the same or similar circumstances, and then nevertheless undertakes to drive or continue to drive on the highway, he is liable for his negligent act or acts resulting therefrom and for resulting injury when thereby he loses control of his car and causes injury to another.
>
> "If the defendant Johnson drove under conditions and failed to stop and cease driving when he had an opportunity to do so at a time when he knew or by the exercise of due care should have known he was being physically or mentally affected or becoming incapacitated to operate his car as a reasonable and prudent person would do, and that in so doing, that is, continuing to drive under such circumstances, he failed to exercise due care to keep a reasonable lookout or failed to keep his vehicle under proper control or failed to exercise due care to avoid a collision with another vehicle, in this instance the vehicle of Mrs. Wallace, then such conduct on the part of the defendant Johnson would constitute negligence on the part of the defendants, and if a proximate cause of plaintiff's injuries the defendants would be liable therefor . . . . "

[4] Plaintiff assigns as error that the court refused to submit the following issues which she tendered:

> "1. Was the plaintiff injured by the negligence of the defendants as alleged in the complaint?

2. If not, was the plaintiff injured by the negligence of the defendants, as alleged in the Amended Reply?"

Plaintiff contends that by submitting only one issue as to negligence, "the court absolved the defendants of their burden of proof on the affirmative defense raised in their answer and put the burden upon plaintiff to disprove defendants' affirmative defense." This argument is without merit. The jury was instructed as follows:

"The burden in this respect is on the defendants to show sudden illness or attack upon Mr. Johnson and that the illness or attack was unanticipated and unforeseen by Mr. Johnson and rendered him unable to control the operation of his car at the time in question. The defendants have the burden of satisfying you of this from the evidence and by its greater weight. In this respect, as to this rule of law and contention of the defendants, the Court instructs you that if the defendants have satisfied you from the evidence and by its greater weight that as the defendant Johnson was driving along N. C. Highway 58 eastwardly in the vicinity of the Nash Garment Company in Nashville at the time in question that he suffered from a brain stroke or loss of control of his mental and physical faculties from a sudden and unforeseeable seizure or sudden incapacitation which deprived him of the ability to act as a reasonable and prudent person would act in the operation of his automobile, and that he had no time to stop or cease the operation of his vehicle beforehand because of said condition, and that his mental or physical condition was such that he was not capable of sense perception and judgment, and that he was not consciously aware of his actions and had no reason to anticipate such attack upon him because of such sudden seizure or incapacitation, that he was rendered unable to control the operation of his car, and that because of such brain stroke and incapacitation he then collided with the plaintiff's vehicle, then and in that event the defendant Johnson would not be guilty of actionable negligence and the defendants would be entitled to have you answer the first issue 'No' in the defendants' favor, the burden being upon the defendants in this respect as to the matter about which I have just instructed you."

That the burden of proof on this defense was on the defendants was elsewhere repeated and clearly stated by the judge.

[5] The issues as framed and tendered by the plaintiff were quite properly rejected. It is neither necessary nor appropriate to submit a separate issue as to every act of negligence alleged by the plaintiff. "Ordinarily, the form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law." *Johnson v. Lamb,* 273 N.C. 701, 161 S.E. 2d 131. The issues submitted, under the clear and comprehensive instructions given by the court, were sufficient to enable the jury to resolve the material controversies in this case.

Plaintiff's other assignments of error have been carefully considered and are overruled. The case was well tried and ably argued on appeal. The crucial issues were resolved in a trial which we believe to have been free of prejudicial error.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM DAVID FIELDS

No. 7127SC359

(Filed 14 July 1971)

1. **Criminal Law § 140— imposition of punishment — concurrent sentences**

A sentence imposed upon defendant's conviction of nonsupport runs concurrently with two consolidated sentences that were imposed two days earlier upon defendant's conviction of other offenses, where the trial judge did not provide that the nonsupport sentence was to run consecutively with the other sentences. G.S. 15-6.2.

2. **Criminal Law § 140— concurrent or consecutive sentences — effect of probation revocation statute**

The statute authorizing the judge in a probation revocation hearing "to deal with the case as if there had been no probation or suspension of sentence" does not authorize the judge, when activating

sentences of imprisonment, to make consecutive those sentences of imprisonment which run concurrently as a matter of law. G.S. 15-200.

3. Constitutional Law § 36— cruel and unusual punishment — failure of State to furnish appearance bond to indigent

Failure of the State to furnish an indigent defendant an appearance bond in the amount set by the court is not cruel and unusual punishment.

APPEAL by defendant from *Thornburg, Judge,* 8 February 1971 Session of Superior Court held in GASTON County.

On 13 January 1970 in district court in case no. 69-CR-18245, the defendant entered a plea of guilty to a charge of non-felonious breaking and entering and was given a two-year prison sentence. On the same date in case no. 69-CR-17848, the defendant entered a plea of guilty to the possession of narcotics and illegal drugs and was given a two-year prison sentence. Both cases were consolidated in one probationary judgment. The two sentences were ordered to run consecutively, and they were suspended for five years.

On 15 January 1970 in district court in case no. 69-CR-21587, the defendant entered a plea of guilty of failing to support his minor children and was given a six-months prison sentence which was suspended for five years. He was placed on probation on the conditions set out in the probationary judgment.

On 6 August 1970 a probation violation warrant and order for capias was entered on both of the probationary judgments. On 13 January 1971, after a hearing, an order was entered by the district judge revoking the probation in all three cases and ordering the six-months sentence "to run at the expiration of the sentences entered in Docket Nos. 69-CR-18245 and 69-CR-17848."

The defendant appealed to the superior court. After a hearing Judge Thornburg found that the defendant had wilfully violated the terms of the probationary judgments, ordered the prison sentences into effect, and ordered the six-months sentence in no. 69-CR-21587 "to run at the expiration of the sentences entered in Docket Nos. 69-CR-18425 and 69-CR-17848." The defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Eatman for the State.

William G. Holland for defendant appellant.

MALLARD, Chief Judge.

The defendant's contention that the evidence was insufficient to support the finding that the defendant had wilfully and intentionally violated the terms of the probationary judgments is without merit.

[1] Defendant contends that the sentence for non-support should run concurrently with the other sentences. The Attorney General does not disagree. When the defendant was sentenced on the charge of non-support of his minor children, the trial judge did not provide that the sentence was to run consecutively. In the case at bar separate sentences were pronounced on each of the three charges. In each of the sentences the defendant was sentenced to "Gaston County Jail, to be assigned to work under the supervision of the State Department of Correction of North Carolina." We hold that the six-months sentence on the non-support charge runs concurrently with the other sentences. See G.S. 15-6.2. In *State v. Efird,* 271 N.C. 730, 157 S.E. 2d 538 (1967), the Supreme Court said:

> "Separate judgments, each imposing a prison sentence, were pronounced. Each judgment is complete within itself. Absent an order to the contrary, these sentences run concurrently as a matter of law."

[2] We do not interpret the provisions of G.S. 15-200 (providing that the judge "shall proceed to deal with the case as if there had been no probation or suspension of sentence") as statutory authority for the judge, at a probation revocation hearing, to order the sentence imposed by the trial judge to run consecutively with some other sentence unless the trial judge ordered it at the time the sentence was imposed. To do so would permit the hearing judge to increase the severity of the punishment imposed by the trial judge.

Also in G.S. 15-200.1, relating to appeals from a probationary or suspended sentence revocation of a court inferior to the superior court, there appears the following language:

"Upon its finding that the conditions were violated, the superior court shall enforce the judgment of the lower court unless the judge finds as a fact that circumstances and conditions surrounding the terms of the probation and the violation thereof have substantially changed, so that enforcement of the judgment of the lower court would not accord justice to the defendant, in which case the judge may modify or revoke the terms of the probationary or suspended sentence in the court's discretion."

In the case at bar there is no finding as a fact by Superior Court Judge Thornburg that circumstances and conditions surrounding the terms of the defendant's probation and the violation thereof have substantially changed so that the enforcement of the judgment of the trial judge would not accord justice to the defendant. There was no factual basis for any change in the sentence imposed by the trial judge. Therefore, it was error for Judge Thornburg, after finding that the conditions were violated, to do anything other than "enforce the judgment of the lower court." We do not reach or decide the question as to whether, under proper findings, the word "modify" in this statute is authority for a judge, after a revocation hearing, to increase the punishment. Suffice to say, in Webster's Third New International Dictionary (1968), "modify" means "to make more temperate and less extreme: lessen the severity of: MODERATE."

[3] Defendant's assignment of error "that it is cruel and unusual punishment for the State of North Carolina not to furnish the defendant, who is an indigent, an appearance bond in the amount set by the Court" is overruled.

The commitment issued in case no. 69-CR-21587 is ordered stricken, and this cause is remanded to the Superior Court of Gaston County with instructions that an order issue directing that the sentence in case no. 69-CR-21587 is to run concurrently with the sentence imposed in the case bearing docket no. 69-CR-18245.

There is no error in the cases bearing docket no. 69-CR-18245 and docket no. 69-CR-17848.

Remanded with directions.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. MARY LOUISE HUDSON

No. 7126SC398

(Filed 14 July 1971)

1. **Larceny § 1— credit card theft — constitutionality of statute**
Statute defining the crime of credit card theft, G.S. 14-113.9(a), is not unconstitutional in failing to require criminal intent.

2. **Forgery § 2— credit card forgery — sufficiency of evidence**
The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of credit card forgery under G.S. 14-113.11(a)(2) where it tended to show that defendant forged a credit card by endorsing thereon the name of another person to whom it was issued and presented it to a merchant in payment for goods defendant had selected.

3. **Criminal Law § 166— abandonment of assignments of error**
Assignments of error are deemed abandoned where defendant has stated no reason or argument and has cited no authority in support thereof. Court of Appeals Rule No. 28.

APPEAL by defendant from *McLean, Judge,* 1 March 1971 Session of Superior Court held in MECKLENBURG County.

The defendant was charged in separate bills of indictment, proper in form, with credit card theft, in violation of G.S. 14-113.9(a)(1), and with credit card forgery, in violation of G.S. 14-113.11(a)(2). Upon the defendant's plea of not guilty to both bills of indictment, the State offered evidence tending to show that on 1 December 1969 the defendant, Mary Louise Hudson, selected from the merchandise of the Pride and Joy Shop in Charlotte, N. C., a pair of white slacks, a tunic top, a sweater, and two dresses. Eloise Lowery, a clerk in the Pride and Joy Shop, testified that the defendant offered to pay for the merchandise by the use of a credit card issued by First Union National Bank to Brenda E. Hasty. The defendant took the credit card out of her purse and signed the name of Brenda E. Hasty on the back of the card. Miss Lowery made out the "charge slips" upon which the defendant also signed the name of Brenda E. Hasty. The charge card and the "charge slips" were identified and introduced into evidence as State's Exhibits 1, 2 and 3. The total cost of the articles selected by the defendant was such that, as a matter of store policy, Miss Lowery was required to check the account with the bank and obtain further identification from the holder of the card. After check-

ing with the bank, Miss Lowery requested further identification from the defendant. When the defendant was unable to produce further identification, a police officer accompanied the defendant to an automobile where the defendant said her husband would identify her. The officer was permitted to testify that the man in the automobile identified the defendant as Sylvia Byrd. The jury found the defendant guilty as charged in both bills of indictment. The court consolidated the two cases for judgment and imposed a prison sentence of three years. The defendant appealed.

Attorney General Robert Morgan and Staff Attorney William Lewis Sauls for the State.

Mraz, Aycock & Casstevens by Frank B. Aycock III for defendant appellant.

HEDRICK, Judge.

[1] By assignments of error 1 and 3 the defendant contends that the court committed error in denying her motion to quash the bill of indictment and her motion to arrest the judgment in case number 69-CR-101030 wherein the defendant was charged with credit card theft. Defendant asserts that the statute, G.S. 14-113.9(a), under which she was charged is unconstitutional in that "it fails to give notice to the defendant of a necessary element of criminal conduct, *i.e.*, criminal intent."

G.S. 14-113.9(a), in pertinent part, provides that a person is guilty of credit card theft when "[h]e takes, obtains or withholds a credit card from the person, possession, custody or control of another without the cardholder's consent. . . . "

In *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961), the North Carolina Supreme Court stated:

> "It is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design."

This statute, and the bill of indictment under which it is drawn, defines with sufficient clarity and definiteness the acts

which are penalized, and informs a person of ordinary intelligence with reasonable precision what acts it intends to prohibit. These assignments of error are overruled.

[2] By assignment of error 6 defendant contends that the court committed error in denying her motions for judgment as of nonsuit in case number 69-CR-101364 wherein the defendant was charged with credit card forgery. The defendant argues that she was charged with credit card forgery under G.S. 14-113.11(a)(1), and that the evidence will not support a verdict of guilty under this charge. It is clear that the defendant was charged under G.S. 14-113.11(a)(2) which provides that a person is guilty of credit card forgery when "[h]e, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a credit card."

All of the evidence tends to show that the defendant forged the credit card by endorsing the name of Brenda E. Hasty and presented it to the Pride and Joy Shop in payment for the merchandise she had selected. This assignment of error is without merit.

[3] Assignments of error 2, 4 and 5 are deemed abandoned by the defendant since she has stated no reason or argument nor cited any authority in support thereof. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

The defendant's other assignments of error brought forward and argued in her brief have been carefully considered and found to be without merit.

We find and hold that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

RALEIGH SWIMMING POOL COMPANY v. WAKE FOREST COUNTRY CLUB

No. 7110DC454

(Filed 14 July 1971)

Corporations § 26— suspension of articles of incorporation — standing to maintain action

A corporation whose articles of incorporation were suspended for failure to pay taxes had standing to maintain an action to recover the amount due on a contract. G.S. 105-230; G.S. 105-231; G.S. 55-114(a) and (b).

APPEAL by plaintiff from *Preston, District Judge,* 26 April 1971 Session, WAKE District Court.

Plaintiff instituted this action on 16 October 1970 to recover $5,000 allegedly due on a contract entered into between the parties on 28 February 1967. When the case was called for trial on 27 April 1971, defendant orally moved to dismiss plaintiff's action on the ground that plaintiff had no legal capacity to sue for that its articles of incorporation had been suspended pursuant to G.S. 105-230 and had not been reinstated. The record discloses a certificate from the Secretary of State dated 26 April 1971 certifying that plaintiff's articles of incorporation were suspended on 21 September 1970 pursuant to G.S. 105-230 upon certification by the Commissioner of Revenue that plaintiff had failed or neglected to make reports or to pay taxes required by the Revenue Act.

Defendant's motion was allowed and from judgment dismissing the action, plaintiff appealed.

