NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 12

SPRING SESSION 1971

FALL SESSION 1971

RALEIGH
1971

CITE THIS VOLUME

12 N.C.App.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1971

RIVER DEVELOPMENT CORP. AND JOSEPH C. HILL v. PARKER TREE FARMS, INC., ALTON P. PARKER, TRUSTEE AND JOHN WEBB, TRUSTEE

No. 7110SC370

(Filed 14 July 1971)

1. **Venue § 5— usury action — note secured by deed of trust on real property**

Although an allegedly usurious loan is evidenced by a note secured by a deed of trust on real property, the action for usury is not an action affecting an interest in real property which may be removed as a matter of right under G.S. 1-76 to the county where the real property is located.

2. **Injunctions § 13; Mortgages and Deeds of Trust § 19— action for usury — foreclosure of deed of trust — temporary injunction**

The court's findings of fact were sufficient to support its order enjoining defendants in a usury action from foreclosing the deed of trust securing the allegedly usurious note pending final determination of the usury action. G.S. 1-485(2).

APPEAL by defendants from *Brewer, Judge,* 15 March 1971 Session of Superior Court held in WAKE County.

This is a civil action instituted pursuant to G.S. 24-2 for forfeiture of interest and recovery of a penalty for twice the amount of interest paid on an allegedly usurious note. The plaintiffs also pray for reformation of the note to reflect the actual indebtedness of plaintiffs to defendants. The note is secured by a deed of trust on a tract of land located in Carteret County.

Subsequent to the issuance of summons, but prior to service of the complaint, the defendants instituted a foreclosure proceeding in Carteret County against the tract of land securing the note. Upon the filing of the complaint on 17 February 1971, the defendants simultaneously filed in the Superior Court of Wake County a motion for change of venue to Carteret County under G.S. 1-76, alleging that the usury action affected an interest in the real property securing the note. Following this, the plaintiffs moved for and obtained a temporary restraining order to restrain the foreclosure proceeding in Carteret County. A hearing to show cause why the restraining order should not be continued pending a final determination of the action, and a hearing upon the defendants' motion for change of venue was held at the 15 March 1971 Session of Wake County Superior Court. In an order dated 24 March 1971, Judge Brewer enjoined the foreclosure proceeding and denied the defendants' motion for change of venue. From this order the defendants appealed to this Court.

Davis, Davis & Smith by F. Leary Davis, Jr., for plaintiff appellees.

Hamilton, Hamilton & Phillips by Luther Hamilton; Kirby, Webb & Hunt by John Webb for defendant appellants.

HEDRICK, Judge.

[1] Appellants first contend that the court erred in denying their motion for change of venue. G.S. 1-76 in pertinent part provides:

> "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, . . .
>
> (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest. . . . "

Plaintiffs' action is founded in usury. The fact that the allegedly usurious loan is evidenced by a note secured by a deed of trust on real property does not make it an action affecting an interest in real property such that G.S. 1-76 would require a change of venue. Plaintiffs' action will not affect the legal title of the trustee; only the amount of the indebtedness secured by

the deed of trust is subject to change. This contention is without merit.

[2] The defendants' contention that the court's findings of fact are not sufficient to support the order enjoining the foreclosure proceeding pending the final determination of the plaintiffs' usury action is likewise without merit. G.S. 1-485 in pertinent part provides:

> "A preliminary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases. . . .
>
> * * *
>
> "(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual. . . . "

The preliminary injunction was based upon the following findings by Judge Brewer:

> "It further appearing to the court that there is probable cause that the plaintiffs will be able to establish their asserted right, and that if plaintiffs' contentions are sustained that foreclosure of said property during the litigation will do irreparable harm and damage to the plaintiffs unless the temporary order of injunction remains in force in that any judgment that plaintiffs recover in the pending action will be rendered ineffectual by said foreclosure sale; and,
>
> "It further appearing to the court that defendants will suffer no considerable injury from being enjoined from foreclosing said deed of trust until the controversy between plaintiffs and defendants can be determined."

It is our opinion that the court's findings adequately support the preliminary injunction. The order dated 24 March 1971 denying the defendants' motion for a change of venue, and enjoining the foreclosure proceeding pending a final determination of the cause is affirmed.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. RICHARD R. CARTWRIGHT, JR.

No. 7117SC405

(Filed 14 July 1971)

Automobiles § 127— drunken driving — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of drunken driving where it tended to show that defendant was driving on the wrong side of the road, and that he had a strong odor of alcohol about him, was unsteady on his feet and had half a fifth of whiskey in his truck.

APPEAL by defendant from *Seay, Superior Court Judge,* 1 February 1971 Session of STOKES County Superior Court.

The defendant was tried on a valid warrant charging him with operating a motor vehicle on one of the public highways of the State of North Carolina while under the influence of intoxicating liquors. This would be in violation of G.S. 20-138. The jury found the defendant guilty of the offense charged; and from the imposition of a valid sentence, the defendant appealed.

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

Powell and Powell by Harrell Powell, Jr., and Edward L. Powell for defendant appellant.

CAMPBELL, Judge.

Defendant assigns no error to the charge of the court and presents for review the one question as to whether or not the evidence taken in the light strongest for the State presented a case for the jury. We are of the opinion that it does. W. C. Blalock, a member of the North Carolina Highway Patrol, testified that on Saturday night, 6 December 1969, at approximately 11:30 p.m., he was traveling north in his patrol car on North Carolina Highway No. 704 going towards Prestonville. Deputy Sheriff Nolaska Allen was with Patrolman Blalock. Blalock testified he "met a 1964 International truck on my side of the road. It ran me out of the road on the right. I immediately turned around and it was approximately a quarter of a mile where N.C. 704 intersects N.C. 772 and 704, he made a left turn in the eastwardly direction toward Madison. I pro-

ceeded behind the truck and I blew the siren and the truck with the two wheels on the right pulled off on the shoulder leaving most of the truck on the highway. I went to the vehicle and Cartwright, the subject, was under the wheel of the truck. There was a strong odor of alcohol on the subject, there was approximately a pint of taxpaid liquor, it was a fifth bottle and it was open and the seal was broken and half of it gone. Mr. Cartwright was unsteady on his feet. I advised him that he was charged with operating a motor vehicle on the public highways while under the influence of some intoxicating beverage and also illegal possession of whiskey. I saw him operating on the public highways in that condition approximately three-quarters of a mile from the time I met and turned on him he was in my sight the whole time."

Officer Blalock further testified that based upon his observation and examination of the defendant he had an opinion satisfactory to himself as to the condition of the defendant, and in his opinion, "[h]e was intoxicated." This was sufficient evidence to carry the case to the jury.

In the case of *Atkins v. Moye,* 277 N.C. 179, 176 S.E. 2d 789 (1970), omitting citations, it is stated:

> "An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. However, an odor, *standing alone,* is no evidence that he is under the influence of an intoxicant, and the *mere* fact that one has had a drink will not support such a finding. Notwithstanding, the '[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138.' "

Likewise, see the case of *State v. Rennick,* 8 N.C. App. 270, 174 S.E. 2d 122 (1970), where evidence similar to that in this case was held sufficient to carry the case to the jury over the defendant's motion for judgment as of nonsuit.

It is interesting to note that Deputy Sheriff Allen, who was with Patrolman Blalock on the occasion, testified that he also had an opinion satisfactory to himself as to the condition of the defendant based upon his observation of the defendant. Although this was developed in the testimony, for some un-

known reason the record does not disclose that the Solicitor for the State ever asked what the opinion was.

In the trial of the Superior Court we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

L. E. JOHNSON v. JAMES MASSENGILL

No. 7111SC364

(Filed 14 July 1971)

Contracts §§ 26, 28— breach of contract — character evidence — issues

In this action for breach of contract, the trial court did not commit prejudicial error in admitting evidence of defendant's character and reputation which was based on specific acts of conduct, and did not err in failing to submit an issue as to whether plaintiff and defendant entered into a contract as alleged in the complaint.

Chief Judge MALLARD and Judge CAMPBELL concur in the result.

APPEAL by defendant from *Hall, Judge,* 15 January 1971 Session of Superior Court held in JOHNSTON County.

This is a civil action to recover damages for breach of contract. The plaintiff, L. E. Johnson, alleged and offered evidence tending to show that he entered into an oral contract to purchase, at $4.00 per bushel, 15,000 bushels of sweet potatoes from the defendant, James Massengill. According to plaintiff's evidence, the potatoes which he contracted to purchase had been stored by the defendant in the plaintiff's warehouse, and after the plaintiff had paid the defendant $60,000 for 15,000 bushels of potatoes in accordance with the contract, he discovered that the defendant had delivered only 12,233 bushels of potatoes in that some of the containers were not full of potatoes but contained Pepsi-Cola bottles, while other containers were virtually empty.

The defendant admitted that he contracted to sell the plaintiff 15,000 bushels of sweet potatoes at $4.00 per bushel, and that plaintiff paid him $60,000. The defendant denied that

he breached the contract. The jury, for its verdict, found that the defendant breached the contract and awarded the plaintiff $8,644 in damages. From a judgment entered on the verdict, the defendant appealed.

N. Leo Daughtry and J. R. Barefoot for plaintiff appellee.

Grady & Shaw by Philip C. Shaw; and George B. Mast for defendant appellant.

HEDRICK, Judge.

The defendant, by his first assignment of error, contends that the court committed prejudicial error in admitting evidence of the defendant's general character and reputation which was based on specific acts of conduct. As a general rule, character and reputation cannot be proved by specific acts of conduct. Stansbury, N. C. Evidence, § 111 (2nd ed. 1963). However, all erroneous rulings of the trial court with respect to the admissibility of evidence will not result in a new trial. The burden is upon the appellant to show not only error but that such error was prejudicial to him, or that such error probably influenced the jury. *Board of Education v. Lamm,* 276 N.C. 487, 173 S.E. 2d 281 (1970). This assignment of error relates to two witnesses, husband and wife, being permitted to testify for the plaintiff that the defendant's reputation was "bad with us." The husband was also permitted, over objection of the defendant, to describe a specific business transaction he had with the defendant. There was considerable evidence upon the part of the defendant as to his good character. Although it may have been technical error for the court to allow the witness to describe a personal business transaction with the defendant, upon which the witness might have based his opinion that the defendant has a bad reputation, the defendant has failed to show that he was prejudiced by such testimony in the eyes of the jury.

Next, the defendant contends that the court committed prejudicial error by not submitting an issue to the jury as to whether the plaintiff and defendant entered into a contract as alleged in the complaint.

Paragraph 2 of the complaint is as follows:

"2. That on or about the 9th day of January 1969, the plaintiff entered into a contract with the defendant wherein

and whereby the plaintiff agreed to purchase 15,000 bushels of potatoes at $4.00 a bushel or a total of $60,000.00; and the defendant agreed to sell to the plaintiff 15,000 bushels of potatoes at $4.00 a bushel."

Defendant's answer states: "Paragraph Two is not denied." "Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading." G.S. 1A-1, Rule 8(d). All of the evidence offered at the trial tended to show that the plaintiff and the defendant entered into the contract described in Paragraph 2 of the complaint. In *Fairmont School v. Bevis,* 210 N.C. 50, 185 S.E. 463 (1936), Connor, J., quoting with approval from *Dickens v. Perkins,* 134 N.C. 220, 46 S.E. 490 (1904), stated: "An issue of fact . . . arises upon the pleadings when a material fact is alleged or maintained by one party and controverted by the other." Except for the amount of damages, the only issue raised by the pleadings was whether the defendant breached the contract. This assignment of error is overruled.

We have considered all of defendant's assignments of error and find and hold that he had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur in the result.

ERNEST P. BRADLEY v. EVELYN P. BRADLEY

No. 7126DC389

(Filed 14 July 1971)

Courts § 14; Divorce and Alimony § 19— motion for change of foreign alimony judgment — jurisdiction of district court

A district court judge in Mecklenburg County did not have jurisdiction to entertain plaintiff's motion for a reduction of alimony payments to defendant ordered by a Georgia court upon divorce of the parties in that state.

Bradley v. Bradley

APPEAL by defendant from *Arbuckle, District Judge,* 4 February 1971 Session, District Court Division, General Court of Justice, MECKLENBURG County.

This is a most unusual proceeding. It was stipulated by both parties, "This action was commenced by the filing of a Motion with the Clerk of Superior Court of Mecklenburg County, North Carolina, on July 27, 1970 and the issuance of an Order pursuant thereto, requiring the defendant to appear on August 6, 1970, and show cause why payment by the plaintiff to defendant for alimony should not be reduced. The Order and Motion were duly and properly served and it will not be necessary to include in the Case on Appeal the Return of Service."

It appears from the record filed with this case that on 9 April 1969 in a divorce action pending in the Superior Court of DeKalb County, State of Georgia, the Superior Court Judge in that county entered a judgment requiring the plaintiff to pay to the defendant permanent alimony in the sum of $250.00 per month, commencing 1 April 1969, until such time as the defendant-wife should remarry or die. The motion referred to in this stipulation as to how this action was commenced in North Carolina was apparently a motion for a change in the judgment entered in the Georgia case. Under date of 4 February 1971, Judge Arbuckle entered the following order:

> " IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that paragraph 5 of the Order of the Superior Court Judge of DeKalb County, Georgia, dated April 9, 1969, be and is hereby modified as follows:
>
> 'The plaintiff is to pay to the defendant as permanent alimony the sum of $250.00 per month, until such time as she dies or remarries; provided, however, that the payments are reduced to an amount of $50.00 per month for and during the period that the defendant remains gainfully employed; under proper showing that the defendant has been continuously unemployed for a period of 90 days, said payments shall revert to the sum of $250.00 per month until such time as the defendant again obtains employment, dies or remarries.' "

From the entry of this order and the denial of a motion entered (prior to the introduction of any evidence) by the defendant that this cause be dismissed for that "this Court does

not now have jurisdiction over the parties and the subject matter of this action," the defendant appealed to this Court.

Haynes and Baucom by W. J. Chandler, Jr., for plaintiff appellee.

Peter H. Gerns for defendant appellant.

CAMPBELL, Judge.

It is not infrequent to hear the most populous county in the State of North Carolina—Mecklenburg County—referred to as "The Great State of Mecklenburg." This great county is not only famous as the most populous county in the State but also as the county where on May 20, 1775, independence from England was declared in the famous Mecklenburg Declaration of Independence—documented on the North Carolina State flag. Despite such fame, the District Court Judges of that county have not acquired jurisdiction to entertain motions filed in causes pending in the Superior Court of DeKalb County, State of Georgia. The State of Georgia is not even contiguous to Mecklenburg County. It is elementary that no court can make orders affecting its citizens until and unless proper jurisdiction has been obtained.

Rule 2 of the Rules of Civil Procedure 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 2.

Rule 3 as contained in G.S. 1A-1 provides how a civil action is commenced. There is no provision for any such procedure as was attempted in this case. For the lack of any jurisdiction, the purported order of Judge Arbuckle entered 4 February 1971 is reversed, and this cause is remanded to the District Court of Mecklenburg County for the entry of an order dismissing the motion filed 27 July 1970, by Ernest Phillip Bradley.

Reversed and remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT CARROLL CASE

No. 7128SC451

(Filed 14 July 1971)

Criminal Law § 134— failure of court to sign judgment or minutes

In noncapital criminal cases, failure of the trial judge to sign the minutes of the court or the judgment does not affect the validity of the judgment; this rule is not changed merely because the judgment sentencing defendant and suspending the sentence referred to the probationary judgment "to be signed by the Court."

APPEAL by defendant from *Ervin, Judge,* 29 March 1971 Session of Superior Court held in BUNCOMBE County.

At the January 1969 Session of Superior Court held in Buncombe County defendant, represented by counsel, pleaded guilty to five charges of felonious breaking and entering. Presiding Judge P. C. Froneberger, after interrogating defendant and determining that the pleas had been voluntarily entered, consolidated the five cases for purpose of judgment and sentenced defendant to prison for not less than three nor more than five years. With consent of defendant and his attorney given in open court, the sentence was suspended and defendant was placed on probation for a period of five years upon conditions set forth in a written judgment dated 29 January 1969. The judgment imposing the sentence and suspending the same and the probationary judgment were not signed by Judge Froneberger at that time.

On 19 January 1971, upon report of the probation officer that the defendant had willfully violated the conditions of his probation in certain respects, Judge Sam J. Ervin III, presiding at the January 1971 Session of Superior Court held in Buncombe County, ordered defendant taken into custody for a hearing as to whether he had violated the terms and conditions of the probation judgment. As required by G.S. 15-200.1 the probation officer informed defendant in writing of his intention to pray the court to revoke probation and put the suspended sentence into effect and set forth in writing the grounds upon which revocation was prayed. After hearing, at which defendant was again represented by counsel, Judge Ervin signed an order, dated 15 March 1971, finding as a fact that defendant had willfully violated the terms and conditions of his probation judg-

ment in certain specified respects. At the time this order was entered, it was called to the court's attention that Judge Froneberger had not signed the original judgment sentencing defendant to prison or the probationary judgment dated 29 January 1969. Subsequently, Judge Froneberger signed these judgments *nunc pro tunc.* Judge Ervin then signed an order, dated 31 March 1971, adjudging that defendant had breached a valid condition upon which execution of his sentence had been suspended, and ordered the suspension revoked and defendant imprisoned to serve the sentence which had been imposed upon him in January 1969. From this judgment, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General R. S. Weathers for the State.

Melvin K. Elias for defendant appellant.

PARKER, Judge.

Appellant's sole contention on this appeal is that the judgment entered 29 January 1969 sentencing him to prison is invalid because it was not signed by the trial judge during the session of court at which it was entered. There is no merit in this contention. In criminal cases in the courts of this State, other than capital cases, the failure of the trial judge to sign the minutes of the court or the judgment does not affect the validity of the judgment. *State v. Dawkins,* 262 N.C. 298, 136 S.E. 2d 632; *State v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507. This rule was not changed in the present case merely because the judgment sentencing defendant and suspending the sentence referred to the probationary judgment "to be signed by the Court." The judgment appealed from is accordingly

Affirmed.

Judges BRITT and MORRIS concur.

State v. West

STATE OF NORTH CAROLINA v. GEORGE GRAHAM WEST

No. 716SC475

(Filed 14 July 1971)

Criminal Law § 76— in-custody inculpatory statements — admissibility

The admission of defendant's inculpatory in-custody statements was proper, where the trial court made findings of fact, supported by competent evidence, that the statements were freely, voluntarily, and knowingly made.

ON Writ of *Certiorari* to review a judgment of *McKinnon, J.*, 12 October 1970 Session of Superior Court held in HERTFORD County.

Defendant was charged with burglary and felonious larceny. Upon the call of the case the solicitor announced that the State would not seek a verdict of first degree burglary, but would seek a verdict of guilty of felonious breaking and entering and felonious larceny. The defendant, represented by court-appointed counsel, pleaded not guilty. The State's evidence, in part, tended to show the following. On the morning of 11 July 1970 at some time prior to 6:15 a.m. the defendant unlawfully entered a dwelling in Ahoskie occupied by Mr. and Mrs. Louis Evans. He took a cup containing pennies and a pocketbook containing $104.00 which he found in the house. From the Evans residence he proceeded across the road to the rear of a service station where he went through the pocketbook and took what cash he could find, leaving the pocketbook, cup and other articles there where they were later found by the officers. Defendant then went across a cornfield to another service station on U. S. Highway No. 13. About daybreak he was observed by a deputy sheriff. Defendant was muddy and wet from the waist down. Other officers were called and the defendant was taken to the Ahoskie Police Station where he was questioned. He gave a statement substantially in accord with the foregoing. The jury returned for its verdict "that the defendant is guilty of felonious breaking and entering and guilty of felonious larceny." A sentence of not less than five (5) nor more than ten (10) years was imposed. Defendant appealed.

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

Jones, Jones and Jones by Carter W. Jones and L. Bennett Gram, Jr. for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in admitting inculpatory statements purportedly made by him while he was in custody. After defendant objected to testimony relating to the statements made by him, a *voir dire* hearing was held and both the defendant and the State offered evidence. Although the evidence was conflicting, there is an abundance of evidence tending to show that defendant's alleged statements to the investigating officers were freely, voluntarily and knowingly made. The court made findings of fact, based on such evidence, which support its conclusions as to the admissibility of defendant's statements. *State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820. The defendant's several assignments of error which stem from the admission of defendant's statements into evidence are overruled.

We have carefully considered the other assignments of error dutifully brought forward by defendant's court-appointed counsel and the same are overruled.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. THOMAS GARLAND HART

No. 7112SC440

(Filed 14 July 1971)

Narcotics § 4— possession of marijuana — issue of defendant's guilt — sufficiency of evidence

Issues of defendant's guilt of possessing more than one gram of marijuana and of possessing and transporting marijuana by means of a vehicle were properly submitted to the jury.

ON *certiorari* to review the order of *McKinnon, Judge,* 2 November 1971 Session of CUMBERLAND Superior Court.

Defendant was tried on two bills of indictment. One was for possession of more than one gram of marijuana; the other for possession and transportation of marijuana upon and by means of a vehicle. Defendant acting as his own counsel pleaded

not guilty to both offenses. The jury found him to be guilty of both offenses, and he appealed from judgment entered on the verdict.

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

Mitchel E. Gadsden for the defendant appellant.

MORRIS, Judge.

By his first two assignments of error, defendant contends that the court should have granted his motion for judgment as of nonsuit.

The evidence for the State tended to show that several police officers, pursuant to the serving of a valid search warrant on defendant, found a quantity—9 grams—of marijuana, which was wrapped in several separate plastic bags, inside a bag of dog food. The bag of dog food was located in the kitchen of the house of the defendant. Defendant admitted to the police that this was his residence. The evidence also tended to show that a marijuana seed was found in the trunk of defendant's car pursuant to a search of the car with the express permission of the defendant, and that later, upon vacuuming the same trunk after the car had been impounded, a quantity of marijuana particles was recovered.

The evidence for the defendant tended to show that there were several men present in the kitchen of his home when the police made the search which resulted in the finding of the small plastic containers of marijuana in the dog food bag, that defendant knew nothing about the presence of the drug, and that one of those present could have placed the drug in the bag where it was found. Defendant also contended that he had not driven his car on the day the search was made and that he had lent his car to someone else the previous day and that he knew nothing about any marijuana being present in his car at any time.