Dan Lynn and Vaughan S. Winborne for plaintiff appellant.

Ellis Nassif for defendant appellee.

BRITT, Judge.

In defending the judgment appealed from, defendant contends G.S. 105-230 and G.S. 105-231 clearly provide that when articles of incorporation are suspended pursuant to G.S. 105-230, "all the powers, privileges, and franchises conferred upon" the corporation cease and determine; and "any corporate act performed or attempted to be performed during the period of such suspension shall be invalid and of no effect."

Plaintiff contends that by virtue of other statutes, particularly G.S. 55-114, and more particularly subsection (b) thereof, and decisions of the Supreme Court, that the judgment was erroneous and that plaintiff does have standing to prosecute this action. We agree with plaintiff's contention.

G.S. 55-114(a) sets forth four ways in which a corporation may be dissolved. Subsection (4) provides as follows: "By suspension of its charter under the provisions of G.S. 105-230 when the time within which the corporation's rights might be restored under G.S. 105-232 has expired; however, the provisions for liquidation of corporate assets in such cases shall be those provided in G.S. 105-232 instead of those provided in this chapter."

G.S. 55-114(b) provides in pertinent part as follows: "A dissolved corporation, however dissolved, nevertheless continues to exist for the purpose of winding up its affairs, *prosecuting and defending actions by or against it,* and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and distribute its assets, but not for the purpose of continuing business except so far as necessary for winding up its affairs or except where G.S. 55-115 applies." (Emphasis ours.)

It would appear that when a corporation's charter is suspended pursuant to G.S. 105-230, the same may be reinstated within five years upon payment of fees and taxes due the Revenue Department; and that if the charter is not so reinstated within five years, then liquidation of corporate assets would be as provided in G.S. 105-232 rather than G.S. 55-114 *et seq.* Inasmuch as plaintiff's charter was suspended on 21 September 1970, we hold that G.S. 55-114(b) applies and that plaintiff corporation is authorized to prosecute and defend actions by or against it and to collect and discharge obligations.

Our holding finds support in *Ionic Lodge v. Masons,* 232 N.C. 252, 59 S.E. 2d 829 (1950) where, in an opinion by Seawell, J., it is said: " * * * by a fair interpretation of the statute, while depriving the corporation of the power to engage in the ordinary business for which it has been chartered, it has not taken away from it the incidental powers necessary to its survival; the power to protect its property in a court of law, either by assertion or defense of right." Although the cited

case was reversed on rehearing (232 N.C. 648, 62 S.E. 2d 73), the reversal was on other grounds not pertinent to this appeal. See also *Trust Company v. School for Boys,* 229 N.C. 738, 51 S.E. 2d 477 (1948); also *Mica Industries, Inc. v. Penland,* 249 N.C. 602, 107 S.E. 2d 120 (1959).

For the reasons stated, the judgment appealed from is

Reversed.

Judges MORRIS and PARKER concur.

BRYTE ELAM LANE AND HUSBAND, GUY F. LANE v. HELEN BENNETT FAUST, WIDOW; HELEN FAUST LLEWELLYN, WIDOW; JACK MARTINDALE FAUST AND ISAAC HENRY FAUST

No. 7119SC233

(Filed 14 July 1971)

Wills § 40— devise with power of disposition

The trial court properly determined that under the terms of testator's will, his widow could convey a fee simple title to the property in question after her remarriage.

APPEAL by defendants from *Long, Judge,* October-November 1970 Civil Session of Superior Court held in RANDOLPH County.

Plaintiffs seek to have any claims of defendants to the lands described in the complaint declared invalid and judgment that plaintiff Bryte Elam Lane is the fee simple owner thereof. Defendants deny that the plaintiff Bryte Elam Lane is the fee simple owner and assert by way of counterclaim that the defendants, as legal heirs of Jack Faust, are the rightful owners in fee simple of the property in question.

Under date of 14 October 1970, plaintiffs gave notice to defendants' counsel that they would move at the October-November 1970 Session of Superior Court held in Randolph County to dismiss the counterclaim for failure to state a claim upon which relief could be granted pursuant to Rule 12 and for summary judgment in their favor pursuant to Rule 56 of the Rules of Civil Procedure.

After the hearing the trial judge entered the following judgment:

"This cause coming on to be heard before the undersigned Judge Presiding at the October-November, 1970, Civil Session of the Superior Court of Randolph County, upon motion of the plaintiff to dismiss and for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure and upon the motion of defendants to continue said hearing so that the same might be heard at a later time and before another Presiding Judge; and it appearing to the Court that the motion for summary judgment, by exhibits, contained sundry stipulations of the parties, sundry documents pertaining to the real estate involved in this matter, including the will of the late I. H. Faust, being Exhibit 2 of plaintiffs' motion, together with affidavits supporting the contentions of the plaintiffs in respect to their possession of the subject property; and that the defendants filed an answer to said motion on the date of the hearing of the same, to which was attached an affidavit of DeEtte Bennett Ingram in respect to certain conversations between the affiant, the late I. H. Faust; Jack Faust and his wife, Helen Bennett Faust, and subsequently filed an affidavit setting forth the birth date of Isaac Henry Faust, one of the defendants, and stating that Jack Faust was under a disability from 1954 until the date of his death in 1956.

WHEREUPON, the Court upon consideration of the verified pleadings and such of the pertinent exhibits and affidavits as were competent for the consideration of the Court in this matter, concludes as a matter of law that the Last Will and Testament of I. H. Faust, as appears in the record as Exhibit 2 to plaintiffs' motion, conferred upon Rosa Petty Faust the right and privilege to sell and dispose of the subject real estate, either publicly or privately, and that the conveyance by her and her then spouse to W. A. Elam and wife, Georgia Parker Elam, as appears in Exhibit 4 to the motion, vested in said grantees a fee simple interest in the property described and that the subsequent conveyance of W. A. Elam and wife, Nettie Moon Elam, to Bryte Elam Lane, as appears in Exhibit 5 to said motion, vested in said grantee the fee simple interest

therein; and that the character of possession of said property by plaintiffs under the deed to Bryte Elam Lane has been adverse to the defendants for a period of time sufficient to vest in her the title to said premises under the applicable adverse possession statutes:

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(a) That the motion of the defendants for a continuance of the hearing on this motion for summary judgment be and the same hereby is denied in the discretion of the Court;

(b) That the motion of the plaintiffs for summary judgment under Rule 56 of the Rules of Civil Procedure be and the same hereby is allowed;

(c) That all claims to estates and interests in said lands by or on behalf of defendants be and they hereby are adjudged invalid and of no effect;

(d) That the plaintiff, Bryte Elam Lane, be and she hereby is adjudged to be the fee simple owner of the lands described in the complaint and as described in Evidentiary Exhibit 5; and

(e) That the costs of this action be taxed against the defendants."

From the entry of the judgment, the defendants appealed to the Court of Appeals, assigning error.

Miller, Beck & O'Briant by G. E. Miller for plaintiff appellees.

John Randolph Ingram and Brown, Brown & Brown for defendant appellants.

MALLARD, Chief Judge.

This case has been heard by this court before. The opinion is reported in 9 N.C. App. 427, 176 S.E. 2d 381 (1970). On that appeal it was held that it was error, in this action to remove a cloud from title, for the trial judge to take the case away from the jury and enter judgment in favor of plaintiffs,

who had the burden of proof, without permitting the defendants to introduce any evidence.

The judgment on this appeal was entered after notice and after the hearing on plaintiffs' motion for summary judgment under Rule 56. At this hearing the parties offered their evidence and made certain stipulations. When the evidence and stipulations are considered, it is apparent that there are no disputed material issues of fact in this case. The principal legal question arises as to whether Rosa Petty Faust in 1942, under the terms of the will of I. H. Faust, deceased, and after her marriage to Jacob Long, could convey a fee simple title to the lands in question.

The pertinent provisions of the will are:

> "I give devise and bequeath to my beloved wife Rosa Petty Faust all my property real and personal including all chattels, insurance, lands or property of any kind whatsoever to be used for her benefit or the benefit of our beloved foster son Jack Faust in whatsoever way to her seems best with the right and privilege to dispose of any or all of the personal property or real estate either privately or at public auction, should she my said wife deem it best for her own or the welfare of our foster son, Jack Faust.
>
> It is my will that my beloved wife shall at any time she thinks best after our foster son, Jack Faust, reaches the age of twenty one years deed or give to him any part of our estate she deems proper and that after the death of my said wife Rosa Petty Faust all the residue of my estate both real and personal shall become the property of our said foster son Jack Faust to have and to hold to him, his heirs and assigns for ever."

When the appropriate basic rules of law are properly applied, we hold that the trial judge did not commit prejudicial error in entering the judgment in this case.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JIMMIE CRANE

No. 7130SC446

(Filed 14 July 1971)

1. **Criminal Law § 114— instructions — expression of opinion — request by jury for additional information**

In replying to the jury's question as to whether defendant's statement to the sheriff was oral or written, the trial court's instruction that, if the jury believed that such a statement was made, it would make no difference whether or not the statement was in writing, did not constitute an expression of opinion. G.S. 1-180.

2. **Criminal Law § 113— instructions — request for restatement of the evidence**

It is discretionary with the court to grant or refuse the jury's request for restatement of the evidence.

APPEAL from *Grist, Judge,* 15 February 1971 Regular Session of Superior Court of JACKSON County.

Defendant was tried on a bill of indictment charging felonious breaking and entering and felonious larceny. He entered a plea of not guilty, was found guilty on both counts, and appealed from the judgment entered on the verdict.

Attorney General Morgan by Staff Attorney Conely for the State.

Orville D. Coward and Thomas W. Jones for defendant appellant.

MORRIS, Judge.

[1] After the jury had been deliberating for some time, they returned to the courtroom. The foreman told the court that the jury wanted to know if the sheriff had said he had a signed statement of the defendant, or just the oral word of the defendant. The court, in instructing the jury again to take their own recollection of the evidence, said:

> "Well, members of the jury, it is in evidence as to the type of statement allegedly made to Sheriff Holcombe. I'll just have to tell you to take your own recollection of what was said or what was not said. (It would be of very little consequence, from a legal standpoint, it might make a difference to you, one way or the other, as to whether or

not the statement was or was not made in writing.) As I say, it is in evidence; some of you may have heard it, and some of you may not have, but I cannot go any further than to say that it is in evidence, and (that whether or not it was or was not a written statement, insofar as its legal sufficiency is concerned, is of no consequence. If you find that there was a statement made, beyond a reasonable doubt, and if you find that you believe what was in the statement, it will be up to you to believe; if you fail to find that such a statement was made, it will be a question of whether it was made or not, not a question of whether it was in writing or not. Do you understand that?)

THE FOREMAN: They just wanted to know if Crane had signed the statement to the Sheriff; they didn't understand what the sheriff said to that.

THE COURT: The evidence was testified to by the Sheriff, one way or the other, so you'll have to take your best recollection of it.

THE FOREMAN: All right, sir."

Defendant excepted to those portions in parentheses and these exceptions, together with an exception to the failure of the court to recapitulate the testimony of the sheriff, support defendant's two assignments of error on appeal.

Defendant contends that the trial judge violated the provisions of G.S. 1-180 prohibiting the judge from giving "an opinion whether a fact is fully or sufficiently proven." We fail to see how the remarks of the court could be construed as expressing an opinion. The jury obviously was satisfied that a statement was made by the defendant to the sheriff. The foreman said they didn't understand what the sheriff said as to whether it was a signed statement. The court simply told them if they believed a statement was made, and if they believed what was in it, it would make no difference whether it was in writing.

[2] Defendant also asserts that the court committed reversible error in failing to recapitulate the evidence of the sheriff. The general rule is that it is discretionary with the court to grant or refuse the jury's request for restatement of the evidence. 23A C.J.S., Criminal Law, § 1377. The evidence requested by

the jury here was not a vital portion of the testimony. This was explained to the jury clearly and fully. We find no abuse of discretion and no prejudicial error.

No error.

Judges BRITT and PARKER concur.

CLAYTON MUTUAL BURIAL ASSOCIATION, INC. v. OVERBY MUTUAL FUNERAL ASSOCIATION, INC.

No. 7111SC244

(Filed 14 July 1971)

Burial Associations; Administrative Law § 3— transfer of burial benefits — administrative regulation — excess of statutory authority

A regulation of the North Carolina Burial Commission which permits the transfer in money, from one funeral director to another, of a deceased member's burial benefits, is in excess of the statute authorizing "the transfer of a member's benefits in merchandise and services." G.S. 58-224.2.

APPEAL by defendant from *Bailey, Judge,* 16 November 1970 Session of JOHNSTON County Superior Court.

Plaintiff instituted this action before the North Carolina Burial Commission to require defendant to pay in *money* to plaintiff, pursuant to a regulation adopted by the North Carolina Burial Commission under the authority of G.S. 58-224.2, one-half of the burial benefits provided for under policies issued by defendant to Mrs. Alice C. Beddingfield, deceased, and Mrs. Edna Carpenter Moore, deceased, both of whom were buried by plaintiff's official funeral director, McLaurin Funeral Home of Clayton. From an adverse decision before the Burial Commission, defendant appealed to the Superior Court of Johnston County for a trial *de novo.*

After selection of the jury but prior to the hearing of the case the trial judge ruled that G.S. 58-224.2 was not an unconstitutional delegation of power by the Legislature and that the regulation of the North Carolina State Burial Commission, under which this action was instituted, was properly adopted pursuant to G.S. 58-224.2.

The evidence presented at the trial tended to show that both Mrs. Beddingfield and Mrs. Moore had burial policies with defendant, Mrs. Beddingfield's in the amount of $200.00 and Mrs. Moore's in the amount of $100.00; that plaintiff's funeral director conducted the funerals of each of the deceased; and that plaintiff's funeral director did not solicit either of the funerals.

At the close of all of the evidence, the trial judge granted a directed verdict in favor of plaintiff for $150.00 and defendant appealed to this Court.

Spence & Mast by Robert A. Spence for plaintiff appellee.

Britt & Ashley by W. R. Britt; and L. Austin Stevens for defendant appellant.

CAMPBELL, Judge.

The regulation of the North Carolina State Burial Commission under which plaintiff attempts to assert its right to one-half of the benefits in money under the policies of the two deceased is as follows:

> "If a member dies, the official funeral director will pay fifty per cent of the benefits to any other official funeral director of a Burial Association, provided that the funeral was not solicited by the servicing funeral director or any of his agents or employees. The servicing funeral director shall allow the deceased member the full amount, in merchandise and services, of the deceased member's benefits. The Commissioner shall have authority to determine whether or not a funeral was solicited."

This regulation was adopted by the Burial Commission under the authority of G.S. 58-224.2 which reads:

> "The Burial Association Commissioner, with the consent of the Commission, and after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this article and in order to carry out the intent thereof. The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits in *merchandise and services* from the official funeral director of the member's

association to the official funeral director of any other mutual burial association in good standing under the provisions of this article." (Emphasis added.)

G.S. 58-224.2 permitted the adoption of a regulation providing for the transfer of a member's benefits in "merchandise and services." The regulation actually adopted and under which plaintiff instituted this action provides for the transfer of benefits but omitted "in merchandise and services."

The question presented is whether the construction placed upon the regulation is valid and within the authorization provided by the Legislature. Both the Burial Association Commissioner and the trial judge construed the word "benefits" as contained in the regulation to be tantamount to money. The statutory authorization specifically stated, "benefits in merchandise and services." Burial Associations historically have always given merchandise and services to their members and never have they attempted to give money. Money benefits would make a burial association more like a life insurance company than burial associations have ever attempted to be. We think the Legislature intended for burial associations to render benefits in merchandise and services and not in money. We are strengthened in this belief by the fact that the 1969 General Assembly refused to pass a provision in House Bill 1159 which contained the following proposed amendment to G.S. 58-224.2.

> "Provided, however, the Commission is specifically authorized to promulgate regulations whereby the official burial association shall pay, in cash, up to one-half the funeral benefit to the official funeral director of any other mutual burial association, within the territory of the official funeral director that is not solicited notwithstanding any provisions of Article 10 of G.S. 58-226 . . . . "

We hold that the trial judge should not have granted plaintiff's motion for a directed verdict but should have granted a directed verdict in favor of the defendant. The judgment is reversed, and the case is remanded to the Superior Court for entry of a judgment in accordance with this opinion.

Reversed and remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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TRUSTS

UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE
USURY

VENDOR AND PURCHASER
VENUE

WILLS

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Agreement between creditor and debtor relating to the payment of the debt constituted an accord. *Supply Co. v. Redmond,* 173.

§ 2. Rights Under Agreement

Payment of debt secured by note and deed of trust. *Supply Co. v. Redmond,* 173.

ADMINISTRATIVE LAW

§ 3. Authority of Administrative Boards

A regulation of the N. C. Burial Commission which permits the transfer in money, from one funeral director to another, of a deceased member's burial benefits is in excess of the statute authorizing "the transfer of a member's benefits in merchandise and services." *Burial Assoc. v. Funeral Assoc.,* 723.

ADOPTION

§ 2. Consent of Natural Parents

Legitimation of a child born out of wedlock in a proceeding brought by the putative father did not invalidate or adversely affect prior written consent to adoption given by the unwed mother or require father's consent to the adoption proceedings. *In re Doe,* 560.

ADVERSE POSSESSION

§ 17. What Constitutes Color of Title

The description in a deed under which a plaintiff relies for color of title must fit the boundaries of the land claimed. *Barringer v. Weathington,* 618.

§ 25. Sufficiency of Evidence

Trial court's findings and conclusions that neither party could prevail under the theory of adverse possession are supported by competent evidence. *Keller v. Hennessee,* 43.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Purported appeal from an order which was never signed or officially filed or approved by the court is dismissed. *In re Estate of Snyder,* 188.

§ 7. Parties Who May Appeal

Court of Appeals dismisses an appeal from a municipal board of adjustment where the persons who attempted to bring the appeal were merely designated, without being named, as "property owners." *In re Coleman,* 124.

APPEAL AND ERROR—Continued

§ 14. Appeal Entries

Appeal from the entry of judgment should be dismissed when the notice of appeal was given more than ten days after the entry of judgment. *Acceptance Corp. v. Samuels,* 504.

§ 18. Costs in Appellate Court

As to defendants who had previously been dismissed from the lawsuit, it was improper for appellants to cause defendants to file a brief. *Robinson v. McAdams,* 105.

§ 24. Form of Assignments of Error

An assignment of error must be supported by an exception previously noted. *Brothers, Inc. v. Jones,* 215.

§ 30. Exceptions to Evidence

An exception to the exclusion of evidence will not be considered when the record fails to disclose what the excluded evidence would have been. *Barringer v. Weathington,* 618.

§ 39. Time of Docketing

Appeal is subject to dismissal for failure to docket record in apt time where record was docketed more than 90 days after date of judgment appealed from. *Lee v. Rowland,* 27; *Horton v. Davis,* 592.

§ 41. Form and Requisites of Transcript

Appeal is dismissed for failure of appellant to state the evidence in narrative form. *McConnell v. McConnell,* 193.

Although statement of the evidence was in question and answer form, the Court of Appeals considered the appeal on its merits. *Lambe v. Smith,* 580.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence

Exclusion of evidence relevant to issue of damages was not prejudicial where that issue was not reached. *Davis v. Cahoon,* 395.

§ 50. Harmless and Prejudicial Error in Instructions

An instruction that parties had stipulated to the issues in the case is erroneous where the parties had not so stipulated. *Terrell v. Chevrolet Co.,* 310.

Error in the court's charge to the jury will be deemed harmless when the evidence was such that the trial court should have directed a verdict against appellant. *Westbrook v. Robinson,* 315.

§ 57. Findings or Judgments on Findings

Findings of fact by the referee which are approved by the trial judge are conclusive on appeal when supported by any competent evidence. *Keller v. Hennessee,* 43.

Where a jury trial is waived, the court's findings of fact are conclusive if supported by any competent evidence, even though there is evidence *contra. Tank Service v. Fortner,* 91.

APPEAL AND ERROR—Continued

Findings of fact made by the trial court upon a motion to set aside a default judgment are binding on appeal if supported by any competent evidence. *Kirby v. Contracting Co.*, 128.

Court's findings of fact properly made must be deemed supported by competent evidence where evidence was not included in record on appeal. *Davis v. Davis*, 115.

Determination by appellate court that trial court properly entered judgment on the pleadings in favor of defendant does not contradict court's disposition of a former appeal in which it reversed a judgment sustaining a plea of *res judicata* interposed by defendant. *Morris v. Perkins*, 152.

§ 59. Judgments on Motion for Directed Verdict

In passing on motion for directed verdict, appellate court must look to the evidence without regard to trial court's findings of fact. *Sink v. Sink*, 549.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

ABC officers lawfully arrested defendant without a warrant upon finding 10 cases of taxpaid liquor in the automobile in which defendant was riding. *S. v. Roberts*, 686.

Police officer had reasonable grounds to arrest defendant without a warrant for the felony of possessing heroin for purpose of sale. *S. v. Jackson*, 682.

A finding that defendant was "taken into custody" was tantamount to a finding that defendant was "under arrest." *Ibid.*

The warrantless arrest of defendant for felonious possession of LSD and the subsequent warrantless searches of his person on the street and at the police station were lawful. *S. v. Parker*, 648.

§ 6. Resisting Arrest

Evidence that defendant had been taken into custody under a warrant and carried before a magistrate and that defendant began struggling with police officers while being taken from the magistrate's office to the jail, *held* sufficient to support a jury finding of defendant's guilt of resisting arrest. *S. v. Leak*, 344.

§ 9. Right to Bail

Fact that defendant was required to post $4000 appeal bond does not show he was being penalized for pleading not guilty. *S. v. Best*, 286.

ASSAULT AND BATTERY

§ 5. Assault With a Deadly Weapon

A pocket knife which has a blade three inches long and a cutting edge two and three-quarters inches long is a deadly weapon *per se*, and defendant cannot complain that it was left for the jury to decide whether it was a deadly weapon *per se*. *S. v. Cox*, 377.

ASSAULT AND BATTERY—Continued

§ 8. Defense of Self

In a prosecution for assault with a deadly weapon, the evidence required an instruction on defendant's right to act in his own self-defense. *S. v. Cox,* 277.

§ 15. Instructions

Trial court was not required to instruct on the issue of self-defense when there was no evidence to support such an issue. *S. v. Pritchard,* 166.

Trial court's failure to charge on apparent necessity in one part of the charge was cured when he charged on apparent necessity immediately thereafter. *S. v. Leak,* 344.

§ 16. Necessity of Submitting Question of Guilt of Lesser Degree of Offense

In prosecution for assault with a deadly weapon, evidence did not require trial court to submit issue of simple assault. *S. v. Cox,* 377.

ATTORNEY AND CLIENT

§ 7. Fees

Plaintiff's motion for attorney fees was denied by the court in its discretion. *Callicutt v. Hawkins,* 546.

AUTOMOBILES

§ 3. Driving Without License or After Revocation

Although defendant testified that he had never had an operator's license, the State offered sufficient evidence to support a jury finding of defendant's guilt of driving on a public highway while his license was suspended. *S. v. Newborn,* 292.

§ 6. Negligence in Sale of Defective Vehicle

In an automobile owner's action against an automobile dealer and the manufacturer for damages allegedly resulting from a latent defect in the master brake cylinder, the owner failed to show that either the dealer or the manufacturer was negligent in regard to the defect. *Coakley v. Motor Co.,* 636.

§ 11. Following Vehicles

While ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent, it does not as a matter of law compel that conclusion. *Robinson v. McMahan,* 275.

§ 21. Sudden Emergencies

Motorist who becomes stricken by fainting spell or other sudden and unforeseeable incapacitation and is by reason of such unforeseen disability unable to control his vehicle is not chargeable with negligence. *Wallace v. Johnson,* 703.

§ 50. Sufficiency of Evidence in General

Plaintiff's evidence which showed that his automobile was hit by defendant's car in an intersection, without any evidence to show that

AUTOMOBILES—Continued

defendant was negligent, is insufficient to go to the jury. *Adams v. Curtis,* 696.

§ 56. Following Too Closely

Summary judgment was improperly entered in favor of plaintiff on issue of negligence in action to recover for personal injuries received by plaintiff when defendants' truck collided with the rear of plaintiff's automobile in dense fog. *Robinson v. McMahan,* 275.

§ 57. Failing to Yield Right of Way at Intersection

Plaintiff's evidence was insufficient to be submitted to the jury on issue of defendant's negligence in action arising out of intersection collision. *Lyle v. Thurman,* 586.

§ 58. Turning

Plaintiff's evidence sufficiently established that defendant was negligent in turning his tractor-trailer across plaintiff's lane of travel without first seeing that such turn could be made in safety. *Laughter v. Lambert,* 133.

§ 62. Striking Pedestrian

Evidence was sufficient for jury in action for injury sustained when pedestrian was struck from rear by defendant's automobile while walking on shoulder of the road. *Walker v. Pless,* 198.

Evidence by plaintiff that during a heavy rainstorm defendant's automobile struck an accumulation of water which flew onto defendant's windshield and that the automobile swerved and struck plaintiff, *held* sufficient to go to the jury. *Hollifield v. Danner,* 205.

§ 63. Striking Children

Motorist driving at a lawful speed was not liable for injuries to a seven and one-half year old child who ran into the street from between two parked vehicles. *Westbrook v. Robinson,* 315.

Evidence of motorist's negligence in striking a three-year-old child who was clearly visible in the street was properly submitted to the jury. *Capps v. Dillard,* 570.

§ 68. Defective Vehicle

Evidence was sufficient for jury on issue of negligence of truck owner in failing properly to inspect the truck and to discover and remedy the defective condition of a brace which had been welded to the truck by a former owner. *Lee v. Rowland,* 27.

§ 83. Pedestrian's Contributory Negligence

Evidence established that pedestrian's negligence was a proximate cause of injuries received when he was struck by defendant's ambulance. *Anderson v. Crawford,* 364.

Testimony by plaintiff that he ran into the street at such speed that he was unable to stop in time to avoid being hit by defendant's car, held to establish plaintiff's contributory negligence as a matter of law. *Widener v. Fox,* 525.

AUTOMOBILES—Continued

§ 89. Last Clear Chance

Defendant motorist who was traveling at a lawful speed did not have the last clear chance to avoid striking a legally blind person who suddenly darted across the highway. *Grant v. Greene,* 537.

§ 90. Instructions in Accident Cases

Failure of trial court to give an adequate definition of "proximate cause" was reversible error. *Keener v. Litsinger,* 590.

Trial court's instructions sufficiently apprised jury that plaintiff was relying on alleged conduct of defendant's intestate in operating his vehicle after he suffered a stroke and with knowledge of his physical impairment as a specific act of negligence and not merely to rebut defendant's affirmative defense of sudden disability. *Wallace v. Johnson,* 703.

It was error for the court to instruct the jury not to consider evidence relating to damaged vehicle where such evidence tended to support plaintiff's testimony. *Little v. Poole,* 597.

§ 91. Issues and Verdict

Trial court did not err in submitting only one general issue as to defendant's negligence and refusing to submit separate issue of negligence in operating an automobile with knowledge of physical impairment. *Wallace v. Johnson,* 703.

§ 94. Contributory Negligence of Passenger

Automobile passenger was not contributorily negligent as a matter of law in riding with an intoxicated driver. *Naylor v. Naylor,* 384.

§ 105. Issue of Respondeat Superior

The statute relating to proof of agency in automobile accidents does not apply in an action brought by one insurer against another insurer for a declaratory judgment of their rights and obligations under their respective policies of insurance. *Surety Co. v. Casualty Co.,* 490.

§ 113. Sufficiency of Evidence of Homicide

In a prosecution charging defendant with involuntary manslaughter arising out of the violation of the speeding and reckless driving statutes, the State's evidence was sufficient to be submitted to the jury. *S. v. Sawyer,* 81.

§ 114. Instructions in Homicide Case

An instruction that would permit the jury to find a motorist guilty of manslaughter without finding beyond a reasonable doubt that violation of the speed statutes was a proximate cause of the collision held reversible error. *S. v. Sawyer,* 81.

§ 126. Competency of Evidence of Driving Under the Influence

Court record was best evidence of defendant's conviction of offense of drunken driving, and trial court erred in allowing a former municipal court clerk to testify from memory as to what the record indicated; such error was not rendered harmless by 1969 amendment to G.S. 20-179 which set maximum sentence of six months for either first or second offense. *S. v. Michaels,* 110.

BAILMENT

§ 1. Nature and Requisites of the Relation

When an owner delivers possession of an automobile to a garage owner for the purpose of having repairs made, a bailment is created. *Terrell v. Chevrolet Co.*, 310.

BANKS AND BANKING

§ 11. Forged Instruments; Transactions With Agents

An agent's power or authority to endorse checks payable to his principal cannot be inferred from express authority to receive checks for his principal. *Stirewalt v. Savings & Loan Assoc.*, 241.