> "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. (cites omitted.)" *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). *State v. Kirby,* 4 N.C. App. 380, 166 S.E. 2d 833 (1969).

"All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion." *State v. Cutler, supra.*

"When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661. (1965). See also *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Paschal,* 6 N.C. App. 334, 170 S.E. 2d 95 (1969).

"If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that (1) the offense charged has been committed and (2) the defendant committed it, it is a case for the jury." *State v. Cook, supra. State v. Jerman,* 9 N.C. App. 697, 177 S.E. 2d 327 (1970).

It is obvious that, considered in the light most favorable to the State, the evidence in this case was sufficient for the question of the innocence or guilt of this defendant to be submitted to the jury. The first two assignments of error are without merit and are overruled.

Defendant's remaining assignment of error is to the failure of the court to advise defendant of his constitutional rights to be represented by counsel at his trial. An addendum to the record on appeal, ordered by this court in conference on 9 June 1971, conclusively shows that the defendant was fully advised of his right to be represented by counsel at his trial and that defendant knowingly and expressly waived this right in writing. The certificate of the court, also a part of the addendum to the record, unequivocally states that the waiver signed by

defendant was executed in the presence of the court after its meaning and effect had been fully explained to him.

In the trial of this case, we find

No error.

Judges BROCK and HEDRICK concur.

MICAH SCOTT EVANS, A MINOR BY HIS GUARDIAN AD LITEM, JOYCE B. LAWS v. IVA MAE EVANS; KERMIT GENE BISSETTE; CARRIE RAMSEY LARGENT; C. W. LARGENT; CHARLES SHOEMAKER; AND UDICO ELECTRIC COMPANY, INC.

No. 7127SC471

(Filed 14 July 1971)

1. **Parent and Child § 2— liability of mother for injury to child — doctrine of parental immunity**

An unemancipated minor child is precluded by the doctrine of parental immunity from maintaining an action against his mother for injuries resulting from the mother's negligence.

2. **Parent and Child § 2; Constitutional Law §§ 20, 23— parental immunity — unemancipated child — due process — equal protection**

The doctrine of parental immunity does not deny an unemancipated child the rights of due process and of the equal protection of the laws.

APPEAL by plaintiff from *Anglin, Judge,* 17 May 1971 Civil Session of Superior Court held in GASTON County.

On 27 September 1969 the minor plaintiff, Micah Scott Evans, was injured when the automobile in which he was riding as a passenger and which was being driven by his mother, Iva Mae Evans, was involved in a multiple vehicle collision on Interstate Highway 85 in Gaston County, N. C. This action to recover damages for plaintiff's injuries was brought against his mother and against the owners and operators of other vehicles involved. Plaintiff alleged his injuries were caused by the joint and concurring negligence of the defendant drivers. Plaintiff's mother answered, denied that she was negligent, and pleaded parental immunity. She also moved for summary judgment to dismiss the action against her. The parties stipulated that at the time

of the collision plaintiff was six years old and was residing in the home of his mother as an unemancipated minor and was a dependent child of his mother. Upon this stipulation the trial court granted the mother's motion, adjudged that plaintiff is not entitled to maintain a tort action against his mother, and entered summary judgment dismissing his claim against her. From this judgment, plaintiff appealed.

Basil L. Whitener and Anne M. Lamm for plaintiff appellant.

Jeffrey M. Guller and James R. Carpenter for defendant appellee, Iva Mae Evans.

PARKER, Judge.

[1] Ever since the decision in *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12, decided in 1923, it has been the rule in this jurisdiction that an unemancipated child, who is a member of his parents' household, may not maintain an action based on ordinary negligence against his parents or either of them. *Watson v. Nichols,* 270 N.C. 733, 155 S.E. 2d 154; *Warren v. Long,* 264 N.C. 137, 141 S.E. 2d 9; *Redding v. Redding,* 235 N.C. 638, 70 S.E. 2d 676. The purpose of the rule is said to be to implement a public policy protecting family unity, domestic serenity, and parental discipline. Upon the same theory it has been held that a parent cannot sue his unemancipated child for a personal tort. *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753.

Appellant recognizes the rule announced in these cases, but vigorously urges that the time has come for this State to join those jurisdictions which in recent years have reexamined and abolished these family immunities, citing such cases as *Streenz v. Streenz,* 106 Ariz. 86, 471 P. 2d 282; *Gibson v. Gibson,* 92 Cal. Rptr. 288, 479 P. 2d 648; *Schenk v. Schenk,* 100 Ill. App. 2d 199, 241 N.E. 2d 12; *Gelbman v. Gelbman,* 23 N.Y. 2d 434, 297 N.Y.S. 2d 529, 245 N.E. 2d 192; and *Goller v. White,* 20 Wis. 2d 402, 122 N.W. 2d 193. If so, the task is for our Legislature or for our Supreme Court. This Court, as was the trial court, is bound by the rule heretofore announced and consistently followed by our Supreme Court in the cases first cited above.

[2] Appellant also contends that the doctrine of parental immunity results in an unconstitutional denial to unemancipated children of due process and equal protection of the laws. We do not agree. The familial relationship has long been recognized as an appropriate and reasonable basis for imposing special rights, obligations and immunities.

The summary judgment dismissing plaintiff's claim against his mother, being in accord with the controlling decisions of our Supreme Court, is

Affirmed.

Judges BRITT and MORRIS concur.

NORTH CAROLINA NATIONAL BANK, EXECUTOR, U/W JOHN T. MATTHEWS, DECEASED v. O. B. CARPENTER, W. F. THOMASON, CLARADELL H. MATTHEWS, GAYLE MATTHEWS MANUS AND JUDY MATTHEWS

No. 7126SC365

(Filed 14 July 1971)

Wills §§ 57, 58— bequest of common stock — exclusion of accretions subsequent to the making of the bequest

A specific bequest of common stock to testator's employee "if he is still employed by said company at the time of my death" takes effect as if the bequest were made immediately before the testator's death, and consequently the bequest does not include accretions resulting from a stock split occurring subsequent to the execution of the will and prior to testator's death. G.S. 31-41.

APPEAL by defendants, O. B. Carpenter and W. F. Thomason, from *Thornburg, Judge*, 22 February 1971 Session of Superior Court held in MECKLENBURG County.

This is an action instituted pursuant to the Declaratory Judgment Act seeking a construction of the Last Will and Testament of John T. Matthews, deceased. The will in question, executed on 2 August 1965, contains the following questioned provisions:

"ITEM IV.

"I give and bequeath to O. B. Carpenter ten (10) shares of my stock in Wil-Mat Corporation if he is still employed by said Company at the time of my death.

"ITEM V.

"I give and bequeath to W. F. Thomason ten (10) shares of my stock in Wil-Mat Corporation if he is still employed by said Company at the time of my death."

When the will was executed the stock in question had a par value of $100 per share. On 5 October 1966, a recapitalization of the Wil-Mat Corporation was had, resulting in a stock split and stock dividend being declared. The net effect of this recapitalization was to reduce the par value of each share of Wil-Mat stock from $100.00 to $1.00. This reduced par value of $1.00 per share remained unchanged at the testator's death on 16 August 1968.

Judge Thornburg made findings of fact and concluded as a matter of law that the defendants, O. B. Carpenter and W. F. Thomason, were entitled to ten shares each of Wil-Mat Corporation stock, as those shares existed at the date of testator's death. Appeal by defendants O. B. Carpenter and W. F. Thomason.

Blakeney, Alexander & Machen by Brown Hill Boswell for North Carolina National Bank, Executor, plaintiff appellee.

R. C. Carmichael, Jr., for Claradell H. Matthews, defendant appellee.

Wardlow, Knox, Caudle & Wade by Lloyd C. Caudle and C. Ralph Kinsey, Jr., for O. B. Carpenter and W. F. Thomason, defendant appellants.

HEDRICK, Judge.

Appellants' contention that a specific bequest of shares of common stock carry with it accretions to said shares resulting from a stock split and a stock dividend occurring subsequent to the execution of testator's will and prior to his death is untenable. G.S. 31-41 provides:

"Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

See also *Wachovia Bank & Trust Co. v. McKee,* 260 N.C. 416, 132 S.E. 2d 762 (1963).

Justice Ervin, speaking for the Court in *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205 (1950), said: "Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for in such event, the words of the testator must be taken to mean exactly what they say." In the instant case, the language in the will of John T. Matthews is plain. Its import is obvious. The will speaks as of 16 August 1968, the date of the testator's death, to bequeath ten shares each to O. B. Carpenter and W. F. Thomason of his stock in Wil-Mat Corporation. The judgment appealed from is affirmed.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. DONALD RAY LAWING

No. 7126SC399

(Filed 14 July 1971)

Criminal Law § 144— correction of sentence

Where the record shows a discrepancy between the pronouncement in open court that defendant be imprisoned for six years and the written judgment that defendant be imprisoned for eight years, the cause is remanded to the trial court for imposition of the six-year sentence.

APPEAL by defendant from *McLean, Judge,* 4 January 1971 Session of Superior Court held in MECKLENBURG County.

Defendant, Donald Ray Lawing, was tried upon a valid bill of indictment charging him with the felony of uttering a forged check.

Clarence Hartsell testified for the State that the building occupied by Hartsell Brothers Fence Company, Inc., was entered on 20 November 1969, and a checkbook was taken from the premises. The name and address of the firm was imprinted on approximately 300 checks that were taken. Clinton R. Hartsell, president of the company, and Clarence Hartsell, vice president, were the only persons authorized to sign the company checks.

State's Exhibit 1 was introduced into evidence. It was identified as one of the checks taken and was payable to Donald Ray Lawing in the amount of $48.15. The check was signed by "Clarence Hartsell" and "Clinton C. Hartsell," but Clarence Hartsell testified that he did not sign it, that he did not know a "Clinton C. Hartsell," and that neither he nor anyone else in the firm authorized anyone to sign State's Exhibit 1.

James W. Wayne testified for the State that he worked at Benson's Rexall Drugs. On 21 November 1969 the defendant approached him and asked him to cash the check, State's Exhibit 1. Wayne approved the cashing of the check and saw defendant endorse it. The check was cashed. On cross-examination, Wayne testified:

> " * * * It is a possibility that the defendant could have come in my store on some other day to cash the check. I am not positive November 21, 1969 was the exact date. I have never cashed any other Hartsell brothers checks."

Defendant offered evidence which tended to establish an alibi.

The jury returned a verdict of guilty as charged, and the judgment pronounced in open court was that the defendant be confined to the common jail in Mecklenburg County for a period of six years. However, the judgment signed by the judge read:

> "It is ADJUDGED that the defendant be imprisoned for the term of Eight (8) years in the common jail of Mecklenburg County * * * ."

From this judgment, the defendant appealed.

Attorney General Morgan and Associate Attorney Ricks for the State.

William D. McNaull, Jr., for defendant appellant.

MALLARD, Chief Judge.

Defendant assigns error to much of the evidence introduced by the State at the trial. We have examined the evidence, and defendant's assignments of error thereto are overruled.

Defendant's motion in arrest of judgment filed herein is denied. The bill of indictment in this case is sufficient and is distinguishable from the bill of indictment in the case of *State v. Able,* 11 N.C. App. 141, 180 S.E. 2d 333 (1971).

Defendant assigns as error the discrepancy between the pronouncement in open court that defendant be imprisoned for six years and the written judgment signed by the judge which indicated that he be imprisoned for eight years. We are unable to tell from the ambiguous state of the record the true character of the sentence. It is apparent that the written judgment contains a clerical error. For this error, the cause is remanded to the trial court to have the commitment corrected to conform to the sentence of six years as the record shows was actually pronounced in open court. *State v. Brown,* 7 N.C. App. 372, 172 S.E. 2d 99 (1970).

Remanded with instructions.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. NEIL McLAURIN

No. 7112SC360

(Filed 14 July 1971)

Assault and Battery § 5— deadly weapon — board — instructions

An instruction that the board used by defendant to assault his wife could be found to be a deadly weapon *per se* was not error. G.S. 14-32(b).

APPEAL by defendant from *Bailey, J.,* 18 January 1971 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was tried upon a bill of indictment charging him with assault with a deadly weapon with intent to kill inflicting serious injuries. The State's evidence, in pertinent part, may

be summarized as follows. The defendant and his wife were separated. At defendant's request the wife met him at a bus stop to discuss a reconciliation. Shortly after they met defendant pulled a knife and placed it at his wife's chest. Defendant told his wife that if she hollered he would kill her. He then led her into a wooded area and beat her with his fists. He choked her. She felt the knife go to her throat and grabbed it with her hand, bending the blade of the knife. One or more leaders in her hand were severed. He then picked up a board and struck her in the back of her head, knocking her unconscious for a short while. The wife was hospitalized for eight days. Forty stitches were used to close the wound where she was struck with the board. Three operations have been performed on her hand. Others will be required. The jury returned a verdict of guilty of assault with a deadly weapon *per se* inflicting serious injuries. From judgment imposing an active prison sentence, defendant appealed.

Attorney General Robert Morgan by Staff Attorney Richard N. League for the State.

Twelfth District Public Defender Sol G. Cherry for defendant appellant.

VAUGHN, Judge.

The board and knife with which defendant allegedly assaulted his wife were introduced into evidence. Defendant's sole assignment of error is that the judge instructed the jury that the board could be found to be a deadly weapon *per se.* The knife and board were not brought forward as exhibits on this appeal. It may have been that the judge could have instructed the jury as a matter of law that the weapons were inherently deadly or deadly *per se. State v. Parker,* 7 N.C. App. 191, 171 S.E. 2d 665; *State v. West,* 51 N.C. 505. The court did not, however, so instruct the jury but required the State to prove this beyond a reasonable doubt. The jury was instructed that before it could return a verdict of guilty it must find that the knife was of sufficient sharpness and size to penetrate a vital part of the body organs or that the defendant used a board of sufficient strength and size to inflict a fatal injury. It would seem that any effect of this precaution by the trial judge would be to the advantage of the defendant and not to his prejudice. *State v. Cox,* 11 N.C. App. 377, 181 S.E. 2d 205.

Admittedly, considerable confusion has resulted from the rewrite of G.S. 14-32 by Chapter 602 of the Session Laws of 1969, particularly from the inclusion of the words *"per se"* following "deadly weapon" in Subsection (b). The words *"per se"* did not appear in House Bill 681 (later enacted as Chapter 602) as introduced or originally passed by the House of Representatives. This inclusion is said to have resulted from a typographical error. See The Twelfth Report of the Judicial Council of the State of North Carolina, Part III., p. 3, 1971. The words *"per se"* following "deadly weapon" in Subsection (b) first appear in an amendment adopted by the Senate on 19 May 1969. The House concurred in the Senate amendment and, as amended, the bill was ratified on 27 May 1969. The 1971 General Assembly has also amended G.S. 14-32. Subsection (b) as rewritten by Chapter 765 of the Session Laws of 1971 now reads as follows:

> "Any person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than five (5) years, or both such fine and imprisonment."

This act was ratified on 6 July 1971 and is effective as of 1 October 1971. As so rewritten the section becomes more meaningful.

Defendant's assignment of error is overruled.

No error.

Chief Judge MALLARD and Judge PARKER concur.

RUBY C. SMITH v. CHARLOTTE CITY COACH LINES, INC.

No. 7126SC443

(Filed 14 July 1971)

Carriers § 19— contributory negligence of passenger in alighting from bus

Plaintiff bus passenger was contributorily negligent as a matter of law in stepping from defendant's bus into a muddy, rain-filled area, where she fell and was injured, when she had observed and knew of the hazardous condition of such area before she alighted from the bus.

Chief Judge MALLARD concurring in the result.

Judge CAMPBELL concurs in concurring opinion.

Smith v. Coach Lines

APPEAL by plaintiff from *Fountain, Judge,* 15 February 1971 Session of Superior Court held in MECKLENBURG County.

This is a civil action instituted by plaintiff, Ruby C. Smith, to recover damages for personal injuries allegedly sustained as a result of a fall which occurred as the plaintiff stepped from the defendant's bus near the intersection of Norris Avenue and Poinsetta Avenue in the City of Charlotte, N. C., on 2 February 1968. The plaintiff offered evidence tending to show that on 2 February 1968 at approximately 4:30 p.m. while riding in defendant's bus in a northerly direction on Norris Avenue, she pulled the cord to inform the driver that she wanted to get off the bus. The driver stopped the bus near the intersection of Norris Avenue and Poinsetta Avenue. It was raining and as the plaintiff exited the bus, she saw that the area where she was stepping was a muddy, rain-filled driveway. As the plaintiff stepped to the ground she fell, resulting in personal injuries. The plaintiff alleges that the injuries suffered were the proximate result of the defendant's negligence.

At the close of the plaintiff's evidence, the defendant moved for a directed verdict. The motion was allowed and from the entry of judgment dismissing the action, plaintiff appealed.

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

Mraz, Aycock & Casstevens by John A. Mraz for defendant appellee.

HEDRICK, Judge.

The appellant's sole contention on this appeal is that the trial judge erred in granting the defendant's motion for a directed verdict. In a negligence action where the evidence of plaintiff discloses contributory negligence so clearly that no other conclusion can be drawn therefrom, a directed verdict in favor of the defendant is proper. *R. R. Co. v. Hutton & Bourbonnais Co.,* 10 N.C. App. 1, 177 S.E. 2d 901 (1970).

In the instant case the plaintiff testified on direct examination as follows:

"Q When you were going down the two bus steps, were you looking where you were going?

A Well, I just was looking, but it was just a bad place and a muddy place there, and I just got on off."

On cross-examination the plaintiff testified:

"Q Did you see this place before you got off the bus?

A Yes, I could see it was a bad place all along. I mean I could see it was a mud place and all."

Thus, the conclusion is inescapable that the plaintiff saw the condition of the ground where the bus had stopped; nevertheless, she proceeded to step off the bus onto the "wet gully muddy place." Clearly, the act of the plaintiff in stepping from the bus onto what she now contends was a dangerous spot was a proximate cause of the fall and any injuries the plaintiff might have sustained. We hold that the evidence establishes plaintiff's contributory negligence as a matter of law, and the judgment dismissing the action is affirmed.

Affirmed.

Chief Judge MALLARD, concurring in the result.

When a motion for a directed verdict is allowed under Rule 50, the action is not "dismissed" (see Rule 41), but a verdict is "directed," and a judgment on the merits should be entered in accordance therewith.

Judge CAMPBELL concurs in concurring opinion of MALLARD, Chief Judge.

SUFFOLK LUMBER COMPANY, INC. v. SALLY MAE EURE WHITE

No. 711DC434

(Filed 14 July 1971)

Laborers' and Materialmen's Liens § 3; Quasi Contracts § 1— materialman's action against owner — insufficiency of complaint

Materialman's complaint failed to state a claim for relief under G.S. Ch. 44A, Art. 2, against the owner of a home for materials furnished in construction of the home where it alleged that the materials were furnished pursuant to an express contract between the materialman and a general contractor.

APPEAL by plaintiff from *Walker, District Judge,* 8 March 1971 Session of District Court held in GATES County.

The pertinent portions of plaintiff's complaint are as follows:

"3. That in late 1969 or early 1970, the defendant entered into an implied, entire, and indivisible contract *with the plaintiff, through her general contractor A. L. Everett, Harrellsville, N. C.,* whereby the plaintiff was to furnish to the defendant certain building materials to be used by said A. L. Everett in the construction of a dwelling house upon certain land belonging to the defendant and hereinafter described; that in accordance with said implied contract plaintiff furnished to the defendant certain building materials for which the defendant agreed to pay the sum of FOUR THOUSAND FOUR HUNDRED NINETEEN AND 68/100 ($4,419.68) DOLLARS as per itemized statement attached hereto and marked "Exhibit A," that said materials were furnished to the defendant between April 28, 1970 and July 6, 1970. [Emphasis ours.]

"4. That said materials were furnished for and used in the construction of a dwelling house upon a certain parcel of land in . . . [followed by description] . . . . "

"5. That the defendant has failed, neglected and refused to pay for said materials that pursuant to General Statutes, Section 44A-7 *et seq.,* the plaintiff filed notice of him [*sic*] in the office of the Clerk of Superior Court of Gates County on September 1, 1970, said notice of him [*sic*] being recorded in Lien Docket 1, page 150; that a copy of said notice of lien is attached hereto as 'Exhibit B' . . . .

"6. That there is now due the plaintiff by the defendant the sum of FOUR THOUSAND FOUR HUNDRED NINETEEN AND 68/100 ($4,419.68) DOLLARS, with interest thereon from July 7, 1970, until paid, and for the costs of this action."

The "notice of lien" incorporated in paragraph 5 of the complaint contains, among other things, the following:

"4. The name and address of the person *with whom the claimant contracted* [Emphasis ours.] for the furnishing of materials is:

A. L. Everett
General Contractor
Harrellsville, N. C."

Defendant's motion to dismiss for failure to state a claim upon which relief could be granted was allowed. Plaintiff appealed.

Revelle and Burleson by L. Frank Burleson, Jr., for plaintiff appellant.

No brief filed for defendant appellee.

VAUGHN, Judge.

Plaintiff concedes that it has stated no claim under Article 2 of Chapter 44 of the General Statutes entitled "Subcontractors, etc., Liens and Rights against Owners." It attempts to proceed under Article 2 of Chapter 44A which is entitled "Statutory Liens on Real Property. Liens of Mechanics, Laborers and Materialmen Dealing with Owner." Plaintiff affirmatively alleges, however, that the material which was used in construction of defendant's dwelling was furnished pursuant to an express contract between the plaintiff and A. L. Everett, General Contractor. It is well established where there is a contract between persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods. *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905. Plaintiff's argument that Chapter 44A provides an exception to this principle is without merit. In his complaint plaintiff has, therefore, failed to state a claim upon which relief could be granted and the same was properly dismissed.

Affirmed.

Judges BROCK and GRAHAM concur.

PEDRO N. OSORNIO v. BEATRICE S. OSORNIO

No. 7112DC442

(Filed 14 July 1971)

Divorce and Alimony § 16— alimony without divorce — sufficiency of evidence

In the wife's action for alimony without divorce, there was sufficient evidence for submission to the jury on the question of whether the wife was maliciously turned out of doors.