A depositor is not required to examine the endorsements on its own genuine checks. *Ibid.*

In a depositor's action to recover funds deposited with a savings and loan association that allegedly were wrongfully paid out by the association to the depositor's wife, the evidence was sufficient to support a finding that the wife had implied authority to draw checks on the depositor's account payable to the depositor. *Ibid.*

BASTARDS

§ 1. Elements of Offense of Wilful Refusal to Support Illegitimate Child

Elements of the offense of failure to support illegitimate child. *S. v. Lynch*, 432.

§ 7. Instructions

Trial court's instruction which precluded jury from answering in defendant's favor the issue of defendant's wilful failure to support his illegitimate child held prejudicial error. *S. v. Lynch*, 432.

§ 12. Legitimation

Legitimation of a child born out of wedlock in a proceeding brought by the putative father did not invalidate or adversely affect prior written consent to adoption given by the unwed mother or require father's consent to the adoption proceedings. *In re Doe*, 560.

BILLS AND NOTES

§ 10. Holders in Due Course

Plaintiff failed to show that it was a holder in due course of a promissory note endorsed by a purported agent of the corporate payee where it offered no proof of the authority of the purported agent to endorse the note for the payee. *Bank v. Furniture Co.*, 530.

BOUNDARIES

§ 10. Sufficiency of Description

Description in a deed which referred to the tract in question as "containing 40 acres entered by Hugh Simpson" was patently ambiguous. *Barringer v. Weathington*, 618.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to go to jury in burglary and larceny prosecution. *S. v. Mornes,* 207; *S. v. Inman,* 202.

Trial court properly refused to set aside jury verdict finding defendant guilty of felonious breaking and entering. *S. v. Smith,* 552.

State's evidence that within two weeks after the theft of merchandise from a filling station the defendants sold much of the merchandise to a person in South Carolina, *held* sufficient to support a jury finding of defendants' guilt of breaking and entering and larceny. *S. v. Waddell,* 577.

§ 10. Prosecution for Possessing Housebreaking Implements

In trial for possession of morphine and possession of burglary tools, evidence relating to cameras, watches, movie projectors and a pistol found upon search of defendant's car was relevant to charge of possession of burglary tools. *S. v. Ayers,* 333.

BURIAL ASSOCIATIONS

A regulation of the N. C. Burial Commission which permits the transfer in money, from one funeral director to another, of a deceased member's burial benefits is in excess of the statute authorizing "the transfer of a member's benefits in merchandise and services." *Burial Assoc. v. Funeral Assoc.,* 723.

CARRIERS

§ 10. Injury to Goods in Transit

Corporate plaintiff's failure to show that a table was damaged at the time when a common carrier delivered it to the plaintiff warrants a directed verdict in favor of the carrier on the issue of its negligence in causing the damage. *Weil's, Inc. v. Transportation Co.,* 554.

COMPROMISE AND SETTLEMENT

§ 1. Nature, Elements, Validity and Effect

Summary judgment was properly entered against a construction company in its third party action seeking to recover over against a motel corporation any amount obtained by a material supplier in its action against the construction company by reason of settlement agreement entered into between the motel corporation and the construction company. *Askew's, Inc. v. Cherry,* 369.

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution

Decision of a three-judge federal court which held G.S. 14-189.1 to be unconstitutional is not binding on the Court of Appeals. *S. v. McCluney,* 11.

CONSTITUTIONAL LAW—Continued

§ 29. Right to Indictment and Trial by Duly Constituted Jury

Fact that court ordered defendant into custody during recesses of the trial does not indicate that defendant was being penalized for exercising his right to a jury trial. *S. v. Best,* 286.

Fact that trial court received testimony of accomplices for the purpose of imposing punishment does not signify that defendant was being penalized for exercising his right to a jury trial. *Ibid.*

Trial court's remark in imposing active prison sentence that "The first step in rehabilitation is an admission of guilt" was not a sign that the court was penalizing defendant because of his plea of not guilty. *Ibid.*

Fact that accomplice who pleaded guilty to attempted common law robbery received a probationary sentence while defendant received an active sentence for the same crime does not show defendant was being penalized for pleading not guilty. *Ibid.*

Fact that defendant was required to post $4000 appeal bond does not show he was being penalized for pleading not guilty. *Ibid.*

§ 30. Due Process in Trial

Defendant was not denied speedy trial by delay of six months between his arrest and trial, during a portion of which time he was confined in jail in another county awaiting trial on other charges. *S. v. Moffitt,* 337.

Juvenile is entitled to constitutional safeguards, including notice of the charges against him. *In re Jones,* 437.

§ 31. Right of Confrontation

Trial court properly construed defendant's absence from his trial after the trial had begun as a waiver of his right to be present for the remainder of the trial. *S. v. Turner,* 670.

Trial court did not err in failing to instruct the jury that defendant had the right to waive his right to be present at his trial and that his absence should not be considered on question of guilt or innocence. *Ibid.*

§ 36. Cruel and Unusual Punishment

Activation of defendant's probationary sentence on ground that defendant had failed to pay the costs of court is not cruel and unusual punishment. *S. v. Fields,* 408.

Failure of the State to furnish an indigent defendant an appearance bond is not cruel and unusual punishment. *S. v. Fields,* 708.

CONTEMPT OF COURT

§ 3. Civil Contempt

A landowner's threats that were designed to intimidate plaintiffs and their witnesses from testifying in support of plaintiffs' efforts to enforce a restrictive covenant against the landowner were punishable as for contempt. *Anderson v. Williard,* 70.

A landowner temporarily enjoined from constructing a carport was not guilty as for contempt in mailing to 125 persons, including the judge who signed the injunction, a postcard bearing a picture of the partially completed carport and a message reading in part: "Wishing You a Prosperous New Year—Williard's Future Car Shed." *Ibid.*

CONTEMPT OF COURT—Continued

§ 6. Hearings on Orders to Show Cause

A landowner who was cited as for contempt had sufficient notice that the plaintiffs would offer testimony of threats that the landowner had made to them. *Anderson v. Williard,* 70.

CONTRACTS

§ 2. Offer and Acceptance

Silence and inaction do not amount to any acceptance of an offer. *Adams v. Insurance Co.,* 678.

§ 6. Contracts Against Public Policy

A person who contracted and undertook to construct a house for others at an agreed price of $67,500 became a "general contractor" and was subject to the licensing provisions of G.S. 87-10. *Holland v. Walden,* 281.

The purpose of the contractor's licensing statute is to protect the public from incompetent builders. *Ibid.*

A person who was a licensed contractor for 18½ months out of the 21 months during which she constructed a house for defendants is entitled to maintain an action against defendants for the balance of the contract price. *Ibid.*

§ 12. Construction of Contract

Where language of a contract is plain and unambiguous, the construction is a matter of law for the courts. *Askew's, Inc. v. Cherry,* 369.

CORPORATIONS

§ 1. Corporate Existence

Disregarding corporate veil under "alter ego" or "instrumentality" doctrine. *Insurance Co. v. Bank,* 544.

Evidence supported trial court's determination that a corporation to which assets were endorsed by a bank in connection with a loan to another corporation was the alter ego and instrumentality of the bank. *Ibid.*

§ 26. Actions by Corporation

A corporation whose articles of incorporation were suspended for failure to pay taxes had standing to maintain an action to recover the amount due on a contract. *Swimming Pool Co. v. Country Club,* 715.

§ 27. Liability of Corporation for Torts

In order to sustain its counterclaim against a corporation for slander by an alleged employee of the corporation, defendant would have the burden of showing that at the time and in respect to the utterance of the words complained of the alleged employee was acting within the course and scope of his employment by the corporation. *Blackmon v. Decorating Co.,* 137.

Trial court properly allowed motion of corporation for summary judgment in action based on alleged slanderous remarks of salesman for corporation. *Ibid.*

COURTS

§ 2. Jurisdiction of Courts in General

Personal jurisdiction over a nonappearing defendant for the purpose of entry of a default judgment is not presumed by the service of summons and an unverified complaint but must be proven and appear of record as required by G.S. 1-75.11. *Hill v. Hill,* 1.

§ 7. Appeal from Inferior Court to Superior Court

Appeal from a conviction in district court entitles defendant to a trial de novo in superior court as a matter of right. *S. v. Bryant,* 423.

§ 9. Jurisdiction of Superior Court After Order of Another Superior Court Judge

Where a superior court judge had denied defendant's motion to amend its answer to plead the statute of limitations, another superior court judge could not thereafter allow the amendment. *Calloway v. Motor Co.,* 511.

§ 11.1. Practice and Procedure in District Court

District court judge in Mecklenburg County did not have jurisdiction to entertain motion for reduction of alimony payments ordered by Georgia court. *Bradley v. Bradley,* 8.

Superior court did not abuse its discretion in refusing to transfer to district court a child custody proceeding instituted in superior court prior to establishment of district courts in the county. *In re Hopper,* 611.

§ 15. Criminal Jurisdiction of Juvenile Courts

Juvenile is entitled to the constitutional safeguards, including notice of the charges against him. *In re Jones,* 437.

CRIME AGAINST NATURE

§ 2. Prosecutions

State's evidence was sufficient to be submitted to jury on issue of defendant's guilt of crime against nature against 11-month-old child. *S. v. Copeland,* 516.

Crime of taking indecent liberties with children is not a lesser included offense of the crime against nature. *Ibid.*

CRIMINAL LAW

§ 8. Limitations

Trial court properly denied motion to quash escape indictment on ground that State had failed to comply with Interstate Agreement on Detainers, where defendant's request for trial was filed prior to time warrant charging escape was issued. *S. v. Pfeifer,* 183.

§ 9. Principals in First or Second Degree

Evidence supported the court's instruction that defendant could be found guilty of larceny of copper bars as a principal in the second degree. *S. v. Wade,* 169.

CRIMINAL LAW—Continued

§ 18. Jurisdiction on Appeals to Superior Court

The superior court has no jurisdiction to try an accused for a misdemeanor on the warrant of the district court unless he is first tried and convicted for such misdemeanor in the district court and appeals to the superior court from sentence pronounced against him by the district court. *S. v. Marshall,* 200.

Although defendant failed to appear in superior court when his case was called for trial de novo, superior court judge was without authority to dismiss defendant's appeal and remand the case to the district court for compliance with the judgment of that court. *S. v. Bryant,* 423.

§ 23. Pleas of Guilty

The fact that defendant was intoxicated at the time he entered a guilty plea was not prejudicial error under the facts of this case. *S. v. Powell,* 194.

Contention by defendant that it was error for the court to accept his guilty plea when he had not admitted that he was in fact guilty is without merit. *S. v. Hunter,* 573.

Record affirmatively shows that defendant's plea of guilty was made freely, understandingly and voluntarily as required by U.S. Supreme Court decision. *Ibid.*

§ 25. Plea of Nolo Contendere

The plea of *nolo contendere* may not be interposed as a matter of right, but may be accepted by the court only as a matter of grace. *S. v. Thurgood,* 405.

No formal acceptance of a plea of *nolo contendere* by the court is required, and the entry of judgment based thereon constitutes an acceptance of the plea. *Ibid.*

Plea of *nolo contendere* does not authorize the judge to enter a verdict of guilty and will not support a recital in the judgment that defendant was "found guilty." *Ibid.*

§ 26. Plea of Former Jeopardy

An acquittal on charges of reckless driving and speed competition does not bar a subsequent prosecution for involuntary manslaughter arising out of the same occurrence. *S. v. Sawyer,* 81.

§ 29. Suggestion of Mental Incapacity to Plead

Question of whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense may be determined by the court with or without the aid of a jury prior to trial of defendant. *S. v. Lewis,* 226.

Defendant who has been found mentally incompetent to stand trial may be committed to a State hospital under G.S. 122-84 without a finding that defendant's mental condition or disease renders him dangerous either to himself or others. *Ibid.*

Due process must be observed in inquisition to determine whether a a person accused of crime is competent to stand trial. *Ibid.*

§ 42. Articles Connected With the Crime

Defendant's contention that the State introduced an exhibit which he

CRIMINAL LAW—Continued

had not been permitted to examine prior to trial is without merit. *S. v. McDonald,* 497.

§ 66. Evidence of Identity by Sight

Photographic identification procedure was not impermissibly suggestive where witness selected defendant's photograph from an album containing at least 50 photographs. *S. v. Moffitt,* 337.

Defendant was not prejudiced by failure of trial court on *voir dire* to make findings, conclusions, and a record determination on question of whether photographic identification procedure was impermissibly suggestive. *Ibid.*

Contention that the victim's in-court identification of the defendant as the perpetrator of the crimes was tainted by illegal out-of-court procedures, including illegal photographic identification, *held* without merit. *S. v. McDonald,* 497.

§ 75. Admissibility of Confession

Statement made by defendant in jail was rendered involuntary by S.B.I. agent's offer to "let it be known" if defendant gave him any information in solving cases. *S. v. Muse,* 389.

§ 76. Determination of Admissibility of Confession

Trial judge did not abuse his discretion in allowing solicitor to ask S.B.I. agent leading questions on *voir dire* to validate a Miranda warning. *S. v. Ayers,* 333.

§ 84. Evidence Obtained by Unlawful Means

Trial court was not required to hold a *voir dire* hearing before allowing a highway patrolman to describe what he saw in plain view inside a station wagon while he was standing on the outside. *S. v. Cumber,* 302.

An objection to the admissibility of exhibits which merely challenged the insufficiency of their identification does not require a *voir dire* hearing into the legality of the search which uncovered the exhibits. *Ibid.*

Highway patrolman had probable cause to search defendant's automobile without a warrant where he was informed by Danville, Virginia, police officers that the car contained alcoholic beverages, narcotics and a pistol, and such information was given the Danville officers by a reliable informant. *S. v. Ayers,* 333.

Evidence supports trial court's ruling that defendant consented to a search in which heroin was found in his shirt pocket. *S. v. Thurgood,* 405.

No search warrant was required for seizure of packets containing heroin which defendant had thrown down behind him while on a public street. *S. v. Powell,* 465.

Stolen taxpaid liquor was lawfully seized without a warrant from the car in which defendant was riding as an incident to defendant's lawful arrest without a warrant. *S. v. Roberts,* 686.

Heroin found on defendant's person as a result of a warrantless search in jail was properly admitted in evidence. *S. v. Jackson,* 682.

Police officers lawfully seized items of stolen property where officers were on the premises pursuant to a valid warrant to search for narcotics. *S. v. Scott,* 642.

CRIMINAL LAW—Continued

§ 85. Character Evidence

Defendant is entitled to have jury consider his character evidence both as bearing upon his credibility and as substantive evidence upon the issue of his guilt or innocence. *S. v. Adams*, 420.

§ 86. Credibility of Defendant and Parties Interested

The qualified right of a defendant to offer evidence showing that an accomplice had reason to expect lenience in return for testifying for the State held not to apply in this case. *S. v. Cumber*, 302.

It is proper for the solicitor to cross-examine defendant concerning a previous and unrelated conviction from which he had appealed. *S. v. Waller*, 434.

§ 87. Direct Examination of Witness

Trial judge did not abuse his discretion in allowing solicitor to ask S.B.I. agent leading questions on *voir dire* to validate a Miranda warning. *S. v. Ayers*, 333.

§ 88. Cross-Examination

Trial court properly disallowed argumentative cross-examination of a State's witness. *S. v. Dickens*, 392.

§ 91. Time of Trial and Continuance

Defendant's motion for continuance on the ground that the essential defense witness had been subpoenaed but not located was properly denied by the court. *S. v. Payne*, 101.

Trial court properly denied motion to quash escape indictment on ground that State had failed to comply with Interstate Agreement on Detainers, where defendant's request for trial was filed prior to time warrant charging escape was issued. *S. v. Pfeifer*, 183.

Trial court properly denied defendant's motion for continuance on ground that public defender who was first assigned as defense counsel was involved in another trial and was unable to represent defendant on the day his case was calendared for trial. *S. v. Moffitt*, 337.

§ 98. Custody of Defendant

Fact that court ordered defendant into custody during recesses of the trial does not indicate that defendant was being penalized for exercising his right to a jury trial. *S. v. Best*, 286.

§ 99. Trial Court's Expression of Opinion on Evidence During Trial

It was not prejudicial error for trial court to question State's witness 34 times during a trial that lasted less than a day. *S. v. Case*, 203.

Trial court's remarks made out of the presence of the jury could not have prejudiced the defendant's cause. *S. v. Hollingsworth*, 674.

Trial judge's statement that the question put to the witness had been previously answered did not amount to an expression of opinion on the evidence. *Ibid.*

§ 102. Argument of Solicitor

Solicitor's argument to jury was prejudicial error as a comment on defendant's failure to testify. *S. v. Waddell*, 577.

CRIMINAL LAW—Continued

§ 107. Nonsuit for Variance

A fatal variance between the indictment and the proof is properly raised by a motion for judgment as of nonsuit. *S. v. Trollinger*, 400.

§ 113. Statement of Evidence and Application of Law Thereto

Defendant in manslaughter prosecution was not prejudiced by failure of trial court to recapitulate testimony of one of his witnesses. *S. v. Craig*, 196.

Trial court did not fail to apply the law of self-defense to the evidence. *S. v. Colson*, 436.

Trial court's instructions which permitted the jury to convict both defendants of the offenses charged upon a finding that either of the defendants was guilty, held prejudicial error. *S. v. Waddell*, 577.

It is discretionary with the court to grant or refuse the jury's request for restatement of the evidence. *S. v. Crane*, 721.

§ 114. Expression of Opinion by Court on Evidence in Charge

Trial court committed prejudicial error in instructing jury that court had found State's witness to be a fingerprint expert, that fingerprints found at crime scene are "receivable in evidence" if they could only have been placed at crime scene when crime was committed, and that circumstantial evidence is highly satisfactory in matters of gravest moment. *S. v. Melton*, 180.

The following instruction constituted an expression of opinion on the evidence and was prejudicial error: "This is not a question of sympathy or prejudice. It is merely a question of facts and *the only question you are to consider is:* Was the defendant at the time and place in question under the influence of intoxicating beverages." *S. v. Hall*, 410.

Trial court's instruction that if the jury believed that defendant made a statement to the sheriff it would make no difference whether or not the statement was in writing did not constitute an expression of opinion. *S. v. Crane*, 721.

§ 115. Instruction on Lesser Degree of Crime

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 was committed. *S. v. Cox*, 377.

§ 116. Charge on Failure of Defendant to Testify

Instruction that defendant may remain off the witness stand as he may elect or "as his counsel may advise him," was not prejudicial error. *S. v. Powell*, 465.

§ 117. Charge on Character Evidence

Trial court erred in instructing jury that defendant's character evidence could be considered as substantive evidence without instructing jury that it also could be considered as bearing upon credibility. *S. v. Adams*, 420.

CRIMINAL LAW—Continued

§ 119. Requests for Instructions

Trial court did not err in failing to instruct jury that defendant had the right to waive his right to be present at his trial and that his absence should not be considered on question of guilt or innocence. *S. v. Turner*, 670.

§ 128. Discretionary Power of Trial Court to Order Mistrial

Nonresponsive answer by the State's witness on cross-examination did not warrant an order of mistrial. *S. v. Payne*, 101.

§ 130. New Trial for Misconduct of Jury

Trial court did not err in denial of defendant's motion for mistrial made on ground that during progress of the trial two of the jurors read a newspaper article which revealed that defendant was then appealing another conviction. *S. v. Powell*, 465.

§ 134. Form and Requisites of Sentence

The commitment of defendant to the Department of Correction for pre-sentence diagnostic study does not preclude the court from thereafter entering a judgment of imprisonment. *S. v. Powell*, 194.

Judgment sentencing defendant to seven-to-ten years' imprisonment was not rendered invalid because it failed to state that the defendant pleaded guilty to a felony. *S. v. Fields*, 408.

Judgment was not specific enough to sentence defendant to work on county properties under authority of G.S. 148-32. *S. v. Stafford*, 520.

§ 138. Severity of Sentence and Determination Thereof

Court of Appeals vacates a judgment of imprisonment which did not give defendant credit for time spent in a pre-sentence diagnostic center. *S. v. Powell*, 194.

Fact that trial court received testimony of accomplices for the purpose of imposing punishment does not signify that defendant was being penalized for exercising his right to a jury trial. *S. v. Best*, 286.

Fact that accomplice who pleaded guilty to attempted common law robbery received a probationary sentence while defendant received an active sentence for the same crime does not show defendant was being penalized for pleading not guilty. *Ibid.*

Punishment imposed in superior court on trial de novo may exceed punishment imposed in the district court. *S. v. Waller*, 434.

Fine of $500 for practicing veterinary medicine without a license was excessive. *S. v. Stafford*, 520.

Fact that judge heard hearsay evidence in a presentence hearing was not prejudicial error. *S. v. Peatross*, 550.

§ 140. Concurrent Sentence

A sentence imposed upon defendant's conviction of nonsupport ran concurrently as a matter of law with two consolidated sentences that were imposed two days earlier upon defendant's conviction of other offenses. *S. v. Fields*, 708.

CRIMINAL LAW—Continued

§ 142. Suspended Sentence

Judgment providing that defendant be "continued on suspended sentence for a period of one year" is deficient in failing to specify or refer to any conditions of suspension. *S. v. Stafford,* 520.

§ 143. Revocation or Suspension of Sentence

Revocation of defendant's probation was lawful. *S. v. Bryant,* 208.

Order revoking suspended sentence is vacated where superior court failed to make specific findings as to what condition of suspension defendant had violated. *S. v. Stevens,* 402.

Judgment of superior court affirming revocation of suspended sentence by district court is vacated where superior court failed to make findings of fact as to what conditions of the suspended sentence defendant had violated. *S. v. Stafford,* 520.

§ 145. Costs

Payment of the costs constitutes no part of the punishment in a criminal case. *S. v. Fields,* 408.

§ 145.1. Probation

Activation of defendant's probationary sentence on ground that defendant failed to pay the costs of court is not cruel and unusual punishment. *S. v. Fields,* 408.

§ 146. Nature and Grounds of Appellate Jurisdiction of Court of Appeals in Criminal Cases

The Court of Appeals *ex mero motu* will arrest judgment of conviction on a bill of indictment insufficient on its face to sustain a criminal charge. *S. v. Able,* 141.

Appeal is dismissed for failure of the record to show jurisdiction of the superior court. *S. v. Marshall,* 200.

§ 151. Appeal and Stay Bonds

The fact that after defendant was sentenced and gave notice of appeal he was ordered held in custody until he posted a $4,000 appearance bond does not show that he was being penalized for having pleaded not guilty. *S. v. Best,* 286.

§ 154. Case on Appeal

Statement of case on appeal which was not agreed to by the solicitor is not properly a part of the record on appeal. *S. v. Young,* 145.

It is the duty of appellant to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *S. v. Marshall,* 200.

§ 155.5. Docketing of Transcript of Record in Court of Appeals

Appeal is subject to dismissal for failure of defendant to docket record on appeal within time permitted by the rules. *S. v. Motley,* 209; *S. v. Burgess,* 430; *S. v. Cook,* 439.

§ 157. Necessary Parts of Record Proper

Court of Appeals will take notice *ex mero motu* of the lack of jurisdiction of the inferior court. *S. v. Marshall,* 200.

CRIMINAL LAW—Continued

Record proper consists of bill of indictment or warrant, plea, verdict and the judgment. *S. v. Thurgood,* 405.

§ 161. Form and Requisites of Exceptions and Assignments of Error

Assignment of error not referring to any exception presents no reviewable question. *S. v. Young,* 145.

An appeal to the Court of Appeals is itself an exception to the judgment. *Ibid.*

Appellant's exceptions must be grouped. *Ibid.*

An appeal is an exception to the judgment and presents the face of the record proper for review. *S. v. Thurgood,* 405; *S. v. Washington,* 441.

Appellant must point out the exceptions upon which he is relying. *S. v. McDonald,* 497.

§ 162. Motion to Strike

When objection is not made in apt time to an improper question asked by counsel, a motion to strike a responsive answer is directed to the discretion of the trial judge except where the evidence is incompetent by virtue of a statute. *S. v. Powell,* 465.

Broadside motion to strike "everything relating to the testing" was properly denied where some of the evidence was competent. *Ibid.*

Defendant cannot for the first time on appeal object to failure of trial court to instruct jury to disregard testimony to which objection had been sustained. *S. v. Dickens,* 392.

§ 163. Exceptions to Charge

An exception to the charge requires that the entire charge, not selected paragraphs, be included in the record. *S. v. Young,* 145.

Grouping of several exceptions relating to different questions of law under a single assignment of error constitutes a broadside assignment and is ineffective. *S. v. Dickens,* 392.

§ 166. The Brief

Assignments of error for which no argument appears in the brief are deemed abandoned. *S. v. Young,* 145; *S. v. Dickens,* 392; *S. v. McDonald,* 497; *S. v. Hudson,* 712.

§ 168. Harmless and Prejudicial Error in Instructions

Trial court's error in charging that embezzlement exhibits had been introduced in evidence, when in fact they had not, was harmless error in this embezzlement case. *S. v. Buzzelli,* 52.

§ 169. Harmless and Prejudicial Error in Admission of Evidence

In this prosecution for felonious assault, defendant was not prejudiced by failure of the court to instruct the jury to disregard testimony by a deputy sheriff that he saw an X-ray "that showed where the bullet stopped." *S. v. Dickens,* 392.

Defendant was not prejudiced by admission of testimony by police officer, a nonexpert, that chemical tests he performed on a substance thrown down by defendant showed presence of an opiate derivative. *S. v. Powell,* 465.

CRIMINAL LAW—Continued

§ 170. Harmless and Prejudicial Error in Remarks of Court

Trial court's remark in imposing active prison sentence that "The first step in rehabilitation is an admission of guilt" was not a sign that the court was penalizing defendant because of his plea of not guilty. *S. v. Best,* 286.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

It was error for the court to instruct the jury that they could assess damages for permanent personal injuries to a defendant who offered no evidence that he had sustained permanent injuries. *Johnson v. Brown,* 323.

Plaintiff's testimony was insufficient to warrant instruction on permanent injuries or on future pain and suffering. *Callicutt v. Hawkins,* 546.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

The dismissal of a wrongful death action on the ground that the administrator was not the real party in interest, in that the right of action had passed to the decedent's employer by operation of the workmen's compensation law, was reversible error. *Long v. Coble,* 624.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

It is not necessary for plaintiff to show an adequate remedy at law is unavailable in order to obtain declaratory judgment. *Insurance Co. v. Bank,* 444.

Plaintiff insurer's action seeking a determination as to whether or not it is liable to defendant bank upon a mortgagee title insurance policy presented a justiciable controversy. *Ibid.*

While the mere fear or apprehension that a claim may be asserted against a party in the future is not grounds for issuing a declaratory judgment, jurisdiction to issue such judgment lies where the court is convinced that litigation, sooner or later, appears to be unavoidable. *Ibid.*

§ 2. Proceedings

A directed verdict may not be entered in a declaratory judgment action. *Surety Co. v. Casualty Co.,* 490.

DEEDS

§ 20. Restrictive Covenants as Applied to Subdivision Developments

There was sufficient evidence to support the trial court's findings that the defendants' property was affected by a restrictive covenant and that placing a mobile home on the property was a violation of the covenant. *Strickland v. Overman,* 427.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

Trial court in action for alimony without divorce was without authority to order husband to convey to wife all his interest in real estate owned by the parties as tenants by the entirety. *Blackwell v. Blackwell,* 693.

§ 18. Alimony and Subsistence Pendente Lite

Trial court erred in awarding alimony and counsel fees *pendente lite* to the wife where the court found that the wife earned a monthly income substantially higher than that earned by the husband. *Davis v. Davis,* 115.

Trial court erred in ordering husband to pay *pendente lite* the monthly premium on two life insurance policies in which the child of the parties is named as primary beneficiary. *Ibid.*

§ 22. Jurisdiction and Procedure in Custody and Support Proceedings

Trial court erred in allowing husband's motion for blood-grouping tests to determine paternity of child born almost three years before parties separated. *Wright v. Wright,* 190.

Where custody and support of minor children had not been determined in prior divorce action, the mother could maintain an independent action in another court to obtain increased child support. *Wilson v. Wilson,* 397.

Trial court did not err in requiring the father to pay reasonable attorney fees of the mother in *habeas corpus* proceeding to determine custody of minor children. *In re Hopper,* 611.

Superior court did not abuse its discretion in refusing to transfer to district court a child custody proceeding instituted in superior court prior to establishment of district courts in the county. *Ibid.*

Habeas corpus action to obtain custody of minor children instituted by the father in the district court and transferred to the superior court was properly dismissed with prejudice by the superior court judge on the ground that there was pending in the superior court a prior action wherein that court has had jurisdiction of the custody of the children since 1967. *Ibid.*

§ 24. Custody

Court properly modified original custody order to award temporary custody to mother because of changed circumstances in proceedings in which child custody was originally awarded to the father because of the uncertainty of the mother's employment and future residence. *In re Custody of King,* 418.

There was no showing of changed circumstances which would warrant change of custody of minor child from father to the mother, notwithstanding the child wished to reside with his mother. *In re Harrell,* 351.