APPEAL from *Herring, Judge,* 1 March 1971 Session of District Court of CUMBERLAND County.

Plaintiff instituted an action for absolute divorce and for custody of one of the three children born of the marriage. The defendant filed answer seeking custody of all three children, child support, alimony without divorce, and alimony *pendente lite.* After hearing, the court sustained plaintiff's motion for a directed verdict as to the action for alimony without divorce and entered judgment awarding custody of one child to plaintiff and custody of the other two children to defendant with a provision for child support to defendant and the payment by plaintiff of counsel fees for defendant. The court sustained the motion for directed verdict on the ground that there was "insufficient evidence from which the jury might find that either the plaintiff or the defendant had the intent, as of the beginning of the alleged separation as set forth in the complaint, to remain permanently separate and apart."

Clark, Clark, Shaw and Clark, by John G. Shaw, for defendant appellant.

No counsel contra.

MORRIS, Judge.

Defendant's evidence tends to show that: She had gone to California on 13 January 1969 to take her nephew home. When she got there she found her mother was sick, and there was no one to care for her, so defendant remained in California. She returned to North Carolina in late March—about a week before her wedding anniversary which was on 31 March—to see her husband and so they could be together on their anniversary. She went back to California in June. Immediately before return-

ing to California, she was in Myrtle Beach, S. C., with her husband helping him in a restaurant business. They were staying in a man's apartment over the restaurant. She told her husband she wanted a separate room. He got angry and after they closed the restaurant, informed her that he had made reservations for her to go back to California. He did not ask whether she wanted to go. That night he took her from Myrtle Beach, S. C., to their home in Fayetteville, N. C., for the express purpose of allowing her to finish packing her bags to leave for California; he threatened her with bodily harm, to-wit, "to hit her," if she did not comply with his wishes; she was afraid not to do as she was told to do by the plaintiff. Plaintiff took her to the airport and bought her a one-way ticket to California and put her on the plane.

> "On appeal from the granting of a motion for directed verdict, 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, 399, 176 S.E. 2d 365 (1970).
>
> "Under the established rules all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts, and inconsistencies therein being resolved in plaintiff's favor. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969)." *Anderson v. Mann, supra.*

Applying these rules to the evidence here, we are of the opinion that there was sufficient evidence for submission to the jury on the question of whether defendant was in fact maliciously turned out of doors.

Error and remanded.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN PEURIFOY SPEIGHTS

No. 7110SC346

(Filed 14 July 1971)

1. **Constitutional Law § 32— consolidated trial of misdemeanors — failure to appoint counsel**

Defendant was not denied his constitutional right to counsel by failure of the trial court to appoint counsel to represent him in the consolidated trial of two misdemeanors where neither offense is a "serious misdemeanor," notwithstanding the maximum punishment for the two offenses could have been seven months.

2. **Criminal Law § 138— appeal from district court to superior court — increased sentence**

Upon appeal to the superior court from conviction in the district court, defendant's constitutional rights are not violated by the imposition of a greater sentence in the superior court than the sentence imposed in the district court.

APPEAL by defendant from *Brewer, J.*, 11 January 1971 Session of Superior Court held in WAKE County.

Defendant was charged with violating the provisions of G.S. 20-125 which require that every motor vehicle when operated upon a highway shall be equipped with a horn in good working order. In a separate warrant he was charged with resisting a public officer in attempting to discharge a duty of his office in violation of G.S. 14-223. Defendant was convicted on each charge in the district court and appealed to the superior court. The cases were consolidated for trial and the defendant, not represented by counsel, pleaded not guilty. The jury found him guilty on each count. An active sentence not less than four nor more than six months was imposed. The defendant gave notice of appeal. He was found to be indigent and counsel was appointed to prosecute the appeal.

Attorney General Robert Morgan by Assistant Attorney General Myron C. Banks and Staff Attorney Ronald M. Price for the State.

Manning, Fulton and Skinner by John B. McMillan for defendant appellant.

VAUGHN, Judge.

[1] At trial defendant was not represented by privately employed counsel. He did not waive any right he may have had to court-appointed counsel. In fact, his request for court-appointed counsel at a prior term of court had been denied without, as far as this record discloses, any determination as to his indigency. The punishment for a violation of G.S. 14-223 is a fine not to exceed $500.00, imprisonment for not more than six months, or both. Since the maximum punishment for the two offenses with which defendant was charged could have been seven months, defendant contends that he was denied his constitutional right to counsel. We do not agree. Neither offense with which defendant was tried constituted a "serious offense." *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245; *State v. Hickman,* 9 N.C. App. 592, 176 S.E. 2d 910. This remains to be so even though the cases were, quite properly we think, consolidated for trial.

[2] The defendant assigns as error that he received a more severe sentence in the superior court than had been imposed by the district court. For the reasons set forth in *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897, and *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765, this assignment of error is overruled.

We have carefully considered defendant's other assignments of error and find them to be without merit.

No error.

Chief Judge MALLARD and Judge PARKER concur.

IN THE MATTER OF: DAVID DUNSTON

No. 719DC367

(Filed 14 July 1971)

Appeal and Error § 30; Infants § 10— juvenile hearing — consideration of hearsay testimony

Hearsay testimony was competent and could be considered in a juvenile hearing where the respondent, who was represented by counsel, made no objection or motion to strike.

APPEAL by respondent from *Banzet, District Judge,* 19 November 1970 Session of District Court held in FRANKLIN County.

Appeal from an order committing respondent to the care of the State Board of Juvenile Corrections.

Respondent, a 15-year old juvenile, was adjudged a delinquent child within the meaning of G.S. 7A-278(2) upon a finding by the Juvenile Court that he committed a simple assault upon Steven Johnson, age 14, by kicking him in the neck.

Attorney General Morgan by Assistant Attorney General Weathers for the State.

Clayton & Ballance by Theaoseus T. Clayton for appellant.

GRAHAM, Judge.

Respondent contends that the court's findings were based upon hearsay evidence. It is true that some of the testimony offered was hearsay. However, respondent, who was represented by counsel at the hearing, made no objection or motion to strike. The testimony was therefore competent and could be considered. *Abbitt v. Bartlett,* 252 N.C. 40, 112 S.E. 2d 751; *State v. Davis,* 8 N.C. App. 589, 174 S.E. 2d 865.

Moreover, there was other competent evidence to support the court's findings. The victim of the assault testified that he was sitting on the commode in the boy's bathroom of Louisburg High School when respondent and some other students came in and turned off the lights. The lights remained off for a minute or more and during that time the witness was kicked in the neck. When the lights came back on respondent was seen walking toward the door. The witness testified, "I am able to say which one kicked me. David Dunston. He was the only one near enough to do it."

The findings and conclusions of the Juvenile Court are specific and are technically sound. We have reviewed the complete record and conclude that no prejudicial error appears therein.

Affirmed.

Judges CAMPBELL and BRITT concur.

HENRY FIELDS PHILLIPS, INCOMPETENT, BY HIS GUARDIAN, L. C. JOHNSON, PLAINTIFF v. WRENN BROTHERS, INC., ORIGINAL DEFENDANT AND THIRD PARTY PLAINTIFF, AND HENRY ALLEN PHILLIPS AND WIFE, LAURATTA MAE PHILLIPS, THIRD PARTY DEFENDANTS

No. 7115SC303

(Filed 14 July 1971)

Appeal and Error § 39— failure to docket record on appeal in apt time

Appeal is dismissed for failure to docket the record on appeal within 90 days from the date of the judgment appealed from, no order having been entered extending the time for docketing the record on appeal. Court of Appeals Rule No. 5.

APPEAL by original defendant from *Canaday, Judge,* at the November 1970 Session, CHATHAM Superior Court.

Plaintiff instituted this action to recover for his interest in certain timber allegedly cut by the original defendant from lands in which plaintiff owned an interest. Jury trial was waived and, following a trial, the court found facts, made conclusions of law and entered judgment in favor of plaintiff. The original defendant appealed from the judgment.

Hoyle & Hoyle by J. W. Hoyle for plaintiff appellee.

Dark & Edwards by L. T. Dark, Jr., for defendant appellant.

BRITT, Judge.

The judgment appealed from was entered on 31 August 1970. The record on appeal was docketed in this court on 15 March 1971. Rule 5 of the Rules of Practice in the Court of Appeals requires that the record on appeal, absent an order extending the time, be docketed within 90 days after the date of the judgment or order appealed from. The record before us contains no order extending time for docketing the record on appeal; therefore, for failure to docket the record within the time prescribed by the rules, this appeal is dismissed. *Williford v. Williford,* 10 N.C. App. 541, 179 S.E. 2d 118 (1971); *James v. Harris,* 9 N.C. App. 733, 177 S.E. 2d 306 (1970); *Public Service Company v. Lovin,* 9 N.C. App. 709, 177 S.E. 2d 448 (1970).

Nevertheless, we have carefully reviewed the record, with particular reference to the questions presented in appellant's

brief, and conclude that the result reached by the trial court was proper.

Appeal dismissed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS LOCKLEAR

No. 7116SC381

(Filed 14 July 1971)

Criminal Law § 155.1— dismissal of appeal — failure to docket case on appeal in apt time

Criminal appeal is subject to dismissal for failure of defendant to docket the case on appeal within the time prescribed by Rule 5 of the Court of Appeals Rules of Practice.

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

Defendant was charged in a proper warrant with unlawfully and wilfully operating a motor vehicle upon a public highway of the State of North Carolina on or about the 21st day of June 1970 after and while his operator's license had been permanently revoked. Defendant was convicted in district court and appealed to superior court. From a conviction in the superior court and a sentence of two years in the Robeson County jail, defendant appeals to this Court.

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

McLean, Stacy, Henry & McLean by William S. McLean for defendant appellant.

CAMPBELL, Judge.

The judgment in this case was entered on 4 September 1970. The case on appeal was not docketed in this Court until 21 April 1971 and no order extending the time for docketing appears in the record. Rule 5 of the Rules of Practice in the Court of Appeals allows 90 days to docket the case on appeal,

provided that the trial judge may extend the time for an additional 60 days upon a showing of good cause. As this case was not docketed within either of the prescribed periods of time, the appeal is subject to dismissal for failure to comply with the Rules.

We have, nevertheless, examined the record and do not find prejudicial error.

Appeal dismissed.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA v. THOMAS STEPHEN FRANCUM

No. 7128SC452

(Filed 14 July 1971)

Habeas Corpus § 4— habeas corpus — appeal

Except in cases involving the custody of minor children, an appeal does not lie from a judgment on return to a writ of *habeas corpus.*

PURPORTED appeal by defendant from *Ervin, J.,* 19 April 1971 Session of Superior Court held in BUNCOMBE County.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Melvin K. Elias for defendant appellant.

VAUGHN, Judge.

Defendant's court-appointed counsel has made no assignments of error and states that the case is brought forward to seek such relief as the Court might find the appellant entitled. The purported appeal is from a judgment denying defendant relief under a paper writing which he labeled a "writ of *habeas corpus*" and which was treated as such by the able trial judge. Except in cases involving the custody of minor children, an appeal does not lie from a judgment on return to a writ of *habeas corpus. In re Wright,* 8 N.C. App. 330, 174 S.E. 2d 27.

Appeal dismissed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT RAY GORDON

No. 7117SC406

(Filed 14 July 1971)

APPEAL by defendant from *Seay, Judge,* 12 January 1971 Session of Superior Court held in SURRY County.

The defendant, Robert Ray Gordon, was charged in a two-count bill of indictment, proper in form, with felonious breaking and entering and felonious larceny.

Upon defendant's plea of not guilty, the State offered evidence tending to establish the following facts: On 31 May 1970, Dowell Brothers store, located at the intersection of Highway 601 and Forest Drive near the Town of Mount Airy, was broken into and a quantity of cigarettes having a value of $1,400 to $1,500 was taken therefrom. Deputy Sheriff Wallace Creed was traveling south on Highway 601 at 5:45 a.m. on 31 May 1970. As he passed Dowell Brothers store he saw a 1961 Buick parked over on Forest Drive southwest of the store with the trunk open. The Buick was located 60 feet from the store. He saw the defendant, Robert Ray Gordon, standing near the car and immediately stopped his vehicle and started backwards. While he was backing, the defendant slammed the trunk lid closed and went into the woods on the west side of Forest Drive. Deputy Sheriff Creed then looked toward the store and saw a man, later identified as Joe Bill Puckett, coming out of the stockroom door. There were four cases of cigarettes in the door. Puckett ran toward the Buick parked on Forest Drive and ran into the woods previously entered by the defendant, Gordon. Deputy Sheriff Creed got out of his automobile, shouted for them to stop, and fired his gun at them. Shortly thereafter, Deputy Sheriff Creed called in bloodhounds and caught Joe Bill Puckett. Eight cases of cigarettes were found in the trunk of the Buick bearing the Dowell Brothers store stamp. The defendant was taken into custody around noon of 31 May 1970.

The defendant offered no evidence. The record discloses that the jury found the defendant guilty of felonious breaking and entering, a violation of G.S. 14-54. From a judgment entered on the verdict imposing a prison sentence of six to eight years, the defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Robert G. Webb for the State.

Gardner & Gardner by Carroll F. Gardner for defendant appellant.

HEDRICK, Judge.

By his one assignment of error, the defendant contends that the trial judge violated the provisions of G.S. 1-180 in his charge to the jury by failing to give equal stress to the contentions of the defendant and the State. Although the defendant cross-examined the State's witnesses, he presented no evidence of his own.

From a careful reading of the charge in light of the fact that all of the evidence offered at the trial was presented by the State, it is our opinion that the court did not violate the requirements of G.S. 1-180, but gave adequate stress to the contentions of the defendant and the State. *State v. Smith,* 238 N.C. 82, 76 S.E. 2d 363 (1953); *State v. Roman,* 235 N.C. 627, 70 S.E. 2d 857 (1952).

In the trial below we find no error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

K. M. BIGGS TRACTOR SALES, INC. v. JAMES FURMAN SCOTT

No. 7116DC401

(Filed 14 July 1971)

APPEAL by plaintiff from *Britt, District Judge,* 15 February 1971 Session of District Court held in ROBESON County.

Plaintiff sought to recover for labor and materials furnished in repairing defendant's tractor and to recover possession of the tractor in order to enforce a mechanics lien. Defendant denied the material allegations of the complaint and sought, by way of counterclaim, to recover on an alleged (1) breach of warranty on a new motor purchased from plaintiff, (2) for

an overcharge paid on the purchase price, and (3) for the cost of needed repairs to the motor.

After hearing the evidence, the judge submitted issues to the jury which were answered as follows:

"1. What amount, if any, is plaintiff entitled to recover of defendant on account of the repair contract as alleged in the complaint?

Answer: None

2. Did defendant remove his tractor from plaintiff's premises without the consent of the plaintiff?

Answer: No

3. What amount, if any, is defendant entitled to recover of plaintiff because of the breach of warranty and overcharge as alleged in the answer?

Breach of Warranty	None
Overcharge	None
Total	None"

From the judgment entered on the verdict, the plaintiff appealed.

Johnson, Hedgpeth, Biggs & Campbell by I. Murchison Biggs for plaintiff appellant.

No counsel of record for defendant appellee.

MALLARD, Chief Judge.

Plaintiff makes eleven assignments of error: nine are to various portions of the charge, one relates to the issues submitted, and the other is to the denial of plaintiff's motion to set aside the verdict.

We have carefully considered all of plaintiff's assignments of error and are of the opinion that no prejudicial error is made to appear.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL HARGROVE

No. 718SC352

(Filed 14 July 1971)

APPEAL by defendant from *Cooper, Judge,* December 1970 Session of Superior Court held in WAYNE County.

The defendant was charged in a two-count bill of indictment, proper in form, with felonious possession and sale of 5.5 grams of a narcotic drug; to wit, marihuana, in violation of G.S. 90-88. The record reveals that a *nolle prosequi* was entered on the count charging the defendant with felonious possession of marihuana, and that the defendant, represented by court-appointed counsel, voluntarily and understandingly entered a plea of guilty on the count charging the defendant with the sale of 5.5 grams of marihuana. From a judgment imposing a prison sentence of three to five years, the defendant appealed.

Attorney General Robert Morgan, Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

George R. Britt for defendant appellant.

HEDRICK, Judge.

Counsel for the defendant states in his brief that he is not aware of any error committed during the trial of the defendant.

From a careful examination of the record it affirmatively appears that the defendant freely, understandingly, and voluntarily entered a plea of guilty to a valid count in the bill of indictment charging him with the sale of 5.5 grams of marihuana, a narcotic drug. The prison sentence imposed is within the limits prescribed by G.S. 90-111. We hold that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. PHILLIP LANCE BENNETT

No. 715SC351

(Filed 14 July 1971)

APPEAL by defendant from *Parker, Judge,* 14 January 1971 Session of NEW HANOVER County Superior Court.

Defendant was charged in a proper, two-count bill of indictment with the possession and sale of two tablets of Lysergic Acid Diethylamide (LSD). Evidence for the State tended to show that F. L. McKinney, an undercover agent for the North Carolina State Bureau of Investigation, purchased two tablets from defendant on the night of 17 June 1970. A subsequent series of chemical tests performed by a chemist employed by the State Bureau of Investigation revealed that the tablets were Lysergic Acid Diethylamide (LSD).

Defendant elected not to put on any evidence.

The jury returned a verdict of guilty as charged in both counts of the bill of indictment. From a judgment of imprisonment of 4-5 years on each count, suspended as to the second count, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Walter E. Ricks III for the State.

Harold P. Laing for defendant appellant.

CAMPBELL, Judge.

Defendant, in his brief, brings forward nine assignments of error. We have carefully reviewed each assignment of error and find no merit in any of them. As neither the bench nor the bar would benefit from discussion of questions previously decided by this Court and by the Supreme Court of North Carolina, we refrain from a discussion of the individual assignments of error.

In the trial below, we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

WILLARD ALLEN SLOCUMB v. EDWARD EARL METTS

No. 7111SC433

(Filed 14 July 1971)

APPEAL by plaintiff from *Hall, Judge,* 15 February 1971 Session of Superior Court held in HARNETT County.

This is a civil action seeking to recover damages for injury to person and property allegedly resulting from a collision of automobiles driven by the plaintiff and the defendant on 8 September 1970 at the intersection of West Carr Street and North Orange Avenue in the Town of Dunn, N. C.

For its verdict, the jury found that the plaintiff was not injured, and that her property was not damaged by the negligence of the defendant. From a judgment entered on the verdict, the plaintiff appealed.

Bryan, Jones, Johnson, Hunter & Greene by Robert C. Bryan for plaintiff appellant.

Cockman, Alvis & Aldridge by John E. Aldridge, Jr., for defendant appellee.

HEDRICK, Judge.

By his one assignment of error, the plaintiff contends that the court failed to declare and explain the law arising on the evidence as required by G.S. 1A-1, Rule 51(a). We have carefully examined the court's instructions to the jury, and find that the court fully, fairly, and adequately declared and explained the law arising on the evidence as presented at the trial. The assignment of error is without merit.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

PIEDMONT TELEVISION CORPORATION T/A WNBE TV
v. BOOMTOWN FURNITURE, INC.

No. 713DC393

(Filed 14 July 1971)

APPEAL by defendant from *Roberts, District Judge,* 18 January 1971 Session of District Court held in CRAVEN County.

This is a civil action to recover $1,245.50 on an open account for advertising. The case was tried before the judge without a jury. The only witness at the trial, Nathan Frank, president of plaintiff corporation and general manager of WNBE TV, identified an itemized statement of the account of the defendant which was introduced into evidence. The witness was not cross-examined, nor did the defendant offer any evidence. The court made findings of fact, conclusions of law, and entered judgment that the plaintiff recover of the defendant $1,245.50 together with interest and costs. The defendant appealed.

Ward & Ward by Sam L. Whitehurst, Jr., for plaintiff appellee.

Zennie L. Riggs for defendant appellant.

HEDRICK, Judge.

We have carefully considered the defendant's eight assignments of error and find them all to be without merit.

We have thoroughly reviewed the entire record of the trial in the District Court and conclude that the court's findings of fact are supported by competent evidence in the record, and these findings support the conclusions of law and the judgment entered. In the trial below we find no error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. EDWARD NATHANIEL WILSON

No. 7118SC473

(Filed 14 July 1971)

APPEAL by defendant from *Johnston, J.*, 8 March 1971 Session of Superior Court held in GUILFORD County.

Defendant tendered a plea of guilty to attempted burglary. The guilty plea was accepted after determination by the court that it was freely, understandingly and voluntarily made. From judgment imposing an active prison sentence, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Eugene Hafer for the State.

Eighteenth District Assistant Public Defender Robert D. Douglas III for defendant appellant.

VAUGHN, Judge.

Defendant's court-appointed counsel has filed a brief in which he states that he is unable to find error in the proceedings. We have reviewed the record proper and find no error.

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. WILLIAM ALBERT LOCKLER

No. 7126SC449

(Filed 14 July 1971)

APPEAL by defendant from *Snepp, J.*, 22 March 1971 Criminal Session of Superior Court held in MECKLENBURG County.

Defendant tendered pleas of guilty to possession of burglary tools and carrying a concealed weapon. The pleas of guilty were accepted after determination by the court that they were freely, understandingly and voluntarily made. From judgments imposing active prison sentences, the defendant appealed.

Attorney General Robert Morgan by Staff Attorney Russell G. Walker for the State.

Plumides and Plumides by Michael S. Shulimson for defendant appellant.

VAUGHN, Judge.

Defendant's court-appointed counsel has filed a brief in which he states that he is unable to find error in the proceedings. We have reviewed the record proper and find no prejudicial error.

Affirmed.

Judges BROCK and GRAHAM concur.

RUTH P. ROSS v. SEBORN PERRY

No. 7118SC294

(Filed 4 August 1971)

1. **Appeal and Error § 26— assignment of error to signing of judgment**

A 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 appears on the face of the record; such assignment of error does not present for review the findings of fact or the sufficiency of the evidence to support them.