ELECTRICITY

§ 5. Liability for Injury from Position or Condition of Wires

Evidence of plaintiff railroad engineer failed to show that fallen electrical wires of defendant power company were a proximate cause of the electrical shock received by the engineer while operating a diesel engine. *Ingold v. Light Co.,* 253.

EMBEZZLEMENT

§ 5. Evidence in Prosecution

It was proper to show that a defendant charged with embezzlement made a cash purchase of an organ immediately following the embezzlement. *S. v. Buzzelli,* 52.

§ 6. Sufficiency of Evidence and Instructions

Evidence of a bookkeeper's guilt of embezzlement was properly submitted to the jury. *S. v. Buzzelli,* 52.

Trial court's error in charging that embezzlement exhibits had been introduced in evidence, when in fact they had not, was harmless error in this embezzlement case. *Ibid.*

ESCAPE

§ 1. Elements of Offense of Escape

In a felonious escape prosecution, trial court must charge that defendant was serving a sentence for a felony conviction at the time of his escape. *S. v. McCloud,* 425.

ESTATES

§ 3. Life Estates and Remainders

Remaindermen did not have to wait until death of life tenant to attack the validity of proceedings in which lands were sold to make assets. *McRorie v. Shinn,* 475.

ESTOPPEL

§ 4. Equitable Estoppel

Equitable estoppel defined. *White v. Moore,* 534.

§ 8. Sufficiency of Evidence on Issue of Estoppel

In a depositor's action to recover funds deposited with a savings and loan association and wrongfully paid out to the depositor's wife, the evidence was sufficient to support a finding that plaintiff's conduct over a nine-year period estopped him from asserting his claim against the association. *Stirewalt v. Savings and Loan Assoc.,* 241.

EVIDENCE

§ 28. Public Records

In a hearing upon defendant's plea of former jeopardy prior to his trial on a burglary indictment, judgment of the district court showing that probable cause had been found on a charge of first degree burglary could not be explained or contradicted by testimony of the clerk of district court that defendant had entered a plea of guilty of nonfelonious breaking and entering and had been sentenced for that crime, but that the judgment was thereafter changed to show a finding of probable cause as to first degree burglary. *S. v. Hopkins,* 415.

EVIDENCE—Continued

§ 31. Best and Secondary Evidence

Court record was best evidence of defendant's conviction of offense of drunken driving, and trial court erred in allowing a former municipal court clerk to testify from memory as to what the record indicated. *S. v. Michaels,* 110.

§ 33. Hearsay Evidence

Hearsay evidence admitted without objection may be considered with the other evidence. *Tank Service v. Fortner,* 91.

§ 40. Nonexpert Opinion Evidence

Trial court properly refused to allow plaintiff to give opinion testimony where jury was as well qualified as the witness to draw inferences and conclusions from the facts. *Davis v. Cahoon,* 395.

A nonexpert witness' answers to hypothetical questions were properly excluded. *Clarke v. Kerchner,* 454.

§ 48. Competency and Qualification of Experts

Trial court acted within its discretion in refusing to qualify the assistant director of a municipal public works as an expert witness to testify whether a landlord was negligent in the construction and maintenance of a back porch railing. *Clarke v. Kerchner,* 454.

§ 50. Medical Testimony

Medical expert may give his opinion as to percentage of permanent disability to a portion of the body without reference to the patient's occupation or daily activities. *Finley v. Rippey,* 176.

Testimony of orthopedic specialist as to what he meant by possible disc injury was proper. *Ibid.*

§ 51. Blood Tests

Trial court erred in allowing husband's motion for blood-grouping tests to determine paternity of child born almost three years before parties separated. *Wright v. Wright,* 190.

EXECUTORS AND ADMINISTRATORS

§ 9. Control and Management of Estate

An executor acts in a fiduciary capacity. *Moore v. Bryson,* 260.

§ 13. Proceedings to Sell Property to Make Assets

Sales of land to make assets held in 1907 and 1908 were binding upon remaindermen who were born thereafter, nothwithstanding unborn remaindermen were not made parties to the proceedings. *McRorie v. Shinn,* 475.

Order of sale of an intestate's undivided interest in realty, which is entered for the purpose of paying the debts of the estate, must be supported by a finding that intestate's personal property was insufficient to pay the debts. *East v. Smith,* 604.

§ 16. Validity of and Attack on Sale

Remaindermen did not have to wait until death of life tenant to attack the validity of proceedings in which lands were sold to make assets. *McRorie v. Shinn,* 475.

FIDUCIARIES

A fiduciary who acquires an outstanding title adverse to his *cestuis que trustent* is considered in equity as having acquired it for their benefit. *Moore v. Bryson,* 260.

A question of fact existed as to whether a tenant in common, who was also executor of the testator who devised the common property, occupied a fiduciary relationship with the other tenants in common at the time when he individually purchased the testator's homeplace which adjoined the common property. *Ibid.*

FORGERY

§ 2. Prosecution and Punishment

Indictment which did not contain a copy of the forged check was insufficient to charge the offense of uttering a forged check. *S. v. Able,* 141.

Indictment for forgery and uttering which alleged the forged instrument was a bank check and set out its contents in full sufficiently showed that it was capable of effecting a fraud. *S. v. Moffitt,* 337.

State's evidence was sufficient to be submitted to the jury on issue of defendant's guilt of credit card forgery. *S. v. Hudson,* 712.

HIGHWAYS AND CARTWAYS

§ 15. Appeal of Cartway Proceeding

Superior court erred in remanding a cartway proceeding to the clerk for hearing *de novo* without first ruling on the merits of petitioner's case. *Taylor v. Askew,* 386.

Clerk's order dismissing a cartway proceeding on the ground that the petitioners had adequate means of ingress and egress is *held* a final order from which the petitioners may appeal. *Ibid.*

HOMICIDE

§ 13. Pleas

An acquittal on charges of reckless driving and speed competition does not bar a subsequent prosecution for involuntary manslaughter arising out of the same occurrence. *S. v. Sawyer,* 81.

HOSPITALS

§ 3. Liability of Hospital to Patient

Hospital was not negligent in failing to provide uninterrupted flow of electric current in operating room while an electric suction pump was used to draw excess blood from decedent's throat during surgery. *Williams v. Lewis,* 306.

Doctrine of charitable immunity applies in an action against a nonprofit hospital which arose prior to the decision of *Rabon v. Hospital,* 269 N.C. 1. *Ibid.*

HUSBAND AND WIFE

§ 4. Conveyances Between Husband and Wife

A wife's deed which purported to convey to the husband a life estate in the house and lot was void where, among other things, the wife was not privately examined. *Boone v. Brown*, 355.

§ 12. Rescission of Separation Agreement

A separation agreement is rescinded by a resumption of conjugal relations. *Bass v. Mooresville Mills*, 631.

§ 14. Estate by Entireties

A devise that the testator's daughter and her husband are "to share equally" in a 42-acre tract creates a tenancy in common between the daughter and her husband, not an estate by the entireties. *Dearman v. Bruns*, 564.

INDICTMENT AND WARRANT

§ 17. Variance Between Averment and Proof

There is a fatal variance between indictments alleging that defendant with force and arms obtained credit cards from the control of a named person and evidence disclosing that defendant took the cards from a garbage can. *S. v. Trollinger*, 400.

INFANTS

§ 6. Appointment of Guardian Ad Litem

In the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem*. *McRorie v. Shinn*, 475.

§ 9. Hearing and Grounds for Awarding Custody of Minor

Findings of fact in child custody proceeding are conclusive on appeal when supported by competent evidence. *In re Custody of Jones*, 210.

While wishes of children are entitled to considerable weight when custody contest is between parents, the child's wishes are not controlling. *In re Harrell*, 351.

A surviving parent who is currently serving a life sentence for the murder of his wife has little, if any, say-so with reference to the custody of their children. *In re Moore*, 320.

INJUNCTIONS

§ 10. Commitment of Minors for Delinquency

Juvenile's constitutional rights were not violated when the court, on the day of the juvenile's hearing, allowed the petition to be amended in order to identify more specifically the owner of the property allegedly stolen by the juvenile. *In re Jones*, 437.

§ 12. Issuance of Temporary Orders

The filing of a complaint or the issuance of a summons is a condition precedent to the issuance of an injunction. *Freight Carriers v. Teamsters Local*, 159.

INSANE PERSONS

§ 11. Restoration of Sanity and Discharge

Statute providing that no judge shall release upon *habeas corpus* a person acquitted of crime because of insanity until the superintendents of the several State Hospitals shall certify that they have examined such person and find him to be sane and that his detention is no longer necessary for his own safety or that of the public held not violative of due process. *In re Tew*, 64.

INSURANCE

§ 13. Effective Date of Life Policy

No contract of life insurance became effective during the life of the applicant where advance payment receipt required applicant to be insurable "at the premium rate applied for" if the insurance was to take effect on the date application was completed, insurer issued a rated policy calling for higher than standard premium and applicant died before rated policy was delivered. *McLean v. Life of Virginia*, 87.

The payment of the initial premium of a life insurance policy some three days before the death of the prospective insured was subject to the terms of the conditional receipt, and the policy never became effective when the company rejected the coverage pursuant to the terms of the conditional receipt. *Adams v. Insurance Co.*, 678.

An application for insurance is a mere offer, which must be accepted before a contract of insurance can come into existence. *Ibid.*

§ 69. Protection Against Injury by Uninsured Motorists

A cause of action for the recovery of property damages under the uninsured motorist clause accrues when the damages are sustained. *Wheeless v. Insurance Co.*, 348.

Where plaintiff's judgment against an uninsured motorist exceeds the uninsured motorist coverage available to her, insurer of the driver of the vehicle in which plaintiff was riding cannot under the uninsured motorist provisions of its policy or under "other insurance" clauses deny coverage to plaintiff on the ground that plaintiff has other similar insurance available to her. *Turner v. Insurance Co.*, 699.

§ 84. Vehicle Covered by "Substitution" Provision

A car owner who did not apply for assigned risk insurance was not an assigned risk insured with respect to a policy voluntarily issued by the insurer to afford coverage to the owner's car, a replacement vehicle. *Beasley v. Insurance Co.*, 34.

§ 87. Drivers Insured

Evidence warranted a peremptory instruction that the automobile insured by a liability insurer was being driven without the actual permission of the insured at the time of the accident. *Surety Co. v. Casualty Co.*, 490.

§ 103. Forwarding of Summons or Other Suit Papers to Insurer After Accident

A car owner who did not apply for assigned risk insurance was not an assigned risk insured with respect to a policy voluntarily issued by

INSURANCE—Continued

the insurer to afford coverage to the owner's car, a replacement vehicle; consequently, plaintiff in an accident case involving the owner's car was not required to forward a copy of the summons and complaint to the insurer. *Beasley v. Indemnity Co.*, 34.

§ 108. Defenses Available to Insurer

A cause of action for the recovery of property damages under the uninsured motorist clause of an automobile liability policy accrues when the damages are sustained. *Wheeless v. Insurance Co.*, 348.

§ 140. Actions on Windstorm Policy

In action upon a windstorm policy, trial court erred in failing to instruct the jury that it should return a verdict for defendant insurer if it found that ice and snow were contributing causes of the damage. *Harrison v. Insurance Co.*, 367.

§ 148. Title Insurance

Bank was not entitled to collect under mortgagee title insurance policy for assets endorsed to a corporation which was the alter ego or instrumentality of the bank. *Insurance Co. v. Bank*, 444.

JUDGMENTS

§ 6. Modification of Judgments in Trial Court

A consent judgment is an exception to the rule that the trial court may set aside a judgment in fieri on his own motion or at the suggestion of counsel. *Robinson v. McAdams*, 105.

§ 14. Sufficiency of Pleadings to Sustain Default

Personal jurisdiction over a nonappearing defendant for the purpose of entry of a default judgment is not presumed by the service of summons and an unverified complaint but must be proven and appear of record. *Hill v. Hill*, 1.

In order for valid default judgment to be entered against a nonappearing defendant, there must be compliance with requirement of Rule 55 that it appear that party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment, and with requirement of G.S. 1-75.1 that there be proof of jurisdiction. *Ibid.*

Summons, certificate of officer serving it, and unverified complaint were insufficient to show that court had jurisdiction to enter personal judgment by default against nonappearing defendant. *Ibid.*

§ 19. Irregular Judgment

Proper procedure for attacking an irregular judgment is by motion in the cause made within reasonable time. *McRorie v. Shinn*, 475.

§ 21. Consent Judgment

Trial court erred in setting aside, during a two-week session of court, a consent judgment that was entered into by plaintiff and defendant during the session. *Robinson v. McAdams*, 105.

JUDGMENTS—Continued

§ 45. Plea of Bar

Plaintiff was estopped by prior action from maintaining her present action where the issues and parties were identical. *Peake v. Babson,* 413.

JUDICIAL SALES

§ 1. Power and Duties of Commissioner

Where the commissioner appointed by the court to conduct a judicial sale has no authority to insert a restriction against house trailers in the deed of sale, the commissioner's insertion of such restriction in the deed was null and void. *White v. Moore,* 534.

JURY

§ 7. Challenges

Trial court properly denied defendant's challenge for cause of two prospective jurors who had had business dealings with some of the State's witnesses. *S. v. Hollingsworth,* 674.

Negro defendant's challenge to the array of special jurors on the ground that the six jurors summoned by the sheriff were white was properly denied by the trial judge. *Ibid.*

LANDLORD AND TENANT

§ 8. Liability for Injury to Person; Duty to Repair

A lessee's social guest who was injured when the back porch railing of the demised premises gave way failed to show that the lessors of the premises breached their common law duty to her. *Clarke v. Kerchner,* 454.

A landlord's violation of the Greensboro housing code was not negligence *per se. Ibid.*

A lessor is not under an implied covenant to repair the premises. *Ibid.*

LARCENY

§ 1. Elements of Crime

Statute defining crime of credit card theft is not unconstitutional in failing to require criminal intent. *S. v. Hudson,* 712.

§ 4. Warrant and Indictment

Indictment alleging that defendant entered the lands of the United States and cut and carried away timber, the property of a lumber company, does not charge the offense of felonious larceny of timber under G.S. 14-80. *S. v. Andrews,* 341.

§ 5. Presumptions

The lapse of ten days between the theft of old coins and the finding of the coins on defendant's person was not so long as to exclude the application of the recent possession doctrine. *S. v. Waller,* 666.

LARCENY—Continued

§ 7. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of larceny of copper bars. *S. v. Wade*, 169.

State's evidence was sufficient to go to jury in burglary and larceny prosecution. *S. v. Innman*, 202; *S. v. Mornes*, 207.

There was plenary evidence to support defendant's conviction of the felonious larceny of 34 men's suits having a value of $2,285.75. *S. v. Young*, 440.

State's evidence that within two weeks after the theft of merchandise from a filling station the defendants sold much of the merchandise to a person in South Carolina, *held* sufficient to support a jury finding of defendants' guilt of breaking and entering and larceny. *S. v. Waddell*, 577.

Evidence was insufficient to support verdict of guilty of felonious larceny of property having value in excess of $200. *S. v. Wilder*, 690.

LIBEL AND SLANDER

§ 13. Parties

In order to sustain its counterclaim against a corporation for slander by an alleged employee of the corporation, defendant would have the burden of showing that at the time and in respect to the utterance of the words complained of the alleged employee was acting within the course and scope of his employment by the corporation. *Blackmon v. Decorating Co.*, 137.

§ 16. Sufficiency of Evidence

Trial court properly allowed motion of corporation for summary judgment in action based on alleged slanderous remarks of salesman for corporation. *Blackmon v. Decorating Co.*, 137.

LIMITATION OF ACTIONS

§ 1. Nature and Construction of Statute of Limitation

The fact that a party does not have certain information necessary to its cause of action does not interrupt the running of the statute of limitations. *Wheeless v. Insurance Co.*, 348.

§ 4. Accrual of Action

A cause of action for the recovery of property damages under the uninsured motorist clause accrues when the damages are sustained. *Wheeless v. Insurance Co.*, 348.

§ 9. Death and Administration

Action by remainderman against executors to recover undistributed share of an estate accrued two years after defendants qualified as executors and was barred by 10-year statute of limitations. *Moore v. Bryson*, 149.

§ 12. Institution of Action, Discontinuance

Plaintiff's action for personal injuries was barred by the three-year statute of limitations where plaintiff timely instituted a second action after

LIMITATION OF ACTIONS—Continued

the first was terminated by voluntary nonsuit but there was no evidence that the costs were paid in the prior action or that the action was brought in *forma pauperis*. *Sheppard v. Construction Co.*, 358.

§ 17. Burden of Proof

Defendant has the burden of proof to show that plaintiff's claim was barred by the statute of limitations. *Knitting, Inc. v. Yarn Co.*, 162.

MASTER AND SERVANT

§ 3. Distinction Between Employee and Independent Contractor

Whether an insurance agent was an independent contractor or an employee of an insurance company at the time of his automobile accident was a question for the jury. *Little v. Poole*, 597.

§ 17. Strikes and Picketing

Affidavit of a trucking company executive which did not meet the requirements of a complaint could not support the issuance of a temporary injunction restraining the Teamsters Union from picketing the company's headquarters; therefore, the injunction was void and the disobedience of it was not punishable. *Freight Carriers v. Teamsters Local*, 159.

§ 34. Scope of Employment

In order to sustain its counterclaim against a corporation for slander by an alleged employee of the corporation, defendant would have the burden of showing that at the time and in respect to the utterence of the words complained of the alleged employee was acting within the course and scope of his employment by the corporation. *Blackmon v. Decorating Co.*, 137.

§ 55. Injuries Compensable Under Workmen's Compensation

An "accident" did not arise from the mere fact that on the day of the injury (hernia) the employee, who ordinarily lifted furniture, was lifting cases of canned beans for the first time, that the day was hot, and that the employee was in a hurry. *Southards v. Motor Lines*, 583.

§ 71. Computation of Average Weekly Wage

In computing the average weekly wage of a carpenter who was employed for less than 52 weeks and whose earnings could not exceed $1680 annually under Social Security regulations, the Industrial Commission properly based its award on the carpenter's actual earnings in the job in which he was injured. *Wallace v. Music Shop*, 328.

§ 79. Persons Entitled to Payment

Parent who abandoned his child during its minority is not barred from participating in a workmen's compensation award for death of the child. *Smith v. Exterminators*, 76.

Evidence supported Industrial Commission's finding that payments made by insured employee to his mother were made in lieu of board and lodging and should not be considered in determining whether the mother was partially dependent upon the employee. *McMurry v. Mills*, 186.

Husband and wife are not living separate and apart for "justifiable cause" within meaning of Workmen's Compensation Act if they are living

MASTER AND SERVANT—Continued

separate and apart as a result of a legally executed separation agreement, and wife cannot go behind the separation agreement in an attempt to show that her separation from employee-husband at the time of his death was caused by misconduct of the husband. *Bass v. Mooresville Mills*, 631.

Employee-husband and his wife were living separate and apart for justifiable cause where they were living apart only until a female companion of the wife could make arrangements to move out of the home so the husband could move back in. *Ibid.*

§ 91. Filing of Workmen's Compensation Claim

Father was not barred from participation in a workmen's compensation award for the death of his son by his failure to file a claim within one year from the time of the accident, where the cause was commenced by application of the insurance carrier for a hearing. *Smith v. Exterminators*, 76.

§ 93. Prosecution of Claim and Proceedings Before Industrial Commission

The Industrial Commission is not required to accept even the uncontroverted testimony of a witness. *Wallace v. Express, Inc.*, 556.

The Industrial Commission is required to make specific findings of fact with respect to the crucial facts upon which the questions of plaintiff's right to compensation depend. *Southards v. Motor Lines*, 583.

§ 94. Findings and Award of Commission

Denial of workmen's compensation is set aside where some of the Industrial Commission's findings of fact were unsupported by the evidence and the Commission failed to make crucial findings of fact. *Wallace v. Express, Inc.*, 556.

MONEY RECEIVED

§ 3. Pleadings and Evidence

Trial court's finding that defendant was indebted to plaintiff for advances made was supported by testimony of an auditor. *Tank Service v. Fortner*, 91.

MORTGAGES AND DEEDS OF TRUST

§ 17. Payment and Satisfaction

A debt secured by a note and deed of trust on the debtor's home was paid in full when, upon the foreclosure of the deed of trust, the creditor successfully bid an amount to cover the note and accepted the trustee's deed in exchange for the note. *Supply Co. v. Redmond*, 173.

§ 33. Disposition of Proceeds

A debtor whose obligation was secured by a note and deed of trust was entitled, upon foreclosure of the deed of trust, to have the foreclosure proceeds applied to the note. *Supply Co. v. Redmond*, 173.

MUNICIPAL CORPORATIONS

§ 31. Review of Order of Municipal Board

An appeal from a superior court judge who vacated an order of a municipal board of adjustment must be brought by a party aggrieved. *In re Coleman,* 124.

NARCOTICS

§ 1. Elements of Statutory Offense

It is a felony to possess LSD in any quantity for any purpose in the absence of proof that the possession was lawful under the provisions of the Narcotic Drug Act. *S. v. Parker,* 648.

§ 4.5. Instructions

Trial judge did not abuse his discretion when, after receiving a request from the jury for additional instructions as to the word "wilfully," he also instructed on actual and constructive possession. *S. v. Ayers,* 333.

§ 5. Verdict and Punishment

Sentence of 15 months' imprisonment imposed upon defendant's plea of guilty to possession of marijuana was valid. *S. v. Peatross,* 550.

NEGLIGENCE

§ 4. Sudden Peril and Emergencies as Affecting Question of Negligence

Motorist who becomes stricken by fainting spell or other sudden and unforeseeable incapacitation and is by reason of such unforeseen disability unable to control his vehicle is not chargeable with negligence. *Wallace v. Johnson,* 703.

§ 5.1. Business Places; Duties to Invitees

A TV repairman was not prejudiced by trial court's instruction which mistakenly referred to him as an employee of defendant rather than an invitee. *Musselwhite v. Hotel Co.,* 361.

§ 12. Doctrine of Last Clear Chance

The doctrine of last clear chance contemplates that if liability is to be imposed the defendant must have had a last "clear" chance, not a last "possible" chance to avoid injury. *Grant v. Greene,* 537.

§ 26. Presumptions and Burden of Proof

Negligence is not presumed from the mere fact of an accident. *Coakley v. Motor Co.,* 636.

§ 37. Instructions on Negligence

It is neither necessary nor appropriate to submit separate issues as to every act of negligence alleged by plaintiff. *Wallace v. Johnson,* 703.

§ 40. Instructions on Proximate Cause

Plaintiff was prejudiced by trial court's instructions on proximate cause which mistakenly used the word "plaintiff" instead of "defendant" in instructing on defendant's negligent breach of duty. *Johnson v. Brown,* 323.

NEGLIGENCE—Continued

§ 53. Duties and Liabilities to Invitees

A TV repairman was not prejudiced by trial court's instruction which mistakenly referred to him as an employee of defendant rather than as an invitee. *Musselwhite v. Hotel Co.*, 361.

§ 59. Duties and Liabilities to Licensees

An invited social guest is a licensee. *Clarke v. Kerchner*, 454.

OBSCENITY

Requisites for conviction of disseminating obscene material in violation of G.S. 14-189.1. *S. v. McCluney*, 11.

State's evidence was sufficient to be submitted to jury in prosecution for disseminating an obscene magazine. *Ibid.*

Statutory presumption that one who disseminates obscenity knows of existence of the parts, pictures or contents which render it obscene is constitutional. *Ibid.*

Court of Appeals reverses quashal of warrant charging that a tavern owner permitted a female dancer to expose her breasts on his premises. *S. v. Tenore*, 374.

PARENT AND CHILD

§ 6. Right to Custody of Child

The desires of the surviving parent with reference to the custody of his children are not binding on the court, especially where the parent is currently serving a life sentence for the murder of his wife. *In re Moore*, 320.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 5.5. Licensing and Regulation of Veterinarians

Fine of $500 for practicing veterinary medicine without a license was excessive. *S. v. Stafford*, 520.

§ 16. Sufficiency of Evidence of Malpractice

Trial court properly entered summary judgment in favor of hospital and surgeon in action to recover for injury allegedly sustained to a nerve in plaintiff's left arm while he was unconscious from anesthesia during surgery on his right arm. *Hoover v. Hospital, Inc.*, 119.

PLEADINGS

§ 32. Motion to be Allowed to Amend

Right to amend answer after time for filing answer has expired is addressed to the discretion of the court. *Calloway v. Motor Co.*, 511.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

The power of an agent to bind his principal may be extended to acts which the principal has negligently permitted the agent to do in the course of his employment. *Stirewalt v. Savings & Loan Assoc.*, 241.

PROCESS

§ 4. Proof of Service

A return untrue in fact is a false return within the meaning of the statute allowing recovery of a penalty for a false return. *Crowder v. Jenkins*, 57.

§ 5. Amendment of Process

A judicial admission by a sheriff and his deputy that the return on a show-cause order was untrue in fact precludes them from thereafter amending the return. *Crowder v. Jenkins*, 57.

§ 16. Service on Nonresident in Action to Recover for Negligent Operation of Automobiles in this State

Statement in an affidavit submitted by plaintiff's attorney that he is informed and believes that defendant has left the State and established residence elsewhere is hearsay and incompetent to support substituted service on the Commissioner of Motor Vehicles under former statute. *Grohman v. Jones*, 96.

RECEIVING STOLEN GOODS

§ 1. Nature and Elements of the Offense

In order for crime of receiving stolen property to be rendered a felony without regard to value of the property, defendant must have known not only that the property was stolen but also that the theft was accomplished under circumstances enumerated in G.S. 14-72(b). *S. v. Scott*, 642.

§ 5. Sufficiency of Evidence and Nonsuit

In prosecution for receiving stolen property, variance between indictment and proof as to ownership of part of stolen property allegedly received was not fatal where court submitted only issue of nonfelonious receiving. *S. v. Scott*, 642.

State's evidence was sufficient for jury to find that defendant knew goods he had received had been stolen. *Ibid.*

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of feloniously receiving taxpaid liquor knowing it to have been stolen. *S. v. Roberts*, 686.

§ 6. Instructions

Trial court did not errr in submitting issue of nonfelonious receiving where there was no evidence that defendant knew theft of the property had been accomplished by breaking and entering. *S. v. Scott*, 642.

Trial court, in prosecution for receiving stolen property, erred in instructing the jury that the test of guilty knowledge was whether a reasonable man would or should have known or suspected that the goods were stolen. *Ibid; S. v. Roberts*, 686.

REFERENCE

§ 8. Review of Exceptions by the Court

Upon hearing of exceptions to referee's report, trial court may affirm, overrule, modify or make additional findings of fact, and such

REFERENCE—Continued

action is not reviewable unless there is error in receiving or rejecting evidence or the findings are not supported by the evidence. *Keller v. Hennessee,* 43.

§ 10. Appeal from Judgment of Court Upon Exceptions to Referee's Report

Findings of fact by the referee which are approved by the trial judge are conclusive on appeal when supported by any competent evidence. *Keller v. Hennessee,* 43.

REGISTRATION

§ 3. Registration as Notice

A purchaser of land is charged with notice of what a title search would disclose. *Strickland v. Overman,* 427.

ROBBERY

§ 4. Sufficiency of Evidence

There is a fatal variance between indictments alleging that defendant with force and arms obtained credit cards from the control of a named person and evidence disclosing that defendant took the cards from a garbage can. *S. v. Trollinger,* 400.

§ 5. Instructions on Lesser Degrees of the Crime

In prosecution for attempted armed robbery, trial court did not err in charging on attempted common law robbery. *S. v. Best,* 286.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

The Rules of Civil Procedure are applicable to proceedings pending on 1 January 1970. *Long v. Coble,* 624.

§ 7. Form of Motions

All motions must state the rule number under which movant is proceeding. *Long v. Coble,* 624.

§ 8. General Rules of Pleadings

Admissions in the pleadings and stipulations by the parties have the same effect as a jury finding. *Crowder v. Jenkins,* 57.

Allegations in a pleading to which a responsive pleading is required are deemed admitted when no responsive pleading is filed. *Acceptance Corp. v. Samuels,* 504.

§ 11. Signing and Verification of Pleadings

Rule 11 does not require verification of pleadings when action or defense is founded on written instrument for payment of money. *Hill v. Hill,* 1.

§ 12. Motion for Judgment on the Pleadings

When matters outside the pleadings are considered by the court on a motion for judgment on the pleadings, the motion shall be treated as one for summary judgment. *Long v. Coble,* 624.

RULES OF CIVIL PROCEDURE—Continued

§ 17. Parties Plaintiff and Defendant

A legal proceeding must be prosecuted by a legal person, not by an aggregation of anonymous individuals. *In re Coleman*, 124.

The dismissal of a wrongful death action on the ground that the administrator was not the real party in interest, in that the right of action had passed to the decedent's employer by operation of the Workmen's Compensation law, held reversible error. *Long v. Coble*, 624.

§ 23. Class Actions

A class action must be prosecuted by one or more named members of the class. *In re Coleman*, 124.