2. **Brokers and Factors § 6— real estate agent's commission — condemnation of property by redevelopment commission**

Where agreement entered into by the lessor of hotel property and a real estate agent provided that, as compensation for the agent's services in procuring a 50-year lease of the property, the lessor would pay the agent "5% of the rent received from" the lessee, that the lessor was to send the agent a check for his 5% within five to fifteen days from the time lessor received the lessee's check, and that the lessee "will continue to do this as long as the lease is in force. No longer; and there are no other obligations on either of us, regarding this particular matter," it was *held* that the payment of the 5% commission was conditioned upon the lessor's receipt of the rent and was to continue only so long as the lease was in force; consequently, the lessor's obligation to pay the 5% commission terminated when a municipal redevelopment commission condemned and took possession of the hotel property.

3. **Brokers and Factors § 6— broker's commission — agreement between broker and principal**

While the general rule does not place upon a broker the risk of nonperformance by a party to a transaction negotiated by him, the broker and his principal may vary the rule to any extent by agreement that the payment of commissions shall be dependent upon certain conditions or contingencies; when this is done, fulfillment of the prescribed conditions is essential to the right of compensation.

Judge BROCK dissents.

APPEAL by plaintiff from *Exum, Judge,* 26 October 1970 Session, Superior Court of GUILFORD County.

Plaintiff alleged that she was the sole devisee and residual legatee under the will of her husband, William F. Ross, and had succeeded to his rights under a certain deferred compensation commission agreement; that defendant and his wife owned certain property in the City of High Point known as the old Elwood Hotel property; that plaintiff's husband William F. Ross contracted with defendants to try to find a long term

lessee for the property, the agreement being that, if he were successful, he would receive as compensation, at defendant's election, either $10,000 in cash or a commission of 5% of the total monthly rental payments, over the full term of the lease to be paid monthly; that William Ross and his partner (whose interest in the contract was acquired by Ross) did procure an acceptable 50-year lease on the property under which defendants would receive in total rental over the 50-year period the sum of $1,130,000 payable in variable monthly installments; that defendant elected to pay as commission a sum equal to 5% of the rentals under the lease over the full term of the lease; that on or about 24 February 1964, plaintiff advised defendant that the commission payments were in arrears and requested him to bring them up to date; that on or about 27 February 1964, defendant advised plaintiff that the arrangement was that he was to pay as commissions $75 per month for the first 20 years of the lease and he had no further obligation under the agreement; that on or about 20 April 1964, plaintiff furnished defendant a letter dated 20 September 1943, addressed to William F. Ross by defendant in which "defendant acknowledged the obligation of the defendant to pay to William F. Ross 5% of the monthly rentals for a period of 50 years," that thereafter defendant acknowledged the obligation to plaintiff "for the full 50 years of the lease" and continued the payments, increasing them to catch up on arrearage; defendant failed to pay the $61.84 due in December 1966 and the $104.16 due in January 1967. The property was taken by the City of High Point in a condemnation proceeding in 1966; that a final judgment had been entered in favor of defendant in the amount of $942,500. Plaintiff prayed judgment for arrearage to date of judgment and an order directing defendant to pay her $104.16 each month thereafter to and including 31 August 1993, or in the alternative that she recover of defendant the reasonable value of services to defendant by Ross plus 6% interest thereon.

Defendant answered admitting an agreement but denying that its terms were as alleged in the complaint. By further answer, the defendant averred that in deciding which method of compensation to use, he chose the 5% because as he advised Ross, the lease might be terminated after 10 or 20 years if it became necessary to tear down the portion of the property on the Southern Railway Company's right-of-way; that subsequently thereto Ross submitted a written contract to defendant which

he refused to sign but confirmed his oral agreement that he would pay Ross 5% of rents "actually received from the tenant so long as the lease remained in force," which is the only agreement ever made, defendant specifically denying any agreement to pay 5% commissions for any specific term of years; that defendant's failure to pay the $61.84 due on 10 December 1966 and $104.16 due on 10 January 1967 was inadvertent and those amounts with interest at 6% were tendered into the registry of the court; that the condemnation award was, by agreement, divided 71% to owner and 29% to lessee.

The case was heard by the court without a jury. It was stipulated that the payment of $195.47 by defendant into court for plaintiff was without prejudice; that High Point paid $947,500 as compensation for the taking by condemnation of the Elwood Hotel property; that since the taking of the property by the City on 1 February 1967, no monthly rental payments had been made to defendant by lessee or any assignee of lessee.

Plaintiff introduced evidence consisting of the testimony of defendant and exhibits which had been agreed to by pretrial stipulation. Exhibit A is a letter dated 20 September 1943 addressed to Mr. W. F. Ross and signed by Seborn Perry. It is as follows:

"Dear sir:

Having read carefully the contract you gave me concerning the commissions and rent of the Elwood Property will say that I do not care to enter into any more contract than the one we have—*i.e.*, that I am to pay you 5% of the rent received from Arthur Lea of William Street NYC, for acting as my agent in making this lease.

Your check for five percent will be sent to you within five to fifteen days from the time I receive Mr. Lea's check—and I will continue to do this as long as the lease is in force. No longer; and there are no other obligations on either of us, regarding this particular matter."

Both parties concede that this letter constitutes the agreement of the parties and that the rights and obligations of the parties are dependent upon an interpretation and construction of the contract.

At the end of the plaintiff's evidence, defendant moved for involuntary dismissal under Rule 41. This motion was denied and no exception was taken by defendant. The court found facts specially as required by Rule 52(a)(1) and entered judgment thereon in favor of defendant. Plaintiff gave notice of appeal.

McLendon, Brim, Brooks, Pierce and Daniels by L. P. McLendon, Jr., and E. Norman Graham, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey and Hill, by Welch Jordan and William L. Stocks, for defendant appellee.

MORRIS, Judge.

The court made the following findings of fact:

"(1) In 1943 the defendant and his wife were the owners of certain real property in High Point, North Carolina, known as the Elwood Hotel property, which property was subject to a right of way of Southern Railway Company.

(2) In 1943 the defendant and his wife entered into a lease received in evidence as plaintiff's Exhibit A-1, with one Arthur Lee *(sic)* dated July 31, 1943, by the terms of which lease the Elwood Hotel property was leased to Arthur Lee *(sic)* for a period specified in the lease to begin on August 1, 1943 and to last until July 31, 1993.

(3) The late William F. Ross, a realtor who lived in Greensboro, North Carolina, performed certain services as a realtor in connection with the negotiation and execution of the lease between the defendant and his wife and Arthur Lee *(sic)*.

(4) Following the consummation and execution of the foregoing lease an agreement was made between the defendant and the late William F. Ross concerning the payment of commissions to William F. Ross by the defendant for the services rendered by William F. Ross in connection with the lease. The terms of the agreement which was made between the defendant and the late William F. Ross pertaining to the payment of commissions to William F. Ross are stated in a letter dated September 20, 1943, received in evidence as plaintiff's Exhibit A, from the defendant to William F. Ross, as follows:

'Having read carefully the contract you gave me concerning the commissions and rent of the Elwood Property will say that I do not care to enter into any more contract than the one we have—*i.e.*, that I am to pay you 5% of the rent received from Arthur Lea of William Street NYC, for acting as my agent in making this lease.

Your check for five percent will be sent to you within five to fifteen days from the time I receive Mr. Lea's check—and I will continue to do this as long as the lease is in force. No longer; and there are no other obligations on either of us, regarding this particular matter.'

(5) Although a dispute arose concerning the amount of certain alleged arrearages in the commissions payable prior to February 1, 1967, this dispute has been resolved and there is no conflict between the parties about the amount of any arrearages in the commissions due and payable prior to February 1, 1967. The defendant has tendered to the plaintiff and paid into the Office of the Clerk of Superior Court of Guilford County the sum of $195.47, which is the total amount of the arrearages alleged by the plaintiff to be due for the period prior to February 1, 1967.

(6) On or about June 1, 1966, the City of High Point Redevelopment Commission, a governmental agency duly authorized to condemn and redevelop property, gave notice to the defendant of the condemnation and taking of the Elwood Hotel property as of February 1, 1967, by the City of High Point Redevelopment Commission. As of February 1, 1967, the City of High Point Redevelopment Commission did in fact condemn and take possession of the Elwood Hotel property.

(7) As of February 1, 1967, the tenants under the lease dated July 31, 1943 moved out and vacated the Elwood Hotel property and thereafter the Elwood Hotel building was demolished and torn down by the City of High Point Redevelopment Commission.

(8) Since the taking of the Elwood Hotel property by the City of High Point Redevelopment Commission on February 1, 1967, no rental payments under the lease dated July 31, 1943 have been made to the defendant by Arthur Lee

(sic), the lessee, or by any assignee of the rights of Arthur Lee *(sic)* under the aforesaid lease.

(9) Subsequent to the condemnation and taking of the Elwood Hotel property an award of $942,500.00 was made for the taking by condemnation of the Elwood Hotel property. A division of the aforesaid award for the condemnation and taking of the Elwood Hotel property was made on the basis of seventy-one percent (71%) to the owners and twenty-nine percent (29%) to the lessee."

Upon these findings of fact the court made the following conclusions of law:

"(1) Under the terms of the agreement between the defendant and the late William F. Ross, the defendant's obligation to pay monthly commissions was conditioned upon the receipt by the defendant of the rentals under the lease and further conditioned upon the lease dated July 31, 1943, remaining in force.

(2) The condemnation and taking of the Elwood Hotel property destroyed the defendant's right to receive rentals under the lease and after the condemnation and taking of said property the lease was no longer in force.

(3) Since the condemnation and taking of the Elwood Hotel property destroyed and terminated the defendant's right to receive rentals under said lease and the defendant has not received any rentals under the lease since February 1, 1967, and since the lease dated July 31, 1943, was no longer in force following the condemnation and taking of the Elwood Hotel property on February 1, 1967, the defendant was not required by the terms of the aforesaid agreement with William F. Ross to make any further payments of commissions after February 1, 1967, the date of the taking of the Elwood Hotel property by the City of High Point Redevelopment Commission.

(4) The award of $942,500.00 following the condemnation of the Elwood Hotel property was not a payment of rentals under the lease dated July 31, 1943, within the meaning of the aforesaid agreement between the defendant and William F. Ross, and it is speculative as to what effect the existence of the lease had upon the amount of the award which was

made to the defendant for the condemnation and taking of the Elwood Hotel property."

[1] The record does not contain any exceptions whatsoever. The single assignment of error is as follows: "1. The action of the Court in signing and entering the Judgment in favor of the Defendant as appears of record. EXCEPTION No. 1 (R p 94)." However, page 94 of the record is barren of any exception. The judgment entered does begin on page 94. Nevertheless, 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. Plaintiff's sole assignment of error does not present for review the findings of fact or the sufficiency of the evidence to support them." *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968). Whether G.S. § 1A-1, Rule 52(c) provides for appellate review of the sufficiency of the evidence to support the findings of fact where no exception is taken, *quaere?* The question is not before us in this case. The findings of fact incorporate and consist of exhibits, stipulations or admissions in the pleadings, and the evidence is sufficient to support the findings of fact.

[2, 3] The only question presented by this appeal is whether the facts found support the conclusions of law and judgment. We hold that they do. Defendant by letter to plaintiff's husband specifically stated the terms of the agreement between the parties. Defendant was to pay to William Ross "5% of the rent received from Arthur Lea of William Street NYC." Further clarification appears in the next paragraph. Defendant was to send Mr. Ross a check for his 5% "within five to fifteen days from the time I receive Mr. Lea's check—and I will continue to do this as long as the lease is in force. No longer; and there are no other obligations on either of us, regarding this particular matter." Plaintiff contends that the equities as between the parties entitle plaintiff to judgment; that, conceding the parties concluded the transaction, under compulsion of government authority, they later modified it by an agreement which divided between them the proceeds of a forced "sale" of the property. This contention, while novel and interesting, is without merit. The agreement, we think, was clear and unambiguous.

" 'Parties have the legal right to make their own contract, and if the contract is clearly expressed, it must be enforced as it is written. *Brock v. Porter,* 220 N.C. 28, 16 S.E. 2d 410. "The contract is to be interpreted as written." *Jones v. Realty Co.,* 226 N.C. 303, 305, 37 S.E. 2d 906, 907. The "only office of judicial construction is to remove doubt and uncertainty." 12 Am. Jur., Contracts, Sec. 229; *McCain v. Ins. Co.,* 190 N.C. 549, 130 S.E. 186; *Jones v. Realty Co., supra.' Johnson, J.,* in *Barham v. Davenport,* 247 N.C. 575, 101 S.E. 2d 367." *Parks v. Oil Co.,* 255 N.C. 498, 501, 121 S.E. 2d 850, 853 (1961).

The agreement to pay 5% commission was plainly and unequivocally conditioned upon (1) receipt by defendant of the rent and (2) was to continue only so long as the lease was in force and no longer. The lease terminated when the property was taken by the City of High Point. The general rule, of course, does not place upon the broker the risk of nonperformance by a party to the transaction negotiated by him. However, the broker and his principal may vary the rule to any extent by agreement that the payment of commissions shall be dependent upon certain conditions or contingencies. When this is done, fulfillment of the prescribed conditions is essential to the right of compensation. 12 Am. Jur. 2d, Brokers § 195, p. 937.

We are of the opinion that the facts found by the court support the judgment.

Affirmed.

Judge HEDRICK concurs.

Judge BROCK dissents.

JEAN HILL MITCHELL v. JAMES THOMAS MITCHELL

No. 7114DC239

(Filed 4 August 1971)

Divorce and Alimony § 18— alimony pendente lite — the order of award — findings that the wife has insufficient means

The order awarding the wife alimony *pendente lite* must contain a specific finding and conclusion that the wife does not have sufficient means whereon to subsist during the prosecution of her action and to defray the necessary expenses thereof; the absence of such findings is reversible error. G.S. 50-16.3(a).

Mitchell v. Mitchell

APPEAL by defendant from *Lee, District Judge,* 6 November 1970 Session, District Court, DURHAM County.

Plaintiff instituted this action 15 October 1970 for alimony, alimony *pendente lite,* custody of children, child support, and counsel fees. She alleged, in substance, that two children were born of the marriage, one 18 and one 13; that defendant is an able bodied man, self-employed and with an adjusted gross income in excess of $26,000 per year; that plaintiff is employed and earns $4900 per year; that defendant, with his two brothers had on deposit in checking accounts $175,470.31; that defendant has other funds on deposit and invested, owns an interest in a houseboat, owns a speed boat, several motorcycles, a substantial interest in his business, and is involved in at least one other business than that with his brothers; that plaintiff is actually substantially dependent on defendant for support; that defendant offered such indignities to the person of plaintiff so as to make her condition intolerable and life burdensome, to wit: Defendant had unjustly accused her of being a lesbian, unjustly accused her of having affairs with men, including acts of perversion, assaulted her on numerous occasions, sometimes before the children, berated plaintiff before friends and openly flirted with other women, carried on a love affair with another woman, told plaintiff he would be happier if she were dead, tried to turn their son against plaintiff, destroyed dishes and articles of furniture in the home, told plaintiff repeatedly he would destroy everything before she would get anything from him, demanded the return of plaintiff's engagement ring, offered to buy plaintiff a gun if she would shoot herself, threatened to throw her out of the house, consumed alcohol in excess on many occasions, intentionally driven a motorcycle over plants, etc., cared for by plaintiff. That defendant has constructively abandoned plaintiff in that although they continue to live in same house, they see very little of each other and defendant has refused to give plaintiff any money for some time for her maintenance and the maintenance of the home and children; that defendant has wilfully failed to provide the dependent spouse with necessary subsistence in accordance with his means and conditions; that he used plaintiff's car which he furnished her and brought it back in an inoperable condition without notifying her, leaving her without transportation to and from work and to transport the children, although he had two other vehicles available to him at all times; that on numerous occasions he

bought food for himself or guests without providing any for plaintiff; that all acts complained of were unprovoked by plaintiff; that defendant had refused to provide sufficient funds for his daughter to go to school; that although the son of the parties is doing poorly in school, defendant does not encourage him but has given him a motorcycle and entered him in races, causing him to miss school; that the parties own their home as tenants by the entirety and it is not encumbered; that plaintiff is without funds to pay her attorney; that plaintiff is a fit and proper person to have the custody of the two children and custody in her would best promote the interests and welfare of the children.

Defendant denied all the material allegations of the complaint, including the allegation that plaintiff and defendant continued to live in the same house, and by way of further answer averred that he was in the building business and had devoted all his efforts to providing the plaintiff and their children with all the comforts and luxuries he could; that plaintiff had constantly and continuously harassed and belittled him, accused him of having an affair with every woman for whom he had built a house; that plaintiff had on a prior occasion abandoned him and the children; that he has not "constructively abandoned plaintiff, for the reason that they are still living in their home located at 2624 East Geer Street, Durham, North Carolina"; that the 13-year-old son had engaged in sports competition on a motorcycle and has become very proficient in handling it; that defendant has participated on many occasions in his son's activities and that despite plaintiff's "tantrums and vilification on this subject" the relationship with his son has been wholesome; that plaintiff is not a dependent spouse; that her complaints are of her own imagination; that plaintiff has "adopted a venomous personality" and is committed to a course of action to destroy the family environment defendant has endeavored to establish.

Defendant appealed from the entry of the following order:

"This cause, coming on to be heard and being heard on the 6th day of November, 1970, before the Honorable Thomas H. Lee, District Court Judge, upon motion of plaintiff for alimony *pendente lite,* custody of infant children, counsel fees *pendente lite,* and support of children *pendente lite;* and the plaintiff being present and being represented by

W. Paul Pulley, Jr., Attorney at Law, and the defendant being present and being represented by Blackwell M. Brogden, Attorney at Law;

After hearing testimony and arguments of counsel, it appearing to the court and the court finds as facts the following:

1. That the parties were married on or about the 16th day of May, 1951, and that two children were born of the marriage, namely, Ylanza Mitchell, age 18 and Tony James Mitchell, age 13.

2. That at the date of the hearing, the plaintiff and defendant are still residing in the same house under the same roof; that they have not had sexual intercourse or otherwise lived as man and wife since July of 1970.

3. That defendant is an able-bodied male, self-employed in the construction business, and for the calendar years 1968 and 1969 earned an adjusted gross income in excess of Twenty-six Thousand Dollars ($26,000.00) each year.

4. That plaintiff is employed and earns approximately Four Thousand Nine Hundred Dollars ($4,900.00) per year.

5. That defendant, along with his two brothers, has deposits in savings and loan institutions of sums in excess of One Hundred Seventy-Five Thousand Dollars ($175,000.00) belonging to his business.

6. That on or about September 25, 1970, defendant did assault plaintiff; that he had previously assaulted her in July of 1970; that preceding the assault in September of 1970, defendant had done other things, such as accusing plaintiff of being a Lesbian; accusing plaintiff of having affairs with men, including acts of perversion; repeatedly told plaintiff he would be happier if she were dead, and he did in fact in September of 1970 offer to buy her a gun if she would shoot herself; intentionally drove a motorcycle over plants and trees planted and cared for by plaintiff; and demanded that plaintiff return to him the engagement ring which he had given her.

7. That defendant offered such indignities to plaintiff as to make her condition and life intolerable and burden-

some and that the items referred to above constituted said indignities.

8. That said indignities and assaults referred to herein were inflicted on plaintiff without provocation on her part.

9. That plaintiff is a dependent spouse within the meaning of G.S. 50-16.1 in that plaintiff is substantially dependent on defendant for maintenance and support and substantially in need of said maintenance and support from defendant.

10. That the sum of Two Hundred Dollars ($200.00) per month as alimony *pendente lite* is reasonable at this time, and said sums should be paid for the use and benefit of plaintiff.

11. That the sum of Five Hundred Dollars ($500.00) is reasonable for attorney's fees for plaintiff's counsel.

12. That the Juvenile Division of the District Court should investigate thoroughly matters as to the best interests of the 13 year old son, Tony James Mitchell, as to where custody shall be placed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

A. That defendant shall pay to the Department of Social Services the sum of Two Hundred Dollars ($200.00) per month for the use and benefit of plaintiff as alimony *pendente lite,* said sum to be payable to the Department of Social Services beginning the 20th day of November, 1970, and payable on the 20th day of each succeeding month until further orders of court.

B. That defendant shall pay directly to plaintiff's counsel, W. Paul Pulley, Jr., the sum of Five Hundred Dollars ($500.00) as attorney's fees for plaintiff's counsel *pendente lite,* said sum to be paid not later than November 20, 1970.

C. That the Juvenile Division of the District Court shall investigate thoroughly the best interests of the 13 year old son born of the marriage, namely, Tony James Mitchell, as to where custody shall be placed.

This 24th day of November, 1970."

W. Paul Pulley for plaintiff appellee.

Brogden and Brogden, by Blackwell M. Brogden, for defendant appellant.

MORRIS, Judge.

Defendant's assignment of error No. 1 is as follows: "That the court committed error in overruling the defendant's motion for summary judgment on the pleadings and issues joined as provided by Rule 56. That his Honor committed error in overruling the defendant's motion for summary judgment when renewed, after all of the evidence, as provided by Rule 56." This assignment is based on exceptions No. 1 and 4. All of the exceptions appear after the judgment and are entitled "Appeal Entries." Exception No. 1 reads as follows: "Upon the call of the case for hearing, the defendant through his counsel, before any evidence was offered or pleadings read, made a motion for summary judgment on the pleadings and issues joined." Exception No. 4 states "After all of the evidence, the defendant through his counsel, renews motion for summary judgment." We are at a loss to determine of what error defendant complains. If the motion made at the beginning of the trial was a motion for summary judgment, no notice thereof was given, nor are we given any idea of the contents of the motion. It does not appear in the record. The second motion referred to in this assignment of error, if it was a motion for summary judgment, would be subject to the same defects. In addition, the office of summary judgment is not to test the sufficiency of the evidence. If defendant's motion was for a directed verdict, we cannot rule on it because the record contains no evidence. If the latter motion was intended to test the sufficiency of evidence, and the first motion was actually for summary judgment, the ruling on them should not be the subject of one assignment of error. This assignment of error is overruled.

A portion of assignment of error No. 2 is as follows: "That the court committed error in overruling the defendant's motion to dismiss plaintiff's action for failure to state sufficient facts upon which relief might be granted, at the close of the plaintiff's testimony, as provided by Rule 12(b)(6). That the court committed error in overruling the defendant's renewed motion to dismiss plaintiff's action for failure to state sufficient facts upon

which relief might be granted, at the close of all the evidence." Again, we are at a loss. If defendant's motion was to test the sufficiency of the complaint, a motion under G.S. 1A-1, Rule 12(b)(6) was the proper motion, and this is one of the defenses listed in Rule 12(b) which can be made by motion as late as at the trial on the merits. However, defendant has not divulged to us the contents of the motion nor does his assignment of error give us any indication as to why he thinks the complaint fails to state sufficient facts upon which relief might be granted. If defendant intended the motion to test the sufficiency of the evidence and would have us, on appeal, treat it as a motion for directed verdict, we cannot comply because no evidence is before us. The record is devoid of any evidence. This assignment of error also includes the following "That the court committed error in awarding alimony *pendente lite* to the plaintiff for the reason that there had been no showing in the pleadings that the plaintiff was entitled to any alimony, temporary or permanent, in that the plaintiff admits that she is still living in the same household with the defendant and further for the reason that there are no particular allegations in the complaint showing any indignities as required by G.S. 50-16.1 *et seq.* and Rule 1, Civil Rules of Procedure, as set forth in defendant's exception No. 8." Exception No. 8 is as follows: "That the defendant excepts to the finding of fact that the plaintiff is entitled to alimony as set out in Finding Number 10 of the Order, as there was not sufficient competent testimony to show that the plaintiff was entitled to alimony." Obviously we cannot discuss this exception since we have no testimony before us. The portion of the assignment of error which the exception No. 8 is supposed to support has to do with pleadings. The last paragraph of this assignment of error is in almost identical words with respect to award of counsel fees and is supposedly based on defendant's exception No. 9. However, exception No. 9 is to "Finding Number 11 of the Order, for the reason that there was no showing that the plaintiff was entitled to counsel fees." Again the portion of the assignment refers to pleadings and the exception upon which it is based relates to evidence. This assignment of error is overruled.

By assignment of error No. 3, defendant contends that the court erred in signing the order for the reasons that "there had been no showing in the pleadings that the plaintiff was entitled to any alimony, temporary or permanent in, that the

plaintiff admits that she is still living in the same household with the defendant and further for the reason that there are no particular allegations in the complaint showing any indignities as required by G.S. 50-16.1 *et seq.* and for the further reason that the plaintiff and the defendant are still living together and the plaintiff is not entitled to any alimony, as a matter of law." This assignment is based on defendant's exception No. 10 which is "To the signing of the Order by the Honorable Thomas H. Lee, District Court Judge, dated November 20, 1970, the defendant excepts, and in open court gives notice of appeal to the North Carolina Court of Appeals, further notice waived." The exception to the signing and entry of the judgment presents the face of the record for review. *Christenson v. Ford Sales, Inc.*, 6 N.C. App. 137, 169 S.E. 2d 542 (1969), which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form and supported by the verdict. 1 Strong, N. C. Index 2d, Appeal and Error, § 26. It is not sufficient basis for consideration of an assignment of error that the pleadings are not sufficient.

We are aware of the points argued by defendant in his brief and in oral argument. However, we have spent considerably more time than should be necessary in trying to unravel and understand defendant's assignments of error. As was said by Brock, Judge, in *Nye v. Development Co.*, 10 N.C. App. 676, 179 S.E. 2d 795 (1971):

> "It is not the function of the appellate courts to search out possible errors which may be prejudicial to an appellant; it is an appellant's duty, acting within the rules of practice, to point out to the appellate court the precise error of which he complains."

Exception No. 10 is, in our opinion assigned as error, albeit most ineptly, by the language "and the plaintiff is not entitled to any alimony as a matter of law" appearing in assignment of error No. 3. We, therefore, look at the judgment to determine whether the facts found or admitted support it. G.S. 50-16.3(a) provides:

> "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."

There are sufficient findings to support a conclusion that the grounds set out in section (1) of the statute exist, but the order contains no factual findings or even a conclusion as to whether plaintiff has sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. "The two quoted sections of G.S. 50-16.3(a) are connected by the word 'and'; it is therefore *mandatory* that the grounds stated in both of these sections shall be found to exist before an award of alimony *pendente lite* may be made." (Emphasis supplied.) *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971). Because of the failure to make specific findings with respect to the sufficiency of plaintiff's means whereon to subsist during the prosecution of her action and to defray the necessary expenses thereof, we must conclude that the facts found and admitted do not support the judgment for alimony *pendente lite*.

Error and remanded.

Judges BROCK and HEDRICK concur.

HOWARD-GREEN ELECTRICAL COMPANY, INC. v. CHANEY & JAMES CONSTRUCTION CO., INC., MOTEL PROPERTIES, INC., CHARLES P. LANDT, TRUSTEE, CAMERON-BROWN COMPANY, BRUCE W. RILEY, TRUSTEE, FIRST UNION NATIONAL BANK OF NORTH CAROLINA, RALEIGH, DOWNTOWN ENTERPRISES, INC. AND GREENWICH SAVINGS BANK, AND TRANSAMERICA INSURANCE CO.

No. 7110SC458

(Filed 4 August 1971)

1. Contracts § 12— construction — intention of the parties

The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

2. Contracts § 16— time of final payment under subcontract

Subcontract provision that "Final payment will be paid within 15 days of acceptance of and payment for the entire contract by the Owner" created no condition precedent by which the subcontractor's right to receive full payment from the general contractor was conditioned upon the general contractor being first paid in full by the owner, but relates solely to the time of payment, and in that regard postpones payment only until, in the usual course of business, final settlement of accounts between the general contractor and the owner could reasonably be expected; by execution of a labor and material payment bond providing that a claimant may sue on the bond if not paid in full within 90 days after the completion of its work, the general contractor and its surety on the bond recognized the 90-day period as a reasonable time after which payment to the subcontractor becomes due.

APPEAL by defendants, Chaney & James Construction Co., Inc., and Transamerica Insurance Co., from *Clark, Judge,* 8 February 1971 Civil Session of Superior Court held in WAKE County.

This is an appeal from a summary judgment in favor of plaintiff. The facts, which were established by the pleadings, answers to interrogatories, and affidavit, are not in dispute and may be summarized as follows:

On 1 July 1968, Chaney & James Construction Co., Inc. (Construction Co.) contracted with Motel Properties, Inc. (Owner) to build a Holiday Inn Motor Hotel on property of Owner in Raleigh, N. C., for a basic price of $1,861,600.00. Thereafter, Construction Co. entered into a written subcontract

with plaintiff under which plaintiff agreed to and did furnish all labor, equipment and materials for the electrical work in construction of the hotel for a contract price, as adjusted by change orders agreed to by plaintiff and Construction Co., of $134,486.76. Plaintiff completed work under its subcontract on 3 March 1970, and no question is raised as to its performance. From time to time Construction Co. made payments to plaintiff on account of work performed by plaintiff under the electrical subcontract, and there now remains a balance owed plaintiff on that contract of $13,430.45. Construction Co. recognizes it owes this amount to plaintiff, but denies that it is presently due and payable.

In connection with the prime contract, Construction Co., as principal, and Transamerica Insurance Co. (Insurance Co.), as surety, executed a labor and material payment bond in the amount of $1,861,000.00 to Owner, as obligee, for the benefit of claimants as defined in the bond, conditioned upon the prompt payment by Construction Co. to all claimants for labor and material used or reasonably required for use in performance of the prime contract. Plaintiff is a claimant as defined in the bond. In the bond the principal and surety agreed that every claimant who has not been paid in full before the expiration of 90 days after the date on which the last of such claimant's work was performed or materials were furnished may sue on the bond. Plaintiff gave due notice of its claim to Insurance Co. as required by the bond, and the 90-day period after plaintiff completed performance of all of its work under its subcontract with Construction Co. expired on 1 June 1970. Plaintiff's claim was not paid, and on 4 September 1970 plaintiff commenced the present action to collect its claim.

A dispute arose between Construction Co. and Owner, which caused delay in settlement of accounts between those parties and delay in final payment to Construction Co. by Owner under the prime contract. This dispute is the subject of a suit now pending between those parties in the United States District Court. The dispute between Construction Co. and Owner and the delay in final payment by Owner to Construction Co. was not caused by any default on the part of plaintiff in the present action in performance of its subcontract for the electrical work, and no claim is made by either party in the United States District Court suit that plaintiff in the present action

defaulted in any way in performance under its subcontract for the electrical work.

Upon finding that no genuine issue of fact exists between the parties in this action as to the foregoing facts, the court granted plaintiff's motion for summary judgment and entered judgment that plaintiff recover $13,430.45, with interest thereon from 1 June 1970, from defendant Construction Co., and that it recover the amount of the bond against defendant Insurance Co., as surety, to be discharged upon payment of the $13,430.45 with interest.

From this judgment, defendants Construction Co. and Insurance Co. appealed. The rights of other defendants are not involved on this appeal.

Purrington & Purrington by A. L. Purrington, Jr., for plaintiff appellee.

Poyner, Geraghty, Hartsfield & Townsend by Marvin D. Musselwhite, Jr., for defendant appellants.

PARKER, Judge.

Defendant Construction Co. acknowledges that it owes plaintiff a balance of $13,430.45 on account of plaintiff's completed performance under the subcontract for the electrical work, and the sole dispute between the parties is whether that balance is presently due and payable. The written subcontract between plaintiff and defendant Construction Co. contains the following:

"3. Payments shall be made monthly in accordance with the following procedure:

"(a) On the 25th of each month (or 2 days before the date on which the contractor has agreed to submit its estimate to the owner, if such date would be earlier in the month) Sub-Contractor shall submit to the Contractor an estimate of materials on hand and work done. Estimates submitted after the submission date in any month may be held by Contractor until the next submission date for processing.

"(b) If satisfactory, the estimate will be forwarded to the Owner, incorporated with the Contractor's estimate.

"(c) To the extent that the Owner recognize the Sub-Contractors estimate and not later than ten days after payment to the Contractor, the Contractor will pay the Sub-Contractor the per cent of the Sub-Contractors' estimate shown in Paragraph 3 of the Basic Contract, provided that it shall not be incumbent upon the Contractor to make payments in an amount that would not leave a sufficient balance to cover all obligations of the Sub-Contractor for labor, materials, etc., previously furnished or to be furnished by the Sub-Contractor under this Sub-Contract.

"(d) Final payment will be paid within 15 days of acceptance of and payment for the entire contract by the Owner, but not before delivery of executed releases of the Sub-Contractor as required by the Contractor."

Appellants contend that the foregoing language in the written subcontract, particularly the language in sub-paragraph 3(d), postponed the time of payment of the balance due under the subcontract from defendant Construction Co. to plaintiff until the Construction Co. receives its final payment from Motel Properties, Inc., the Owner. We do not agree.

[1, 2] "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295. Here, plaintiff contracted solely with the prime contractor and did not contract with or extend credit to the Owner, nor did plaintiff accept responsibility for any part of the building project other than the electrical work. Viewing the language of the electrical subcontract in light of the situation of the parties, the end which they sought to accomplish, and against the background of customary practices in the construction industry, it is our opinion that by paragraph 3(d) of their contract the parties created no condition precedent by which plaintiff's right to receive full payment from defendant Construction Co. was conditioned upon the Construction Co. being first paid in full by the Owner. Rather, in our opinion, paragraph 3(d) relates solely to the time of payment, and in that regard postpones payment only until, in the usual course of business, final settlement of accounts between the general contractor and the Owner could reasonably be expected.

Our conclusion is supported by the decision in *A. J. Wolfe Company v. Baltimore Contractors, Inc.*, 355 Mass. 361, 244 N.E. 2d 717, a case which presented a factual situation very similar to the case now before us. In that case a subcontractor for electrical work on an apartment house sued the general contractor and the bonding company. The subcontract called for monthly progress payments and provided that "[t]he balance of the contract price shall be paid . . . within thirty . . . days after full and final payment for the work" by the owners to the general contractor. The general contractor and the bonding company defended on the grounds that the subcontractor had not produced evidence that the owners ever paid the general contractor amounts due for the several classes of work done by the subcontractor. In affirming the trial court's judgment in favor of the subcontractor, the Supreme Judicial Court of Massachusetts said:

> "We interpret art. II(a) merely as setting the time of payment and not as creating a condition precedent to payment. In the absence of a clear provision that payment to the subcontractor is to be directly contingent upon the receipt by the general contractor of payment from the owner, such a provision should be viewed only as postponing payment by the general contractor for a reasonable time after requisition (and completion of the subcontractor's work mentioned in the requisition) so as to afford the general contractor an opportunity to obtain funds from the owner."

To the same effect is the decision in *Thos. J. Dyer Co. v. Bishop International Engineering Co.*, 303 F. 2d 655 (6th Cir. 1962). That case also involved an action brought by a subcontractor against the general contractor and the surety on its bond. Paragraph 3 of the subcontract provided that the subcontractor should be paid a specified amount for performance under the subcontract, "no part of which shall be due until five (5) days after Owner shall have paid Contractor therefor. . . . " The work was completed, but before making full payment to the general contractor, the Owner filed for reorganization under Chapter X of the Federal Bankruptcy Act. In the subcontractor's action against the general contractor, the latter defended on the grounds that, under pargraph 3 of the subcontract, no payment was due. In affirming a summary judgment in favor of the plaintiff-subcontractor the Court said:

"In our opinion, paragraph 3 of the subcontract is a reasonable provision designed to postpone payment for a reasonable period of time after the work was completed, during which the general contractor would be afforded the opportunity of procuring from the owner the funds necessary to pay the subcontractor. *Stewart v. Herron,* 77 Ohio St. 130, 149, 82 N.E. 956. To construe it as requiring the subcontractor to wait to be paid for an indefinite period of time until the general contractor has been paid by the owner, which may never occur, is to give to it an unreasonable construction which the parties did not intend at the time the subcontract was entered into."

In the case now before us, the payment bond which was executed by defendant Construction Co., as principal, and by defendant Insurance Co., as surety, provides as follows:

"2. The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. . . . "

No question is raised but that plaintiff is a claimant within the meaning of the bond. Neither payment by the Owner to the general contractor, nor completion of work of other subcontractors, are among conditions imposed by the bond. By executing the bond, defendant-appellants have themselves recognized the 90-day period as a reasonable time after which payment to plaintiff becomes due.

The judgment in favor of plaintiff is

Affirmed.

Judges BRITT and MORRIS concur.

D. I. ROBERTS v. WILLIAM N. AND KATE B. REYNOLDS MEMORIAL PARK, ALSO KNOWN AS TANGLEWOOD PARK, AND GRADY SHUMATE

No. 7121SC231

(Filed 4 August 1971)

Negligence § 34; Games and Exhibitions § 3— rental of golf cart — brake failure — evidence of negligence — directed verdict

Plaintiff's evidence that he was injured when the brakes failed on the golf cart which he rented from the defendant, together with the opinion testimony of plaintiff's expert witness that, under the facts of the case, a reasonable inspection of the golf cart at the time of rental would have revealed a defect in the brakes, was insufficient to withstand defendant's motion for directed verdict on the issue of negligence.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Armstrong, Judge*, 18 November 1970 Session of Superior Court held in FORSYTH County.

This is a civil action to recover damages for personal injuries allegedly sustained by plaintiff while operating a golf cart rented from the defendants William N. and Kate B. Reynolds Memorial Parks, Inc. (Tanglewood Park), and Grady Shumate.

The plaintiff, D. I. Roberts, offered evidence tending to show that on 3 May 1967, he and a friend, David Copen, went to Tanglewood Park in Forsyth County to play golf. They rented a Pargo golf cart from defendant Grady Shumate, an employee of defendant Tanglewood Park, which the plaintiff drove. As they started down a grade on the first hole, the plaintiff noticed that the brakes felt as though they were fading, but said nothing, thinking it to be a matter of getting adjusted to the cart's brakes as compared to the power brakes on his automobile. Throughout the rest of the first nine holes, the plaintiff did not notice any further difficulty with the brakes, but mostly he coasted up to the ball and had no occasion to set the brake on an incline.

On the tenth hole, the second shots of the plaintiff and his companion landed near the top of a steep incline. As they approached Copen's ball, the plaintiff stopped the cart and then attempted to set the brake which did not hold. With the plaintiff still applying pressure to the brake pedal, the cart began to roll

backward, picking up speed until it struck a rock which sheared off the front wheel. The plaintiff and his companion were thrown out of the cart, which rolled over on the plaintiff, resulting in personal injuries to him. Copen testified that plaintiff was "pumping on that brake" as the cart rolled downhill. Plaintiff's expert witness testified as follows:

> " . . . To get the maximum braking effect, you leave it in. In other words, you keep the pressure on the brake. So that a man who would be pumping or attempting to pump that brake would be releasing the brake each time he pumped. So that if a man, because he panicked or something else, started pumping that brake, he'd be working against himself, he'd be letting the brake off when he should have it on.
>
> " . . . As to whether the fact that a cart rolled back down a hill with a man pumping the brakes would be any indication of a defect in the brakes or not would depend on the incline. If it is a steep incline, it could still roll and him pumping the brakes. Because each time he'd pump he'd be releasing the brakes."

With respect to whether any defects in the brakes on the golf cart could have been discovered by the defendants, plaintiff's expert witness testified:

> " . . . Other than a cable breaking, which would cause it to go suddenly, for the brakes to fail would be a gradual thing. The brake lining itself wearing, similar to your automobile would cause them to fail over a period of time. That would not be a sudden thing. It would take a considerable period of time for it to wear to a dangerous degree. A reasonable inspection would reveal whether or not it was worn to a dangerous degree. It would take many, many, many hours of driving to wear it to a dangerous degree.
>
> "As to what kind of inspection would reveal whether or not the linings of the brakes were worn to a dangerous degree, the first thing you would notice, if you have got any wear or loose motion back here, you don't have any brake pedal; you can push the pedal half or three-fourths down; you'd have no brakes. That would be the first sign. It is just like your car; you could still have brakes, but you

wouldn't have the full pedal. And a person who was renting those, who was skilled in them, from day to day by driving it could tell. There would be a visual inspection of the brake mechanism itself that one could tell whether or not the brakes were wearing or worn to a dangerous degree. Well, actually, you can't show it here. But if you know where the brake mechanism is, you can look into it from the side and you can see the brake lining, just like if we were looking at it here. . . . What I am basically saying is, that the operator has to periodically look at it to see. I'd say he should look at it once a year. If he looked at it and the brakes were worn, the brake lining should be replaced. Now, other than the lining wearing out, which would be over a period of time, and the cable breaking, which would be a sudden event, there is nothing that can cause the brakes of this vehicle to fail, that I know of. Assuming that the brakes on a vehicle failed after having been driven over nine and a half holes of a golf course, between 3,300 and 3,500 feet; I have an opinion satisfactory to myself that if the brakes had failed at the end of nine and a half holes as to whether or not a reasonable inspection would have revealed the defect at the time the cart was rented. The answer is yes.

* * *

"If you had the brakes to the floor and the vehicle was not stopping but instead was gaining speed, that would indicate some defects in the brakes. If you had the pedal all the way to the floor and the cart is still rolling, it would indicate some defects in the brakes."

In this regard, the plaintiff testified:

" . . . I was mashing the brake pedal with my foot as hard as I could, sir. The car was going backwards, at that time. . . . I was still trying to apply the brakes or trying to get the brakes to work. I was pressing upon the pedal."

At the close of plaintiff's evidence, the defendants' motion for a directed verdict was allowed on the grounds that the plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendants' negligence. The plaintiff appealed to this Court.

Roberts, Frye & Booth, by Leslie G. Frye; and Powell & Powell, by Harrell Powell, Jr., for plaintiff-appellant.

Deal, Hutchins & Minor, by John M. Minor and William Kearns Davis, for defendants-appellees.

BROCK, Judge.

We agree with the ruling of the trial judge that plaintiff has failed to offer evidence of defendants' negligence. Directed verdict for defendants is

Affirmed.

Judge MORRIS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

A bailor for hire may be liable for personal injuries proximately resulting from the defective condition of a vehicle rented by him, where he is aware of the defect, or by reasonable care could have discovered it. *Hudson v. Drive It Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4 (1952); 46 A.L.R. 2d 404, 443.

In the instant case, it would have been negligence for the defendants to have rented a golf cart with defective brakes to the plaintiff and his companion if the defects were known to the defendants or could have been discovered by reasonable inspection.

With respect to whether any defects in the brakes on the golf cart could have been discovered by the defendants, an expert witness for the plaintiff testified:

> " . . . I have an opinion satisfactory to myself that if the brakes had failed at the end of nine and a half holes as to whether or not a reasonable inspection would have revealed the defect at the time the cart was rented. The answer is yes.
>
> * * *
>
> "If you had the brakes to the floor and the vehicle was not stopping but instead was gaining speed, that would

indicate some defects in the brakes. If you had the pedal all the way to the floor and the cart is still rolling, it would indicate some defects in the brakes."

In this regard, the plaintiff testified:

"I was mashing the brake pedal with my foot as hard as I could, sir. The car was going backwards, at that time. . . . I was still trying to apply the brakes or trying to get the brakes to work. I was pressing upon the pedal."

"On appeal from the granting of a motion for directed verdict, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. *Anderson v. Mann,* 9 N.C. App. 397, 176 S.E. 2d 365 (1970)." *Adler v. Insurance Co.,* 10 N.C. App. 720, 179 S.E. 2d 786 (1971). See also *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971).

Evidence that the brakes failed to hold the golf cart on the incline when the plaintiff pressed the brake pedal as hard as he could, when considered with the testimony of the expert witness, is sufficient to raise an inference that the brake lining was defective at the time the cart was rented by the defendants to the plaintiff, and could have been discovered by a reasonable inspection, 46 A.L.R. 2d 404, § 8, which would permit, but not compel, the jury to find that the defendants' negligence proximately caused the accident resulting in personal injuries to the plaintiff.

In my opinion the judgment appealed from should be reversed.