§ 26. Depositions in a Pending Action

The reading of a deposition in a civil trial was prejudicial error where there was no finding that the deponent was dead or that he lived more than 75 miles from the place of trial or that any other condition specified in Rule 26(d)(3) was applicable so as to make the deposition competent. *Maness v. Bullins*, 567.

§ 27. Depositions Before Action

Petition under Rule 27 for order to examine respondent to obtain information to prepare complaint should have been denied. *In re Lewis*, 541.

§ 41. Dismissal of Action

In ruling on a motion to dismiss in a trial without a jury, the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery. *Knitting, Inc. v. Yarn Co.*, 162.

§ 42. Consolidation for Trial

The district court properly consolidated the case involving custody of a minor child with the case involving custody of her two older sisters. *In re Moore*, 320.

§ 50. Motion for a Directed Verdict

Motion for directed verdict which failed to state rule number under which it was made did not comply with rules of practice for superior and district courts. *Lee v. Rowland*, 27.

Trial court should not make findings of fact and conclusions of law in ruling on motion for directed verdict. *Walker v. Pless*, 198.

It was harmless error for trial court sitting without a jury to grant plaintiff's motion for directed verdict. *Brothers, Inc. v. Jones*, 215.

A directed verdict may not be entered in a declaratory judgment action. *Surety Co. v. Casualty Co.*, 490.

A motion for directed verdict which was based on "the case of Blake v. Mallard, decided by Justice Sharp in 1964" does not comply with the statutory requirements that the motion shall state the specific grounds therefor. *Grant v. Greene*, 537.

In passing upon the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, the appellate court must look to the evidence and base decision thereon without regard to the trial court's "Findings of Fact" and "Conclusions of Law." *Sink v. Sink*, 549.

A directed verdict on the issues of negligence and agency in favor of the party having the burden of proof is error. *Little v. Poole*, 597.

RULES OF CIVIL PROCEDURE—Continued

Consideration of evidence on motion for directed verdict. *Barringer v. Weathington,* 618.

§ 51. Instructions to Jury

Trial court's use of hypothetical facts in its instructions to the jury was confusing. *Terrell v. Chevrolet Co.,* 310.

An instruction requiring the jury to answer the issue of damages in the amount of $507 was erroneous in not permitting the jury to pass upon the credibility of the evidence. *Ibid.*

Trial court's instruction, "I will not attempt to recall all of the evidence, but only so much of it *as the court deems is important* when you come to consider your verdict," was erroneous as an expression of opinion on the importance of the recapitulated evidence. *Little v. Poole,* 597.

§ 52. Findings by the Court

When it becomes incumbent on the trial court to make findings of fact, the court should make its own determination as to what pertinent facts are actually established by the evidence rather than merely reciting what the evidence may tend to show. *Davis v. Davis,* 115.

In a trial by the court without a jury, the court must find the facts specially and state separately its conclusions of law; credibility and discrepancies are to be resolved by the court. *Laughter v. Lambert,* 133.

§ 53. Referees

A party ordered to submit to a reference can waive his right to a jury trial. *Brothers, Inc. v. Jones,* 215.

Trial court properly ordered a reference in a plaintiff's action to recover on a promissory note and on an open account for goods sold and delivered. *Ibid.*

§ 55. Default Judgment

In order for valid default judgment to be entered against a non-appearing defendant, there must be compliance with requirement of Rule 55 that it appear that party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment, and with requirement of G.S. 1-75.1 that there be proof of jurisdiction. *Hill v. Hill,* 1.

A defendant's unverified motion to set aside a default judgment on the ground that she was uneducated and ignorant of the law and living on welfare held insufficient to set aside the judgment on the ground of mistake, etc. *Acceptance Corp. v. Samuels,* 504.

Default was established where the defendant failed to answer seller's complaint demanding possession of real property and recovery of back payments for the property, and where the court thereafter entered default judgment. *Ibid.*

§ 56. Summary Judgment

When summary judgment should be allowed. *Askew's Inc. v. Cherry,* 369; *Moore v. Bryson,* 260.

It is only in the exceptional negligence case that summary judgment should be invoked. *Robinson v. McMahan,* 275.

RULES OF CIVIL PROCEDURE—Continued

Although defendants did not respond by affidavits or otherwise to plaintiff's supported motion for summary judgment, the court could enter summary judgment against them only "if appropriate" under all of the circumstances. *Ibid.*

The hearing of defendants' motion for summary judgment without at least 10 days' notice to the plaintiff was reversible error. *Ketner v. Rouzer,* 483; *Long v. Coble,* 624.

Summary judgment is the correct procedure in the absence of any genuine issue as to any material fact. *Adams v. Insurance Co.,* 678.

On motion for summary judgment, the test is whether the moving party presents materials which would require a directed verdict in his favor if offered as evidence at trial. *Coakley v. Motor Co.,* 636.

A party against whom the motion for summary judgment is made must demonstrate that there is an issue for trial. *Ibid.*

§ 60. Relief from Judgment or Order

Findings of fact made by the trial court upon a motion to set aside a default judgment are binding on appeal if supported by any competent evidence. *Kirby v. Contracting Co.,* 128.

The neglect of defendant's attorney in failing to answer an amended complaint in apt time will not be imputed to defendant where the attorney's secretary had failed to bring the complaint to the attention of the attorney. *Ibid.*

A motion in the cause was a proper procedure for seeking relief from an execution sale. *Supply Co. v. Redmond,* 173.

§ 65. Injunctions

The filing of a complaint or the issuance of a summons is a condition precedent to the issuance of an injunction. *Freight Carriers v. Teamsters Local,* 159.

A temporary restraining order may be issued without notice; a preliminary injunction may only be issued after notice to the adverse party and a hearing. *Lambe v. Smith,* 580.

Plaintiff who sought a preliminary injunction to keep defendants from interfering with her right to use water from a well located on defendants' land failed to show that the trial court abused its discretion in denying the preliminary injunction. *Ibid.*

SALES

§ 10. Recovery of Goods or Purchase Price

In plaintiff's action to recover the alleged contract price for certain items it had sold to defendant, plaintiff's evidence was sufficient to withstand defendant's motion for dismissal. *Knitting, Inc. v. Yarn Co.,* 162.

§ 14. Actions for Breach of Warranty

Privity of contract is necessary in action for breach of warranty against manufacturer of tractor tire. *Byrd v. Rubber Co.,* 297.

Trial court properly ordered a reference in a plaintiff's action to recover on a promissory note and on an open account for goods sold and delivered. *Brothers, Inc. v. Jones,* 215.

SALES—Continued

§ 22. Actions for Personal Injuries Based Upon Negligence, Defective Goods or Materials

Evidence was sufficient for jury on issue of negligence of former owner of dump truck in the design and installation of a steel brace on the truck which fell from the truck and was propelled through the windshield of plaintiff's car. *Lee v. Rowland,* 27.

In an automobile owner's action against an automobile dealer and the manufacturer for damages allegedly resulting from a latent defect in the master brake cylinder, the owner failed to show that either the dealer or the manufacturer was negligent in regard to the defect. *Coakley v. Motor Co.,* 636.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Highway patrolman had probable cause to search defendant's automobile without a warrant where he was informed by Danville, Virginia, police officers that the car contained alcoholic beverages, narcotics and a pistol, and such information was given the Danville officers by a reliable informant. *S. v. Ayers,* 333.

No search warrant was required for seizure of packets containing heroin which defendant had thrown down behind him while on a public street. *S. v. Powell,* 465.

Heroin found on defendant's person as a result of a warrantless search in jail was properly admitted in evidence. *S. v. Jackson,* 682.

The warrantless arrest of defendant for felonious possession of LSD and the subsequent warrantless searches of his person on the street and at the police station were lawful. *S. v. Parker,* 648.

Trial court's finding of fact that the arresting officer had placed the defendant under arrest prior to his search of the defendant's person was supported by the arresting officer's testimony on *voir dire. Ibid.*

§ 2. Consent to Search Without Warrant

Evidence supports trial court's ruling that defendant consented to a search in which heroin was found in his shirt pocket. *S. v. Thurgood,* 405.

§ 4. Search Under the Warrant

Police officers lawfully seized items of stolen property where officers were on the premises pursuant to a valid warrant to search for narcotics. *S. v. Scott,* 642.

TENANTS IN COMMON

§ 1. Nature and Incidents of the Estate

A devise that the testator's daughter and her husband are "to share equally" in a 42-acre tract creates a tenancy in common between the daughter and her husband, not an estate by the entireties. *Dearman v. Bruns,* 564.

§ 3. Mutual Rights and Liabilities

A fiduciary relationship may arise between tenants in common as a result of their conduct. *Moore v. Bryson,* 260.

TENANTS IN COMMON—Continued

§ 6. Acquisition of Title or Interest by One Tenant in Common

A question of fact existed as to whether a tenant in common, who was also executor of the testator who devised the common property, occupied a fiduciary relationship with the other tenants in common at the time when he individually purchased the testator's homeplace which adjoined the common property. *Moore v. Bryson,* 260.

TRESPASS TO TRY TITLE

§ 2. Burden of Proof

Where both parties claim title to the disputed land, each has the burden of proving title in himself. *Keller v. Hennessee,* 43.

§ 4. Sufficiency of Evidence

There was a break in defendants' chain of title where they failed to introduce deed from trustee in bankruptcy of former owner to their predecessors in title. *Keller v. Hennessee,* 43.

There was a break in defendants' chain of title where defendants introduced a commissioner's deed but failed to offer the judgment roll in the action appointing the commissioner. *Ibid.*

Plaintiffs failed to show a connected chain of title from the State where they introduced an 1896 deed conveying the property to their immediate predecessors in title but offered no evidence of ownership of the disputed property by the grantors in the 1896 deed. *Ibid.*

TRIAL

§ 3. Motion for Continuance

A plaintiff who made no formal motion for continuance cannot complain on appeal that the trial judge failed to grant a continuance. *Barringer v. Weathington,* 618.

§ 33. Statement of Evidence and Application of Law Thereto

An instruction which assumed a fact not in evidence was erroneous. *Plumbing Co. v. Supply Co.,* 662.

§ 35. Instructions on Burden of Proof

An instruction that the greater weight of the evidence is "such evidence as when compared with that opposed to it has more convincing force" was erroneous in a case in which the defendant offered no evidence. *Plumbing Co. v. Supply Co.,* 662.

§ 51. Setting Aside Verdict

Trial court did not abuse its discretion in setting aside jury verdict in favor of plaintiff in contract action. *Branson v. York,* 589.

§ 58. Findings; Appeal and Review by Court

When it becomes incumbent on the trial court to make findings of fact, the court should make its own determination as to what pertinent facts are actually established by the evidence rather than merely reciting what the evidence may tend to show. *Davis v. Davis,* 115.

TRUSTS

§ 8. Income and Persons Entitled Thereto.

Testamentary trust is interpreted as requiring share of deceased child of testatrix' son in trust income to be paid to the son. *Price v. Price*, 657.

§ 13. Creation of Resulting Trust

Plaintiff's allegations (1) that, during negotiations for the sale of school property, he offered to refrain from bidding on the property on condition that the defendant would sell two portions of the property to plaintiff if the defendant became the successful bidder of the property and (2) that the defendant agreed to the proposal and became the successful bidder but has since refused to convey the two portions in question to the plaintiff, *held* sufficient to give notice of transactions and occurrences which might support a finding that a valid parol trust in the two portions had been established. *Ketner v. Rouzer*, 483.

The provision of the English Statute of Frauds which requires all trusts in land to be manifested in writing has not been adopted in this State. *Ibid.*

UNFAIR COMPETITION

It is unfair competition for a company to copy on magnetic tapes the phonograph records that were produced by a recording company and to sell the taped performances in competition with the recording company; such conduct may be temporarily enjoined. *Liberty/UA, Inc. v. Tape Corp.*, 20.

UNIFORM COMMERCIAL CODE

§ 20. Breach of Warranty

In instructing the jury on damages arising out of a breach of warranty, trial court erred in refusing to give instructions that complied with the applicable statute. *Motors, Inc. v. Allen*, 381.

§ 27. Rights of a Holder in Due Course

Plaintiff failed to show that it was a holder in due course of a promissory note endorsed by a purported agent of the corporate payee where it offered no proof of the authority of the purported agent to endorse the note for the payee. *Bank v. Furniture Co.*, 530.

USURY

§ 1. Transactions Usurious

A loan secured by real estate located in North Carolina is subject to the laws of North Carolina relating to interest and usury. *South, Inc. v. Mortgage Corp.*, 651.

A construction loan commitment which charged an annual interest of 7¾%, plus a "service fee" of ½% per month on the outstanding balance, the loan to be paid within one year, was usurious. *Ibid.*

VENDOR AND PURCHASER

§ 11. Abandonment and Cancellation of Contract

In a seller's action to recover possession of real property from a defaulting buyer, the allegations were sufficient to state a claim for relief. *Acceptance Corp. v. Samuels,* 504.

VENUE

§ 8. Removal for Convenience of Witnesses

Motion for change of venue for convenience of witnesses rests in the discretion of the trial judge. *Brothers, Inc. v. Jones,* 215.

WILLS

§ 3. Attested Wills

The testator's request for attestation may be implied from the conduct of the testator and from the surrounding circumstances. *In re Will of Knowles,* 155.

§ 20. Evidence of Due Execution of Will

Evidence in a caveat proceeding could support a jury finding that a physically incapacitated testator requested a minister to sign the will for him. *In re Will of Knowles,* 155.

§ 22. Mental Capacity

It is proper for attesting witnesses to give their lay opinion concerning the competency of testator to make a will. *In re Will of Knowles,* 155.

§ 28. General Rules of Construction

Intent of the testator is to be gathered from the four corners of the will. *Dearman v. Bruns,* 564.

§ 33. Rule in Shelley's Case

Rule in Shelley's case did not apply to devise to testator for life with remainder "to his children in fee simple." *Barnacascel v. Spivey,* 269.

§ 40. Devises With Power of Disposition

Trial court properly determined that under terms of testator's will, his widow could convey a fee simple title to the property in question after her remarriage. *Lane v. Faust,* 717.

§ 52. Residuary Clauses

Testator intended to dispose of the residue of his real property by an item of his will which devised "all the lands owned by me at the time of my death (and not otherwise disposed of herein)" and to dispose of the residue of his personal property by an item which devised "all the residue of my estate after taking out the devises and legacies hereinbefore mentioned." *Barnacascel v. Spivey,* 269.

§ 53. Whether Devisees take in Common or in Severalty

A devise that the testator's daughter and her husband are "to share equally" in a 42-acre tract creates a tenancy in common between the daughter and her husband, not an estate by the entireties. *Dearman v. Bruns,* 564.

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