STATE OF NORTH CAROLINA v. THOMAS ALLEN HOSICK

No. 7118SC418

(Filed 4 August 1971)

1. **Narcotics § 1— drug not listed in Uniform Narcotic Drug Act**

In order for any drug not listed or described in the Uniform Narcotic Drug Act to be classified as a narcotic drug within the intent and meaning of the Act, it must be a drug to which the federal narcotic laws apply or a drug found by the State Board of Health, after reasonable notice and opportunity for hearing, to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, or possess hallucinogenic properties similar to lysergic acid diethylamide.

2. **Narcotics § 1— determination that drug is narcotic — authority of State Board of Health**

Authority given the State Board of Health by G.S. 90-87(9) to determine that a drug is a narcotic drug is not an unconstitutional delegation of legislative authority.

3. **Narcotics § 1— MDA as a narcotic — insufficiency of findings by State Board of Health**

State Board of Health's passage of a motion "that the drug, Methylenedioxyamphetamine (MDA) be added to the list of drugs in the Uniform Narcotic Act" was insufficient to make MDA a narcotic drug under the provisions of G.S. 90-87(9), where there was no finding by the Board that MDA has an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, or that it possesses hallucinogenic properties similar to lysergic acid diethylamide.

APPEAL by defendant from *Kivett, Judge,* 1 February 1971 Session of Superior Court for the trial of criminal cases held in GUILFORD County.

The indictment upon which defendant was tried contained two counts and read as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That THOMAS ALLEN HOSICK late of the County of Guilford on the 31st day of January 1970 with force and arms, at and in the County aforesaid, did unlawfully, wilfully, and feloniously have in his possession and under his control the narcotic drug, 3, 4—Methylenedioxyamphetamine, commonly known as MDA in violation of Chapter 90, Section 88, of the General Statutes of North Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the State.

AND THE JURORS FOR THE STATE, UPON THEIR OATH, DO FURTHER PRESENT, That THOMAS ALLEN HOSICK late of the County and State aforesaid, on the day and date aforesaid, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously sell to one Larry Sonberg, the narcotic drug, 3, 4—Methylenedioxyamphetamine, commonly known as MDA in violation of Chapter 90, Section 88, of the General Statutes of North Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The jury returned a verdict of guilty as charged. From the imposition of judgment of imprisonment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Jones for the State.

J. Erle McMichael, Fred G. Crumpler, Jr., and Michael J. Lewis for defendant appellant.

MALLARD, Chief Judge.

Before pleading the defendant moved to quash the bill of indictment on the grounds that "the drug, 3, 4—Methylenedioxyamphetamine (MDA) had not been referred to in the motion made by Dr. Baker at a hearing conducted by the North Carolina State Board of Health on December 4, 1969, as 3, 4—Methylenedioxyamphetamine (MDA) but had been referred to as Methylenedioxyamphetamine and that, therefore, the charge against the Defendant having to do with 3, 4—Methylenedioxyamphetamine (MDA) had not been outlawed by the action of the Board of Health on December 4, 1969, and therefore, no crime had been committed; and that notices given in the various newspapers concerning the hearing scheduled for the date of December 4, 1969, had not been reasonable and consequently that the Defendant had not had an opportunity to be present at the meeting of the State Board of Health on December 4, 1969, to be heard with reference to the question of whether or not 3, 4—Methylenedioxyamphetamine (MDA) is a narcotic drug."

On the motion to quash the following proceedings were held: A certified copy of the minutes of the State Board of

Health (with all nine members present) held on 4 December 1969 was marked State's Exhibit 1 and introduced into evidence without objection. The pertinent parts of these minutes read as follows:

> "The next item on the agenda was a public hearing relative to the classification and legal status of the new drug, 3, 4—Methylenedioxyamphetamine (MDA). Mr. Charles Dunn, Director, State Bureau of Investigation, Dr. Peter N. Witt, Director of Research, Department of Mental Health, members of the staff of the SBI, and representatives from the Department of Mental Health were present. Dr. Peter Witt, of Mental Health, and Mr. William S. Best, Chief Chemist for the SBI, answered questions from the Board concerning the technical aspects of the drug. Mr. Dunn expressed appreciation for the opportunity of coming to talk about what he feels is a serious problem in North Carolina. He said: 'The State Bureau of Investigation believes that MDA is becoming a problem in North Carolina. We have had several cases of it in our Laboratory. We would like to point out that the findings of various individuals and groups indicate this is a dangerous drug. It is being sold and possibly manufactured in the State of North Carolina. At the present time we do not have the authority to cope with it legally.' Mr. Dunn explained that MDA is not now one of the drugs included in the registry of federally controlled drugs or one included in the Uniform Narcotic Act (90-86). Statute 90-87 (9) provides for the State Board of Health to determine that a particular drug has addiction forming or addiction sustaining liability or possesses halluncinogenic properties similar to lysergic acid diethylamide. Mr. Dunn wished to know whether the State Board of Health would make such a determination of MDA. Dr. Raper inquired if any member of the public wished to be heard concerning this matter. No one did, and the secretary was instructed to let the minutes show that no one was heard. Motion was made by Dr. Baker THAT THE DRUG, (3, 4—) METHYLENEDIOXYAMPHETAMINE (MDA) BE ADDED TO THE LIST OF DRUGS IN THE UNIFORM NARCOTIC ACT (90-86). The motion was seconded by Dr. Dawsey and carried unanimously."

The State offered the testimony of Ben Eaton (Eaton) that State's Exhibit 1 is an exact copy of the minutes, and he also testified that State's Exhibit 2 is a copy of a certified abstract taken from these minutes. There is a difference between the two exhibits. In Exhibit 1 in the motion made by Dr. Baker, the figures "3, 4—" appear to be made with a ballpoint pen in handwriting before the word "Methylenedioxyamphetamine" and in Exhibit 2 these figures do not appear. Eaton testified that he was Director of Administrative Services Division, State Board of Health and that "(o)n Page 4, motion was made by Dr. Baker that the drug Methylenedioxyamphetamine (MDA) be added to the list of drugs in the Uniform Narcotic Act, and I have gone in there and writen '3, 4' to that. The minutes reflect March 5, 1970."

On cross-examination Eaton testified that the "3, 4—" was not added by the Board members, that he added this to the motion and does not know whether there is a difference between the drug "3, 4—Methylenedioxyamphetamine" and Methylenedioxyamphetamine. Eaton also testified that "the notices that were run in the newspapers, these notices referred to MDA, spelling it out, and then abbreviating it." This testimony is not corroborated by State's Exhibits 3, 4, 5 and 6 containing photocopies of the notices published. Each of these notices refers only to the "drug MDA" and does not spell it out. They were published on 29 November 1969, 1 December 1969, and 3 December 1969 in Raleigh, Charlotte and Greensboro, respectively. The four exhibits give notice of a public hearing on 4 December 1969 to consider the "drug MDA as to addiction-forming or addiction-sustaining qualities or possessing hallucinogenic properties."

The State further offered the testimony of Dr. Peter Witt who testified that he was a medical doctor, Director of Research for the North Carolina Department of Mental Health, and a lecturer of Pharmacology at the University of North Carolina at Chapel Hill. He said: "There would be a great difference between 3, 4—Methylenedioxyamphetamine or 1, 2—Methylenedioxyamphetamine, or 5, 6—Methylenedioxyamphetamine." But Dr. Witt stated that he would not have any doubt at all as to what was being referred to in the notice.

There was no further evidence offered on the motion to quash. The court denied the motion after finding, among other things, that at the meeting on 4 December 1969, the members of the State Board of Health, in using the word "Methylenedioxyamphetamine," had "in mind 3, 4—Methylenedioxyamphetamine (MDA)," that reasonable notice was given of the meeting, and that the State Board of Health "added that day the drug '3.4—Methylenedioxyamphetamine' (MDA) to the list of drugs proscribed in the Uniform Narcotic Act under G.S. 90-87(9)."

The defendant assigns as error the failure to quash the bill of indictment.

G.S. 90-87(9), which is part of the Uniform Narcotic Drug Act, defines narcotic drugs in the following language:

> " 'Narcotic drugs' means coco [coca] leaves, opium, opium poppy, cannabidial, tetrahydro-cannabinol, cannabis, peyote, mescaline, psilocybe mexicana, psilocybin, lysergic acid diethylamide, or other psychedelic drugs or hallucinogens, or any derivatives of any of these which possess hallucinogenic properties, and every other substance neither chemically nor physically distinguishable from them; and other drugs to which the federal narcotic laws may now apply; and any drug found by the State Board of Health, after reasonable notice and opportunity for hearing to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, or possesses hallucinogenic properties similar to lysergic acid diethylamide, from the effective date of determination of such finding by said State Board of Health."

[1] The Uniform Narcotic Drug Act does not specifically list MDA as a narcotic drug. According to the minutes of the State Board of Health, MDA was not included in the registry of federally controlled drugs, and in this case the State relied upon the action of the State Board of Health to bring MDA under the classification of a narcotic drug. In order for any drug not listed or described in the Uniform Narcotic Drug Act to be classified as a narcotic drug within the intent and meaning of the Act, it must be a drug to which the federal narcotic laws applied or be a drug *found* by the State Board of Health, *after reasonable notice* and *opportunity for hearing,* to have an *addiction-forming* or *addiction-sustaining* liability similar to

morphine or *cocaine,* or *possess hallucinogenic properties* similar to *lysergic acid diethylamide.* It then becomes, by virtue of the statute, a narcotic drug from the effective date of such *determination* or finding.

[2] The Legislature in G.S. 90-87(9) delegated to the State Board of Health the power and authority to find facts. We hold that the standards set out therein are sufficient and that this is not an unconstitutional delegation of legislative authority. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310 (1953); 1 Am. Jur. 2d, Administrative Law, § 111, p. 910; 1 Am. Jur. 2d, Administrative Law, § 117, p. 923.

[3] However, in the case at bar the minutes of the State Board of Health do not show that there was a *finding* or *determination* by the State Board of Health that MDA had an addiction-forming or addiction-sustaining liability similar to morphine or cocaine. Neither was there a *finding* or *determination* that it possessed hallucinogenic properties similar to lysergic acid diethylamide. Absent such a finding or determination, MDA was not a narcotic drug as defined in the Uniform Narcotic Drug Act. The action of the State Board of Health, in passing the motion "that the drug, Methylenedioxyamphetamine (MDA) be added to the list of drugs in the Uniform Narcotic Act (90-86)," is insufficient to make MDA a narcotic drug under the provisions of G.S. 90-87(9) and bring it within the list of drugs classified as narcotic drugs under the provisions of the Uniform Narcotic Drug Act. Therefore, the indictment does not charge a crime. The trial judge's conclusion that the State Board of Health added "the drug '3, 4—Methylenedioxyamphetamine to the list of drugs proscribed in the Uniform Narcotic Act under G.S. 90-87(9)" is not supported by the evidence and the record, and the trial judge committed error in failing to quash the bill of indictment.

In view of the above, we do not discuss or decide whether the notice that was given was "reasonable notice" as required by G.S. 90-87(9), whether the provisions of G.S. 143-195 were complied with, whether the provisions of G.S. 143-198.1 were applicable, or any of defendant's other assignments of error.

The judgment of the superior court is vacated.

Judgment arrested.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. GRADY DEBBS KERSH

No. 7129SC460

(Filed 4 August 1971)

1. **Indictment and Warrant § 9— surplus averments**

If an averment in an indictment is not necessary in charging the offense, it may be disregarded.

2. **Burglary and Unlawful Breakings § 10— possession of housebreaking tools — indictment — surplus allegation**

In an indictment alleging possession of housebreaking implements, an allegation that defendant possessed implements for opening car doors, which was not illegal under the statute, could be disregarded as surplusage. G.S. 14-55.

3. **Burglary and Unlawful Breakings § 10; Indictment and Warrant § 17— possession of housebreaking tools — variance between indictment and proof**

There was no material variance between an indictment alleging that the housebreaking tools possessed by defendant were in front of "his automobile" and evidence indicating that another person owned the automobile and that most of the tools were located in the trunk of the car.

4. **Searches and Seizures § 2— warrantless search of automobile — consent of owner**

The evidence fully supported a finding that the owner of an automobile voluntarily consented to a warrantless search which uncovered defendant's housebreaking implements in the trunk of her car, and there is no merit to defendant's contention that the officers undertook the search by means of a defective search warrant.

5. **Criminal Law § 175— review of findings of fact**

Findings of fact made by the trial judge are conclusive on review if supported by any competent evidence.

6. **Criminal Law § 76— admissibility of spontaneous statement to police officers**

Evidence fully supported a finding that defendant's statement to police officers explaining his possession of housebreaking implements was made spontaneously and as a voluntary statement and not as a result of a custodial interrogation.

APPEAL by defendant from *Snepp, Judge,* 26 January 1970 Session of Superior Court held in POLK County.

Defendant was tried upon a bill of indictment charging that on 21 September 1969 he unlawfully, wilfully and feloniously had in his possession and without lawful excuse "implements

of housebreaking and burglary, to wit: pick-locks, keys, bits and wires used for the purpose of opening locked doors of autobiles; screwdrivers, files and a crowbar, located in the front of his automobile in Polk County. . . . "

The State offered evidence tending to show the following:

At approximately 12:30 p.m. on 21 September 1969 the Chief of Police of Tryon saw defendant use a credit card listed in another's name for the purchase of gas at a Tryon service station. Defendant was driving a 1963 Ford with a Michigan license plate and was accompanied in the car by Mrs. Pearl Scruggs. After being advised of his constitutional rights, defendant requested counsel and was furnished with a list of attorneys and their telephone numbers. As a result of a telephone call Attorney William Miller came to the station and conferred with defendant. Mr. Miller did not agree to represent defendant at that time but was later appointed as his attorney.

Mrs. Scruggs furnished the Tryon police with a registration card indicating the 1963 Ford was registered in her name in the State of Michigan. The license plates displayed on the car did not conform to the registration so a warrant was obtained charging Mrs. Scruggs with improper registration. While the warrant was being prepared the car was searched and various implements were seized, including a crowbar which was located in the front of the car, and various items located in the trunk including a set of 18 lock-picks, 4 pull keys, 7 different tension tools, about 2,000 automobile "try keys" and various master keys for different types of door locks. Also found in the car were five different sets of license plates, 146 cartons of cigarettes, a tape recorder, slugs which could be used in coin machines, and other items.

While the search was being conducted an officer, upon seeing the tools, remarked to another officer, "What do we have here?" Defendant then said something to the effect: "That's all right, those are mine, I am a locksmith. . . . I wish we had driven the other car today."

Mrs. Scruggs testified that the tools did not belong to her and that defendant had packed the automobile.

The jury returned a verdict of guilty and from judgment of imprisonment imposed thereon defendant appealed.

Attorney General Morgan by Deputy Attorney General White and Trial Attorney Hart for the State.

J. T. Arledge for defendant appellant.

GRAHAM, Judge.

Defendant contends that his motion to dismiss and his subsequent motion in arrest of judgment were improperly overruled, arguing that the bill of indictment did not charge the offense of possessing implements of housebreaking as set forth in G.S. 14-55; and further, that there was a fatal variance between the indictment and the proof.

The indictment was drawn under the provisions of a portion of G.S. 14-55 which provides: "If any person . . . shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; . . . such person shall be guilty of a felony. . . . " In our opinion the indictment clearly charges a violation of this provision. See *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377.

[1, 2] Defendant's position is apparently that reference in the indictment to "wires used for the purpose of opening locked doors of automobiles" renders the charge ambiguous. It is true that G.S. 14-55 does not make it illegal to possess implements used for opening car doors. However, reference in the indictment to the defendant's possession of items used for this purpose is mere surplusage since the indictment also charges the possession of specific items listed in the statute, and the proof shows that defendant possessed these specific items as well as other items which come within the generic term of implements of housebreaking. If an averment in an indictment is not necessary in charging the offense, it may be disregarded. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252; *State v. Dixon,* 8 N.C. App. 37, 173 S.E. 2d 540.

[3] Defendant contends that a variance between the indictment and the evidence arises because the indictment alleges that the items defendant possessed were in the front of "his automobile"; whereas, the evidence indicated Mrs. Scruggs owned the auto-

mobile, and further, that most of the tools in question were located in the trunk of the automobile. These variances are not material. The evidence tended to show that defendant was in control of the automobile; also, that he owned the tools and had placed them therein. Under these circumstances, who owned the automobile, and where the tools were located therein, were not essential elements which had to be shown in order to convict defendant of possession of burglary tools within the meaning of G.S. 14-55.

[4] Defendant next contends that the search of Mrs. Scruggs' automobile was illegal since, at the time of the search, the officers were in possession of a search warrant which was later found to be defective. It is true, as defendant asserts, that a search cannot be justified as lawful on the basis of consent when consent is based upon a representation by the official conducting the search that he possesses a warrant. *Bumper v. North Carolina,* 391 U.S. 543, 20 L. Ed. 2d 797, 88 S.Ct. 1788. Here, however, there was no representation by the officer to this effect. In fact it was not until after Mrs. Scruggs consented to the search that a warrant was obtained. The officer conducting the search explained that he obtained the warrant to be on the safe side, stating "I was trying both ways. . . . I am not a learned lawyer by any means."

The circumstances of this case do not compare even slightly with those in *Bumper.* There, evidence was presented upon *voir dire* from which the Supreme Court of the United States concluded that the consent given was in effect coerced. The occupant of the premises searched testified: "He [the law enforcement officer] said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word." Mr. Justice Stewart, speaking for the majority of the court, stated: "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." There was no evidence presented here that Mrs. Scruggs believed, or had any reason to believe, that at the time she consented to the search, the officers were armed with lawful authority to conduct the search and therefore to resist the search would be futile. On the contrary, the evidence was that she gave the keys to the officer and said "go ahead and search it."

Mrs. Scruggs was present at trial and testified before the jury for the State. It is significant that defendant did not call her to testify on *voir dire* and presented no evidence to the effect that she did not freely and voluntarily consent to the search.

[4, 5] After an extensive *voir dire* hearing on the question of the constitutionality of the search, the court made extensive findings of fact and concluded that the tools in question were seized as a result of a search to which the owner of the car had consented. Findings of fact made by the trial judge are conclusive on review if supported by any competent evidence. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. We hold that the evidence amply supported the court's findings which in turn support the conclusions reached.

[6] Defendant assigns as error the admission of his statement made while the search was being conducted. He contends that the statement came after he had requested counsel and before counsel had been obtained. Whether this is correct is immaterial as the court found the facts from evidence elicited upon *voir dire* and concluded that the statement was not made as a result of custodial interrogation, but was made spontaneously and as a voluntary statement. The evidence compels this conclusion. Defendant testified on *voir dire,* "I do not recall being asked anything at the time of the search. . . . At the time we were standing there when something was said about tools, I said 'They are Gary's tools, he is a locksmith student.' " Thus, it appears defendant's contention at the trial related to the accuracy of the statement attributed to him, and not to the question of whether the statement resulted from continued interrogation after counsel was requested. This assignment of error is overruled.

Defendant's other assignments of error have been reviewed and found without merit.

No error.

Judges BROCK and VAUGHN concur.

State v. McCall and State v. Sanders and State v. Hill

STATE OF NORTH CAROLINA v. MELVIN McCALL

— AND —

STATE OF NORTH CAROLINA v. SAMUEL SANDERS

— AND —

STATE OF NORTH CAROLINA v. BILLIE HILL

No. 717SC417

(Filed 4 August 1971)

1. **Criminal Law § 92— consolidation of larceny charges against three defendants**

The trial court did not err in consolidating for trial prosecutions against three defendants for the larceny of money from a Piggly Wiggly Store. G.S. 15-152.

2. **Larceny § 6— testimony as to amounts of money found on defendants and another**

In this prosecution of three defendants for larceny, the trial court did not err in the admission of testimony by a police officer that each defendant, when arrested, had between $20 and $25 on his person and that a fourth occupant of the car in which defendants were riding had $221, the testimony being offered to show why defendants were charged with larceny of a greater amount than that found in a paper bag which had been thrown from defendants' car.

3. **Indictment and Warrant § 17— larceny — variance — ownership of stolen money**

There was no fatal variance between indictment and proof where the indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc.," there being no evidence that any other Piggly Wiggly store existed in the city or county, and there being nothing to indicate that the defendants, witnesses or jurors were confused by the difference in names.

4. **Indictment and Warrant § 17— larceny — variance as to amount stolen**

There was no fatal variance where the indictment charged felonious larceny of $1948 and the evidence showed felonious larceny of $1748.

5. **Larceny § 8— instructions on doctrine of recent possession**

In this prosecution of three defendants for larceny of money from a grocery store, evidence tending to show that a witness saw the defendants run from the store carrying a paper bag, enter a car and drive away, and that a paper bag containing the money was thrown from the right front seat of a car occupied by defendants and two others while the car was being chased by a patrolman a short time later, *held* sufficient to justify instructions as to all defendants on the doctrine of recent possession, notwithstanding the right front seat of the car was occupied by a person who is not a defendant.

State v. McCall and State v. Sanders and State v. Hill

APPEAL by defendants from *Martin, Special Judge,* 4 January 1971 Session of WILSON Superior Court.

Defendants were charged, in separate bills of indictment, with larceny of $1,948.00 from Piggly Wiggly Store #7, a corporation, on 24 July 1970. Upon motion of the State, the trials of defendants were consolidated.

Evidence for the State tended to show: The manager of the Piggly Wiggly store in Wilson, North Carolina, Hilton Kennedy, on 24 July 1970, approached the door to the office of the store and saw someone crouched behind the door. As he entered the office he saw a long screwdriver and a money bag lying on the floor and concluded that the store had been robbed. He immediately hollered to his employees and called the police. An employee of the store, Thomas Tyndall, saw the defendants run from the store carrying a paper bag, get into a car, and drive away. Tyndall obtained the license number and description of the car in which defendants left.

State Highway Patrolman Conwell testified: He had been given, by radio, a description and license number of a car to watch for. While watching traffic, he observed a car fitting the description given him and occupied by defendants. He gave chase and as he closed in on the car, a bottle and a paper bag were thrown from the front seat of the car on the passenger's side. Noting where the bag had been thrown, Patrolman Conwell apprehended defendants and two other occupants of the car some distance down the road. After assistance arrived at the scene, he went back to where the bag had been thrown and found the bag along with some scattered money around it. He put the money back in the bag and turned it over to Detective Johnny Moore of the Wilson Police Department.

Detective Moore testified that the bag contained $1,749.00 in paper money and that he made a search of the occupants of the car. Further testimony by Detective Moore is hereinafter referred to.

The jury returned a verdict of guilty as charged. Defendant McCall was given a prison sentence of three to five years, and defendants Hill and Sanders prison sentences of seven to ten years each. They appealed.

Attorney General Robert Morgan by Assistant Attorney General Henry T. Rosser for the State.

Lucas, Rand, Rose, Meyer, Jones & Orcutt by David S. Orcutt for defendant appellants.

BRITT, Judge.

[1] Defendants first assign as error the denial of their motions for separate trials and the allowance of the State's motion to consolidate the cases against them for the purpose of trial. This contention is without merit. The offenses charged were so connected and tied together in time, place, and circumstances as to make one continuous criminal episode. In such cases, there is ample authority for a consolidation. G.S. 15-152; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965); *State v. Walker,* 6 N.C. App. 447, 170 S.E. 2d 627 (1969). See also, *State v. Blackburn,* 6 N.C. App. 510, 170 S.E. 2d 501 (1969). The motions made by defendants and by the State were addressed to the sound discretion of the trial judge. *State v. Walker, supra.* No abuse of discretion having been shown, the assignments of error are overruled.

[2] Defendants' next assignment of error is directed to the testimony of Detective Moore of the Wilson Police Department concerning his reasons for charging defendants with larceny of $1948.00 rather than $1748.00, the amount found in the paper bag. Detective Moore testified that each defendant had between $20.00 and $25.00 on his person and that a fourth occupant of the car, Robert Holmes, had $221.00. The trial judge overruled an objection and denied a motion to strike. Detective Moore then testified, without objection, that as a result of his investigation and conversations with the occupants of the car the sum of $200.00 was added to the money found in the paper bag. He further stated that he left each occupant of the car with the approximate sum of money that each stated was his own. The admission of this testimony was not error. The search was conducted as an incident of the arrest. The results of the search were offered merely to show how the officers arrived at the amount which defendants were charged with taking. While it may not have been necessary to offer this testimony, no error resulted from its admission.

[3] Defendants' third assignment of error is directed at the denial of their motions for nonsuit based on an alleged fatal

variance between the evidence and the bills of indictment. The indictments laid title to the money alleged to have been stolen in Piggy Wiggly Store #7, a corporation. The witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc." In support of their assignment of error defendants rely principally on *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413 (1965) and *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967). We think these cases are distinguishable from the instant case. In *Brown,* the bill of indictment referred to a building and property of "Stroup Sheet Metal Works, H. B. Stroup, Jr., owner"; the evidence showed that the property belonged to "Stroup Sheet Metal Works, Inc." The indictment laid ownership in an individual while the evidence showed the ownership to be in a corporation, an entirely different entity. In *Miller,* the indictment charged the defendants with breaking and entering a building "occupied by one Friedman's Jewelry, a corporation." The evidence showed that the occupant of the building was actually "Friedman's Lakewood, Incorporated," that there were three Friedman's jewelry stores in the city, each a separate entity, and that there was in fact a corporation known as "Friedman's Jewelry" with its home office in Augusta, Georgia, and that it was the owner of the property in the building broken into.

In the present case ownership was alleged in a corporation and the evidence showed that it was in a corporation. There was no evidence that any other Piggly Wiggly store existed in the city or the county and nothing to indicate that the defendants, witnesses, or jurors were confused by the difference in the names. Defendants' third assignment of error is overruled.

[4] Defendants' contention that there was a fatal variance between the bill of indictment and the evidence because the indictment alleged felonious larceny of $1948.00 and the evidence showed felonious larceny of $1748.00 (also evidence of $1749) is without merit. The offense charged was that of felonious larceny. In order to distinguish the offense of felonious larceny from misdemeanor larceny, it is necessary to show that the value of the property stolen was more than $200.00. G.S. 14-72. This having been done, a difference between the value alleged in the bill of indictment and the value shown by the evidence is immaterial.

[5] Defendants' final assignment of error is directed at the charge to the jury on the doctrine of recent possession. Defendants first contend that there was no evidence that the bag containing the money was in the possession of defendants; thus the trial judge should not have charged on recent possession. There is no merit in this contention. The evidence showed that defendants were seen running from the store to the car carrying a paper bag; as the patrolman was chasing, a paper bag was thrown from the right-hand side of the car occupied by defendants and two others; on returning to the spot where the bag was thrown from the car, the patrolman found a bag with $1749 in or around it. Although Robert Holmes was sitting in the front on the right hand side of the car when the bag was thrown out, all of the evidence when considered together warranted a charge on recent possession as to all defendants.

Defendants also contend that the trial judge committed error in failing to charge that money in the possession of Robert Holmes should not be used as evidence unless the jury was satisfied beyond a reasonable doubt that defendants also were in possession of the money. An examination of the charge, considered in its entirety, reveals that the burden of proving every element of the crimes charged, including possession, was placed on the State. This assignment of error is overruled.

We hold that defendants had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LUTHER HAGER

No. 7120SC484

(Filed 4 August 1971)

1. **Constitutional Law § 32; Criminal Law § 21— counsel at preliminary hearing — nonretroactivity of U. S. Supreme Court decision**

U. S. Supreme Court decision that an accused has a constitutional right to counsel at a preliminary hearing is not retroactive and applies to preliminary hearings held after 22 June 1970.

2. **Criminal Law § 112— instructions — placing burden on defendant to disprove State's evidence**

Instruction that "the burden of proof never rests upon the defendant to show his innocence, *but* to disprove the facts necessary to establish the crime for which he is charged" constitutes prejudicial error, since it tends to place a burden upon defendant to disprove evidence presented by the State.

3. **Criminal Law § 168— conflicting instructions on material aspect**

Conflicting instructions upon a material aspect of a case must be held prejudicial error since it cannot be known which instruction was followed by the jury.

4. **Criminal Law § 158— conclusiveness of record**

The Court of Appeals is bound by the record as certified to it.

APPEAL by defendant from *Godwin, Special Judge,* 1 June 1970 Session of Superior Court held in STANLY County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felonies of forgery and uttering a forged instrument.

The jury found the defendant not guilty of forgery but guilty of uttering a forged instrument.

Defendant's appeal was originally heard in this Court during the 1970 Fall Session. At that time defendant asserted by affidavit that notwithstanding his diligent efforts he had been unable to obtain from the court reporter a transcript of the evidence and the court's charge. One of the assignments of error was that the defendant had been denied the right to a meaningful appeal because of his inability to obtain and the State's failure to provide a transcript. Before opinion was rendered a transcript was obtained by the Director of the Administrative Office of the Courts and delivered to defendant's counsel. Thereafter, in compliance with an order of the Supreme Court, this

Court remanded the case to the Superior Court of Stanly County to the end that defendant could, if so advised, proceed to perfect his appeal. The record on appeal, this time containing a narrative of the testimony and the court's charge, was again docketed in this Court and the case was reviewed a second time during our 1971 Spring Session.

Attorney General Morgan by Assistant Attorney General Briley for the State.

Charles P. Brown for defendant appellant.

GRAHAM, Judge.

[1] Defendant contends his constitutional right to counsel was violated in that counsel was not provided for him at a preliminary hearing. In support of this contention he cites *Coleman v. Alabama,* 399 U.S. 1, 26 L. Ed. 2d 387, 90 S.Ct. 1999 (1970). In that case, the Supreme Court of the United States held that a preliminary hearing is a critical stage of the prosecution so as to constitutionally require the furnishing of counsel to protect the rights of a defendant. The case was remanded to the Alabama Supreme Court for a determination of whether the failure to provide counsel for defendant at his preliminary hearing constituted harmless error.

Before the decision in *Coleman,* our Supreme Court had consistently held that counsel at a preliminary hearing was not necessary where the proceedings were not in any way prejudicial to the trial itself. *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885; *State v. Clark,* 272 N.C. 282, 158 S.E. 2d 705; *State v. Miller,* 271 N.C. 611, 157 S.E. 2d 211; *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740.

Coleman was decided 22 June 1970. This defendant's preliminary hearing was held 10 June 1969. The question is therefore whether the decision in *Coleman* is retroactive. If it is not, defendant is entitled to no relief because he has not shown that the proceedings at his preliminary hearing were prejudicial to the trial itself.

Federal courts of appeal in at least three circuits have refused to apply the ruling in *Coleman* retroactively. *Phillips v. State of North Carolina,* 433 F. 2d 659 (4th Cir. 1970); *Konvalin v. Sigler,* 431 F. 2d 1156 (8th Cir. 1970); *United States ex*

rel. Bonner v. Pate, 430 F. 2d 639 (7th Cir. 1970).

In *Phillips* it is stated:

"We conclude that the limited purpose which might be served by making *Coleman* retroactive is clearly outweighed by the state's proper reliance on the former standard and the resulting burden on the administration of criminal justice. We hold, therefore, that *Coleman* should apply only to those preliminary hearings held after June 22, 1970."

In *Konvalin* we find:

"Although it might be said that the ruling in *Coleman* had been foreshadowed, there is no doubt that a great many states followed the rule as applied in this circuit, that counsel at the preliminary hearing was not necessary where the proceedings were not in any way considered prejudicial to the trial itself. . . . State law enforcement officials undoubtedly have relied upon this weight of authority. To apply the rule retroactively would be the genesis for literally hundreds of post-conviction evidentiary hearings which in sheer numbers would virtually shatter the bounds of reality. . . . "

In *Pate,* the court held:

"Since denial of an attorney at a preliminary hearing when no rights are lost does not 'invariably deny a fair trial, * * * ' we hold that the ruling announced in *Coleman* is not retroactive."

Under the retroactivity rule expressed in *Foster v. California,* 394 U.S. 440, 22 L. Ed. 2d 402, 89 S.Ct. 1127 (1969); *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S.Ct. 1967 (1967); *Phillips v. North Carolina, supra; Konvalin v. Sigler, supra;* and *United States ex rel. Bonner v. Pate, supra,* we are of the opinion and so hold that the principles of law set forth in *Coleman* ought not to be applied retroactively under the facts of this case and that the defendant's contention in this respect is without merit. See also *Wetzel v. North Carolina,* 399 U.S. 934, 26 L. Ed. 2d 805, 90 S.Ct. 2250 (1970).

Defendant assigns as error several portions of the charge. In each instance it appears likely that the statements giving rise to exception resulted from error on the part of the court

reporter in transcribing the charge. For instance, the record reflects the following which are subjects of exception:

> "The burden of proof never rests upon the defendant to show his innocence, *but* to disprove the facts necessary to establish the crime for which he is charged.
>
> * * *
>
> "Although, in this case there has been evidence, as I have *argued,* introduced by the State of North Carolina tending to show that at the time mentioned in the bill of indictment that the defendant in this case did offer this check for payment for value. . . .
>
> * * *
>
> "Now, in the second count in the bill of indictment, . . . there are four separate elements to that charge. You *may* find from the evidence and beyond a reasonable doubt, that all the elements are present in this case on the second count before you may return a verdict of guilty on that count." (Emphasis added.)

[2] The first portion of the charge set forth above which relates to the burden of proof is clearly erroneous for it tends to place a burden upon defendant to disprove evidence presented by the State. " 'Where no admission is made or presumption raised, calling for an explanation or reply on the part of the defendant, the plea of not guilty challenges the credibility of the evidence, even if uncontradicted, since there is a presumption of innocence which can only be overcome by a verdict of the jury.' *S. v. Davis,* 223 N.C., 381, 26 S.E. (2d), 869; *S. v. Hill,* 141 N.C., 769, 53 S.E., 311. . . . " *State v. Stone,* 224 N.C. 848, 850, 32 S.E. 2d 651, 652.

[3] The charge contained in the record shows that in other portions the jury was correctly instructed with respect to the burden of proof. However, conflicting instructions upon a material aspect of a case must be held prejudicial error since it cannot be known which instruction was followed by the jury. *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582; *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802.

[4] It is with reluctance that we remand the case for a new trial for we feel that the possibility is great that the errors which dictate this result are stenographical rather than judicial.

However, the record before us has been accepted by the solicitor and certified here by the clerk. We are bound by the record as certified to this Court. See *State v. Locklear,* 8 N.C. App. 535, 174 S.E. 2d 641. Perhaps the case will serve to encourage counsel and solicitors to review records with care and to call to the attention of the trial judge any material errors which appear to have resulted from an inaccurate transcript.

New trial.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES VINCENT MONTGOMERY

No. 7126SC435

(Filed 4 August 1971)

Robbery § 4— common law robbery — permanent intent to deprive owner of property — sufficiency of evidence

In a prosecution charging defendant with common law robbery, evidence that defendant's friend forcibly took a pistol from a storekeeper's hand while the defendant was hitting the storekeeper over the head with a boat paddle and that the storekeeper never saw the pistol again *is held* sufficient to support a jury finding that the defendant and his friend intended to permanently deprive the storekeeper of the pistol, notwithstanding defendant's contention that their immediate purpose was to disarm the storekeeper so that he could not use the pistol against them.

APPEAL by defendant from *Hasty, Judge,* 30 November 1970 Schedule "A" Criminal Session of Superior Court held in MECKLENBURG County.

Indictment: Common-law robbery. Plea: Not guilty. The State introduced evidence to show: About 3:55 p.m. on 9 July 1970 storekeeper Arthur Louis Frazier was standing behind the counter at the cash register in Frazier's Grocery on Beatties Ford Road in Mecklenburg County. The only other person in the store at the time was his employee, Mike Booker, who was leaning against the drink box about twenty feet away from the cash register. Four boys entered the store and went toward the back of the store. One of the boys struck Booker in

the head with his fist. On seeing this, Frazier picked up a loaded pistol from beside the cash register. Before he could get his finger in the trigger hole, one of the boys struck him twice across the head with a boat paddle taken from the store's stock. The four boys then jumped across the counter on top of Frazier, who had the pistol in his hand but still did not have his finger in the trigger hole. Frazier was holding the gun pointed down to keep from shooting himself. The boys took the gun away from Frazier and then ran out of the store. The pistol was valued at $40.00 and Frazier has not seen it since. After the boys left, Frazier went to the hospital where his wounds required over 100 stitches. A fingerprint expert testified that he found a fingerprint of defendant's right ring finger on the paddle which had been used to hit Frazier. After defendant was arrested, he voluntarily signed a waiver of his constitutional rights and made a voluntary statement, which was reduced to writing by an officer and signed by defendant, and which was as follows:

"I, the undersigned, Charles Vincent Montgomery, of 2133 Holly St., Charlotte, N. C., being 17 years of age, born at Charlotte, N. C. on 8-13-52, do hereby make the following statement to L. S. Mathis, he having first identified himself as a Mecklenburg County Police Officer, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement may later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

"I parked the car on Grier Grove Rd. and walked up Beatties Ford Rd. towards Frazier's Grocery, then Ike (Isaac Harris) said, 'He hadn't forgotten what that man did to him.' We walked inside Frazier's Grocery on Beatties Ford Road, Jerry and Ike were next xx (LSM) to the white boy in the store, when Jerry or Ike hit the white boy. I don't know which one hit him first. Flattop (David Larry Brooks) and Pablo (William Henry Richardson) and myself stayed in the store as if we did not know the boys that had hit the white boy. After Ike and Jerry hit the white boy they ran from the store. When the man behind the

counter pulled a gun I hit him with a boat paddle to keep him from shooting us. Pablo took the gun from the man. We all ran from the store back to xx (LSM) my car."

Defendant testified in substance as follows: On 9 July 1970 he and four other boys went to Frazier's store to get a carton of orange juice. The boy leaning on the drink box would not move when Pablo asked him to move. Pablo hit the boy with his hand. The boys got the orange juice and were walking toward the front when Mr. Frazier pulled out a gun. Jerry Johnson hit Frazier with the paddle and Pablo took the gun from Frazier. Defendant did not know what Pablo did with the gun, but he didn't have it afterwards. Defendant stopped Johnson from hitting Frazier any more, and defendant's fingerprints got on the paddle when he did so. Defendant admitted that he signed the statement which the State had introduced in evidence, but denied that he had done so voluntarily, stating that he had asked and been denied permission to call his mother so that he could get an attorney, that he was beaten by the officers so that his mouth was bruised and bleeding and a tooth chipped, and that he signed the statement only to stop the officers from beating him.

The State presented rebuttal evidence tending to show that defendant had not asked to call his mother, had not requested an attorney, and had not been beaten.

The jury found defendant guilty of common-law robbery. From judgment on the verdict imposing a prison sentence for a term of four years, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General I. B. Hudson, Jr., for the State.

Charles V. Bell for defendant appellant.

PARKER, Judge.

Defendant assigns as error the denial of his motion for nonsuit on the charge of common-law robbery. In this connection he contends that the pistol was taken only to disarm Frazier and the evidence was insufficient to support a finding that it was taken with any felonious intent permanently to deprive the owner of his property. Even assuming, however, that the takers' immediate purpose may have been to disarm Fraizer so that

the pistol could not be used against them, this is not inconsistent with an intent permanently to deprive the owner of his property. "When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal *(animus furandi)*." *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. While the evidence here does not disclose what ultimately became of the pistol, all of the evidence shows it was forcibly taken from Frazier's hand while he was being severely beaten on the head and that he has never seen the pistol since. On this evidence it was a permissible inference for the jury to draw that the takers of the pistol harbored an intent not only to disarm Frazier but also to deprive him permanently of his property. Considering the evidence in the light most favorable to the State, the jury could also legitimately find that defendant was present and was actively aiding and abetting when the pistol was taken. There was no error in denying his motion for nonsuit as to the charge of common-law robbery.

The trial court submitted to the jury an issue as to defendant's guilt of the lesser included offense of an assault inflicting serious injury. Under proper instructions, the jury found defendant guilty of the more serious offense of common-law robbery. In the charge we find no prejudicial error.

While defendant testified that the statement which he signed was not voluntary, no objection was made when it was introduced in evidence against him and he raises no question on this appeal concerning the admissibility of that statement.

In the entire trial we find

No error.

Judges BRITT and MORRIS concur.

ANNE SPIVEY WIMBISH, WIDOW; LAURA GAYE WIMBISH, DAUGHTER; AND JAMES T. WILLIAMS, JR., GUARDIAN AD LITEM OF CHERYL LEE WIMBISH, DAUGHTER; CONRAD A. WIMBISH, DECEASED EMPLOYEE v. WIMBISH AVIATION, INC. (T/A MID-ATLANTIC AIRWAYS) EMPLOYER; LUMBERMEN'S MUTUAL CASUALTY COMPANY, CARRIER

No. 7118IC312

(Filed 4 August 1971)

1. **Appeal and Error § 26— appeal as exception to the judgment**

An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper.

2. **Master and Servant § 56— workmen's compensation — compensable injury — death in a flying accident**

The death of a charter flying service employee, who was also the sole stockholder of the employer-corporation, did not occur in an accident arising out of and in the course of his employment, where the employee was killed in an airplane crash while on a trip to make repairs to a beach trailer home owned by the corporation, and where the ownership of the trailer home benefited the employee and his family rather than the corporation.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 25 November 1970, affirming the opinion and award of Deputy Commissioner R. F. Thomas, filed 10 June 1970, denying compensation.

The facts found by Deputy Commissioner Thomas, and affirmed by the Full Commission, are as follows:

"1. Anne Spivey Wimbish was married to the deceased on August 5, 1945 in Raleigh, North Carolina, and they lived together as husband and wife until the death of the deceased except for a brief period of separation. Two children, Laura Gaye Wimbish, age 19, and Cheryl Lee Wimbish, age 17, were born of this marriage. Said widow and children were dependent for support on the deceased and there was no one else either wholly or partially dependent for support on the deceased.

"2. Defendant employer was a corporation, deceased being the sole stockholder and president, and his wife, Anne Spivey Wimbish, being the secretary of the corporation.

"3. Defendant employer flew charter flights, transported cadavers, bought and sold surplus airplane parts, aircraft radios and equipment, and had a dealership for Piper Aircraft for the sale of new and used aircraft. Deceased and his wife jointly owned a tract of land near Guilford Battleground, Guilford County, North Carolina, upon which was located their home and the flying field where defendant employer conducted its operations.

"4. In July 1965 defendant employer acquired by purchase a 1961 New Moon house trailer, the title therefor being issued to defendant employer by the North Carolina Department of Motor Vehicles on August 2, 1965. This house trailer was purchased in Greensboro and moved to Ocean Drive Trailer Park, North Myrtle Beach, South Carolina. The cost assigned to the house trailer was $2,393.39, which included the actual purchase price plus the cost of preparing the trailer and moving it to South Carolina.

"5. Income from the rent of the house trailer in 1966 was $278.00, in 1967 was $290.00, and in 1968 was $549.00. Rent received in 1969 prior to the death of the deceased was $20.00. Some of the other expenses connected with the house trailer consisted of property tax to the town of North Myrtle Beach, South Carolina, in amount $10.00 for listing of January 1, 1969, $27.00 per month for rent of the lot where the house trailer was kept, and electric bill in an unspecified amount.

"6. Deceased and members of his family used the house trailer occasionally, paying no rent to defendant employer for the use thereof. The house trailer was not used by any officers or employees of defendant employer for entertainment or other business purposes. The house trailer was not profitable to defendant employer.

"7. Arrangements had been made to rent the house trailer beginning June 29, 1969. Deceased was aware that the sink and refrigerator in the house trailer were not in proper operating condition. Deceased made several telephone calls to Myrtle Beach in an attempt to get someone to make repairs to the sink and refrigerator but was unable to do so.

"8. Deceased therefore made plans to fly to Myrtle Beach, South Carolina, to make the repairs, and this was the sole purpose of his trip. Deceased departed from defendant employer's airfield about eleven o'clock p.m. on the night of June 16, 1969 in defendant employer's Piper Twin Comanche No. 8003-Y.

"9. Deceased has *(sic)* filed a flight plan and was last heard from when about two miles northwest of Crescent Beach-Myrtle Beach Airport on an instrument approach. Deceased was reported missing and a search was begun on June 17, 1969. Wreckage of the plane was found about two miles northwest of the airport on June 19, 1969. The airplane and the body of deceased were identified.

"10. The ownership of the house trailer by defendant employer did not further, directly or indirectly, defendant employer's business to an appreciable degree. The expense connected with the house trailer substantially exceeded the income defendant employer received from rental of the house trailer. The ownership of the house trailer by defendant employer was for the personal benefit of deceased and members of his family.

"11. Deceased did not sustain an injury by accident arising out of and in the course of his employment with defendant employer."

"Finding of Fact" No. 11 is repeated as "Conclusion of Law" No. 2, and is the basis of the denial of compensation. Plaintiffs appealed to this Court.

McLendon, Brim, Brooks, Pierce & Daniels, by L. P. McLendon, Jr., and E. Norman Graham, for plaintiffs-appellants.

Perry C. Henson and Thomas C. Duncan for defendants-appellees.

BROCK, Judge.

No exceptions are noted in the Record on Appeal.

[1] "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. . . .

[R]eview is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form and supported by the verdict. But an appeal alone . . . does not present for review the findings of fact or the sufficiency of the evidence to support them." 1 Strong, N. C. Index 2d, Appeal and Error, § 26, pp. 152-154. Rule 21, Rules of Practice in the Court of Appeals of North Carolina.

In *Bryan v. Church,* 267 N.C. 111, 147 S.E. 2d 633, the Court said:

> " 'So it has been stated as a general proposition that the phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business.' "

[2] In our opinion, the determination that the deceased did not sustain an injury by accident arising out of and in the course of his employment is supported by the findings of fact, the correctness of which, due to the state of the record, is not before us on this appeal.

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. HOWARD JACK STACK

No. 7126SC448

(Filed 4 August 1971)

1. Criminal Law § 76— involuntary confession — admissibility of subsequent confession

Where an accused has made an involuntary confession, any subsequent confession is presumed to proceed from the same vitiating influence, with the burden on the State to prove to the contrary.

2. **Criminal Law § 76— confession without receiving constitutional warnings — subsequent confession to another crime**

Defendant's confession to the crime of robbery after having been fully advised of his constitutional rights was not tainted and rendered inadmissible by his confession three days earlier to another crime without having been advised of his rights to counsel and against self-incrimination.

3. **Criminal Law § 166— abandonment of assignments of error**

Assignment of error will be overruled where no reason or argument is stated or authority cited in its support. Court of Appeals Rule No. 28.

4. **Criminal Law § 169— exclusion of evidence thereafter admitted**

Error, if any, in exclusion of an order entered in the trial of defendant for another crime was cured when the court thereafter allowed the order into evidence.

5. **Criminal Law § 169— exclusion of testimony — failure to put answer in record**

An exception to the exclusion of testimony will not be considered on appeal where counsel made no attempt to have the excluded testimony entered on the record.

6. **Criminal Law § 33— exclusion of defendant's testimony of personal prejudice**

In this common law robbery prosecution, the trial court did not err in the exclusion of defendant's testimony that a Negro had murdered his father, which defendant contends would tend to cast doubt upon the State's evidence that he had committed the robbery in the company of a Negro.

7. **Criminal Law § 97— denial of motion to reopen case**

The trial court did not abuse its discretion in the denial of defendant's motion, made after the close of all the evidence, to reopen the case and recall the prosecuting witness.

APPEAL from *McLean, Judge,* 8 March 1971 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in an indictment with the offense of common law robbery. The State's evidence tended to show that defendant entered Arthur's Gourmet Shop in the City of Charlotte on 8 August 1970, in the company of an unidentified Negro male, told Arthur Pressman, the proprietor, that his companion had a gun, and demanded Pressman's money. Pressman gave the defendant $17.00, and the pair departed. The defendant's evidence tended to establish an alibi. It appears that defendant was taken into custody on 14 August 1970 in con-

nection with the investigation of another crime, as to which he subsequently gave a statement without having been advised of his rights, and, while still in custody, on 17 August 1970, after being advised of his rights, he confessed to the offense charged in this case. The confession was admitted into evidence. From a verdict of guilty of common law robbery and judgment of imprisonment entered thereupon, defendant appealed to this Court. Defendant's court-appointed counsel was allowed to withdraw from the case, and he is represented on appeal by privately employed counsel.

Attorney General Morgan, by Deputy Attorney General Moody and Assistant Attorney General Safron, for the State.

Arthur Goodman, Jr., for defendant-appellant.

BROCK, Judge.

Defendant assigns as error the admission of evidence of his confession, on the ground that it was involuntarily given. His contention is that, since his prior statement as to a different crime had been involuntarily given, and he had continuously been in custody since that time, the present confession is tainted.

[1, 2] It is true, of course, that " . . . where an accused has made an involuntary confession, any subsequent confession is presumed to proceed from the same vitiating influence, with the burden on the state to prove the contrary." 2 Strong, N. C. Index 2d, Criminal Law, § 76, p. 582. Assuming, without deciding, that a confession to a separate, unrelated crime, which, standing alone, would undeniably have been voluntary, is a "subsequent confession" within the contemplation of the foregoing rule, we hold that the state has carried the burden of proving that defendant's confession to robbery did not flow from the "same vitiating influence" which rendered the prior statement inadmissible. The prior statement was not induced by any promise or hope of reward or any threat. The defendant was in no way abused, tortured, or intimidated. He was not told that, unless he confessed, he would be delivered to a mob, as was true in *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193, relied upon by defendant, and in which the Court held that, nevertheless, the second statement was rendered voluntary by reason of defendant having been advised of his rights. In short, the sole "vitiating influence" relied upon by this defend-

ant, whose acquaintance with the processes of criminal law is not inconsiderable, is that he was not advised of his rights to counsel and against self-incrimination prior to giving his first statement. Under such circumstances, the effect of that omission was adequately removed by the warning which he received prior to making the confession to the robbery. The case of *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492, cited by defendant, is obviously distinguishable. This assignment of error is overruled.

[3, 4] Defendant assigns as error that the court erred in refusing to allow him to "explore on cross-examination the full course of the police officers' conduct" between his arrest and his confession. This assignment of error is subject to being overruled for that "no reason or argument is stated or authority cited" in its support. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. However, the record reveals that the action of the Court to which defendant excepted was not the denial of any cross-examination, but was the exclusion from evidence of an order of another judge, ruling defendant's first statement inadmissible in a prior trial. The record also shows that the error, if error there be, was cured shortly thereafter, when Judge McLean allowed the order into evidence, as Defendant's Exhibit No. 1. In any event, the order did not serve to strengthen defendant's contention that his robbery confession was inadmissible. This assignment of error is overruled.

[5] Defendant assigns as error the Court's refusal to allow him to testify as to false confessions which he had made in the past, and contends that evidence that he was a "chronic confessor" would impeach his confession to the crime charged. Assuming, *arguendo,* that the exclusion of such evidence was error, we cannot determine whether it was prejudicial, since counsel made no attempt to have the answer to his question entered on the record. *Dotson v. Chemical Corp.*, 10 N.C. App. 123, 178 S.E. 2d 27. An exception to the exclusion of such evidence will not be considered on appeal. *Brixey v. Cameron,* 9 N.C. App. 339, 176 S.E. 2d 7. This assignment of error is overruled.

Defendant assigns as error the Court's refusal to allow him to testify as to whether he had any identifying marks on his arms, the prosecuting witness having testified that "I don't remember any identifying marks about him." This assignment

of error is subject to the same infirmity as the preceding one and, for the same reason, is overruled.

[6] Defendant assigns as error the Court's instruction to the jury to disregard the defendant's testimony that a Negro had murdered his father, and contends that such testimony would tend to cast doubt upon the State's evidence that he had committed the robbery in the company of a Negro. In *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22, the Court said: "The law recognizes that evidence, when of slight value, may be excluded because the sum total of its effect is likely to be harmful. Stansbury states the rule: 'Even relevant evidence may, however, be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great.' N. C. Evidence, 2d Ed., § 80, p. 175." This assignment of error is overruled.

[7] Finally, defendant assigns as error the denial of his motion, made after the close of all evidence, and three days prior to the substitution of privately-employed counsel, to re-open the case and recall the prosecuting witness. It is within the discretion of the trial judge to allow or deny a motion to re-open the case. In the absence of abuse of discretion, such a ruling will not be disturbed on appeal. Upon this record, we cannot say that such abuse has been shown.

No error.

Judges VAUGHN and GRAHAM concur.

SYLVIA ANNE COLLINS SCHOOLFIELD AND HUSBAND, JAMES NORMAN SCHOOLFIELD, PETITIONERS v. WANDA LOUISE COLLINS (SINGLE); JOHN W. COLLINS AND WIFE, MYRTLE COLLINS; NASH R. COLLINS AND WIFE, ANN COLLINS; STEVE C. COLLINS AND WIFE, FREDA SINK COLLINS; ALICE COLLINS MAYS AND HUSBAND, GARLAND D. MAYS; DORA LUCILLE COLLINS (SINGLE); HAZEL COLLINS THOMPSON AND HUSBAND, WAKE THOMPSON; FLEET M. COLLINS AND WIFE, CAROLYN COLLINS; AND RAYMOND COLLINS AND WIFE, JUANITA COLLINS, RESPONDENTS

No. 7118SC20

(Filed 4 August 1971)

Rules of Civil Procedure § 56— summary judgment

In this special proceeding for sale of a house and lot for partition, summary judgment was properly entered for petitioners where they offered, in support of their motion, interrogatories and the answers thereto of the appealing respondent, the appealing respondent offered no affidavits in response except an affidavit of counsel which asserts in effect that he believes he will be able to offer pertinent evidence at trial, respondent's answers to the interrogatories reveal that no genuine issue as to a material fact exists, and upon the facts established petitioners are entitled to judgment as a matter of law.

APPEAL by Respondent Dora Lucille Collins from *Johnston, Judge,* 1 June 1970 Session of Superior Court held in GUILFORD County.

This action was instituted on 15 October 1969 as a special proceeding before the Clerk of Superior Court of Guilford County for the sale of a house and lot for partition. The appealing respondent occupies the house.

On 26 May 1958 Cone Mills Corporation entered into a contract to convey to Alma C. Collins (widow) and son Robert W. Collins the house and lot involved in this proceeding. The contract called for a cash down payment plus equal monthly installments until the specified purchase price was paid. A policy of mortgage life insurance was written upon the life of Robert W. Collins. On 21 December 1962 Robert W. Collins died and the mortgage life insurance paid the balance due on the contract of purchase. On 14 January 1963 Cone Mills Corporation executed a warranty deed conveying a one-half undivided interest in the house and lot to Alma C. Collins (widow) and the other one-half undivided interest to the heirs at law of

Robert W. Collins (Louise G. Collins, estranged wife, Wanda Louise Collins and Sylvia Anne Collins, daughters of Robert W. Collins). On the same date, 14 January 1963, Louise G. Collins quitclaimed her interest in the house and lot to the two daughters, Wanda Louise Collins and Sylvia Anne Collins. At this point, according to the deeds, Alma C. Collins (widow) owned a one-half undivided interest in the house and lot, and Wanda Louise Collins and Sylvia Anne Collins owned the other one-half undivided interest.

On 24 March 1963 Alma C. Collins (widow) died leaving surviving her eight children, including the appealing respondent (Dora Lucille Collins). These are eight of the respondents listed in the caption, the ninth respondent (the first-named in the caption) is the sister of petitioner.

On 5 January 1970, after this proceeding was instituted, the will of Alma C. Collins, dated 8 February 1959, was admitted to probate in common form by the Clerk of Superior Court of Guilford County. Under the terms of this will Alma C. Collins devised her interest in the house and lot to the appealing respondent, Dora Lucille Collins. The parties have agreed that the said will is binding upon them in this proceeding.

By her answer, Dora Lucille Collins alleges that she and Alma C. Collins furnished the money for the cash down payment on the purchase contract and that she furnished the money for all household expenses, in order to leave Alma C. Collins' funds free to make the monthly payments. She alleges that Robert W. Collins furnished no part of the purchase price but was named as a party to the contract only for the purpose of obtaining mortgage life insurance upon his life, since Alma C. Collins was too old and Dora Lucille was an invalid. She prays that petitioner and her sister, as heirs of Robert, be declared to hold title to a one-half undivided interest as trustees of a resulting trust in favor of Dora Lucille; and that she be declared the beneficial owner of the entire fee title to the said house and lot. Dora Lucille Collins further alleges a contract between her and Robert W. Collins and Alma C. Collins that upon the death of both Alma C. Collins and Robert W. Collins, if Dora Lucille Collins should survive them, the said house and lot would become the property of Dora Lucille Collins.

Petitioner caused interrogatories to be served upon Dora Lucille Collins which were duly answered and filed. Thereafter

petitioner moved for summary judgment, and the trial judge granted summary judgment, ruling that Sylvia Anne Collins Schoolfield and Wanda Louise Collins each owned a one-fourth undivided interest in said house and lot, and that Dora Lucille Collins owned a one-half undivided interest therein. He further ordered that Guilford County be made a party because it had a recorded lien against the interest of Dora Lucille Collins, and that a sale of the property be deferred until the interest of Guilford County could be determined.

Respondent, Dora Lucille Collins, appealed assigning as error the granting of summary judgment for petitioner, and assigning as error that her request for jury trial was denied.

Turner, Rollins & Rollins, by Elizabeth O. Rollins, for petitioner-appellee.

Smith & Patterson, by Henry N. Patterson, Jr., for respondent-appellant.

BROCK, Judge.

In support of their motion for summary judgment petitioners offered their interrogatories and the answers thereto of the appealing respondent. The appealing respondent offered no affidavits in response, except an affidavit of counsel which asserts in effect that he believes he will be able to offer pertinent evidence at trial. Otherwise the appealing respondent relies upon her pleadings and her answers to the interrogatories. For the sake of brevity and economy we will not set out here the lengthy interrogatories and answers; suffice to say, a careful reading fails to disclose competent evidence of facts showing that there is a genuine issue for trial. The affidavit of counsel adds no competent evidence.

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e).

The purpose of Rule 56 is to provide an expeditious method of determining whether a genuine issue as to any material fact

actually exists, and if not, whether the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). In our opinion the appealing respondent's answers to the interrogatories reveal that no genuine issue as to a material fact exists; and further that upon the facts established petitioner was entitled to judgment as a matter of law.

Affirmed.

Judge MORRIS and HEDRICK concur.

LYNDA TURNER PRESSON v. HAROLD BENJAMIN PRESSON

No. 7126DC466

(Filed 4 August 1971)

Divorce and Alimony § 18— husband's offer of indignities to wife — insufficiency of evidence

Evidence that the husband does not take the wife out very often, that he has not given her anniversary or birthday gifts for the past five years, that the husband is the quiet type and there is a lack of communication between the parties, that the husband does not spend much time at home, and that the husband is usually at work, at home or at his mother's home working on his car, *held* insufficient to support a finding that the husband has offered such indignities to the wife as to render her condition intolerable and her life burdensome.

APPEAL by defendant from *Stukes, District Judge,* 29 March 1971 Session of MECKLENBURG District Court.

Plaintiff instituted this action seeking alimony without divorce, exclusive custody of the minor child of the marriage, alimony *pendente lite* and attorney's fees, and exclusive possession for herself and the minor child of the home as well as a 1970 Volkswagen. Plaintiff bases her claim on G.S. 50-16.2(7) which allows alimony where the supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome. This appeal is from an order awarding temporary alimony, etc.

At the conclusion of all of the evidence presented at the hearing, the trial judge found and concluded that defendant, through a course of studied neglect, has offered such indignities

to the person of plaintiff as to render her condition intolerable and life burdensome without sufficient cause or provocation on the part of plaintiff; that defendant is supporting spouse and plaintiff is dependent spouse and plaintiff is in need of financial support from the defendant; that the child of the marriage is in need of support of defendant; that plaintiff is a fit and proper person to have custody of the child; that defendant is gainfully employed and has a net take home pay of between $225.00 and $250.00 every two weeks and plaintiff nets approximately $260.00 per month; that plaintiff and the minor child are in need of the home of the parties; that plaintiff's reasonable needs for support of herself and the minor child amount to at least $555.00 per month; and that plaintiff is unable to fully defer legal expenses in connection with this action.

Pursuant to his findings and conclusions, the trial judge entered an order granting plaintiff the following relief: awarding her exclusive custody and control of the child, with defendant to have reasonable visitation privileges; that defendant pay $25.00 per week for child support; that the mobile home and lot be sequestered to the use of plaintiff and the child; that defendant make the monthly payments of $160.83 on the mobile home and $65.00 per month on the lot; that defendant pay $15.00 per week as partial support for plaintiff; and that defendant pay $150.00 as partial fees for plaintiff's attorney. Defendant appealed from the order.

Edwards and Millsaps by Joe T. Millsaps for plaintiff appellee.

Weinstein, Sturges, Odom & Bigger by T. LaFontine Odom for defendant appellant.

BRITT, Judge.

Defendant assigns as error the denial of his motion to dismiss made at the close of plaintiff's evidence and renewed at the close of all the evidence. Such a motion, apparently made under Rule 41 (b), in an action or cause tried by the court without a jury challenges the sufficiency of the plaintiff's evidence to establish her right to relief. *Wells v. Sturdivant Life Ins. Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971). In determining the sufficiency of the evidence in this cause, when the trial judge

denied defendant's motion for dismissal, he was subject to the same principles applicable under our former procedure with respect to the sufficiency of the evidence to withstand the motion for nonsuit. *Wells v. Sturdivant Life Ins. Co., supra.*

We are of the opinion that plaintiff's evidence, together with pertinent evidence presented by defendant, did not make out a *prima facie* case and was not sufficient to support the order in her favor. Defendant's motion to dismiss should have been granted.

In cases involving alimony without divorce on the grounds that defendant has offered such indignities to the plaintiff as to render her condition intolerable and life burdensome, our courts have not agreed upon an undeviating rule as to what constitutes "such indignities" but leave it to the courts to deal with each particular case and to determine it upon its own peculiar circumstances. *Barwick v. Barwick,* 228 N.C. 109, 44 S.E. 2d 597 (1947). *Sanders v. Sanders,* 157 N.C. 229, 72 S.E. 876 (1911). *Taylor v. Taylor,* 76 N.C. 433 (1877).

Here, we have the unusual case of the parties living together at the time the action was instituted and the hearing held. The substance of plaintiff's evidence showed: Defendant does not take her out very often. Although he has regularly given her Christmas gifts, he has not given her anniversary or birthday gifts for the past five years. Defendant is the quiet type and there is a lack of communication between the two of them. Defendant does not spend much time at home but "when I want to get in touch with him, I have no problem. He would be at work, at home, or working on his car at his mother's home." Defendant did not take plaintiff to the annual Christmas party given at his place of employment in December 1970. Defendant is a steady worker and misses very little work; he is a good father and loves his daughter; and he has done a considerable amount of work about the mobile home. Plaintiff admitted that the failure to receive anniversary or birthday presents had not bothered her much. Defendant stated on cross-examination that he did not love his wife but did not hate her; that his failure to love her was because she misled him into marrying her in that she claimed to be pregnant when in fact she was not.

Considering all the pertinent evidence, we cannot say that it shows that defendant has offered such indignities to the plaintiff as to render her condition intolerable and life burdensome.

For the reasons stated, the judgment of the trial court is

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION, AND FIRST-CITIZENS BANK & TRUST COMPANY v. BANK OF ROCKY MOUNT

No. 7110SC213

(Filed 4 August 1971)

1. **Administrative Law § 4; Banks and Banking § 1— decision by Banking Commission — members who have not heard all the evidence**

Banking Commission chairman properly ruled that members of the Commission who had not heard all of the evidence and oral arguments could vote on an application to establish a branch bank provided those members had received transcripts of the proceedings prior to voting.

2. **Evidence § 48— failure to find that witness is an expert**

The Banking Commission did not err in allowing one of its members, the Commissioner of Banks, to give his opinion that the solvency of the protestant bank would not be materially affected by the approval of plaintiff's application to establish a branch bank, notwithstanding the Commissioner was not found to be an expert witness, where there is sufficient evidence in the record to show that the witness is an expert.

3. **Banks and Banking § 1; Evidence § 49— foundation for opinion testimony**

Sufficient foundation was laid for opinion testimony by the Commissioner of Banks that establishment of a branch bank by plaintiff would not materially affect the solvency of the protestant bank when the Commissioner testified that his opinion was based on "information that we have available to us in the files, and based on the reports of examination that we make of this bank."

4. **Banks and Banking § 1— contention unsupported by record**

Protestant bank's contention that a newspaper article was sent by mail to each member of the Banking Commission and considered by

the Commission in passing upon an application to establish a branch bank is unsupported by the record.

5. **Banks and Banking § 1— establishment of branch bank — sufficiency of evidence**

The evidence was sufficient to support findings and conclusions of the Banking Commission that the branch bank applied for by plaintiff is needed, and that its presence will not have a detrimental effect upon the solvency of existing banks in the community. G.S. 53-62.

APPEAL by defendant, Bank of Rocky Mount, from *Clark, Judge,* 3 December 1970 Session of Superior Court held in WAKE County.

On 19 September 1969, First-Citizens Bank & Trust Company filed an application to establish a branch bank in Rocky Mount, N. C. The application was opposed by existing banks in the community, one of which is the defendant Bank of Rocky Mount. On 30 October 1969, the Commissioner of Banks approved the application. Upon review of the approval by the Banking Commission, facts were found and conclusions of law entered on 21 January 1970 which approved and allowed the application. The protestant banks appealed to the Superior Court of Wake County, and on 1 May 1970, Bailey, Judge, sitting as an appellate court, remanded the application to the Banking Commission for the taking of additional evidence. After taking additional evidence, the Commission on 23 September 1970 made findings of fact and conclusions of law whereby it once again approved the application. The defendant Bank of Rocky Mount appealed to the Superior Court of Wake County.

From a judgment of Clark, Judge, affirming the Commission's findings and conclusions, the defendant appealed to this Court.

Jordan, Morris and Hoke by John R. Jordan, Jr., and William R. Hoke for First-Citizens Bank & Trust Company, plaintiff appellee.

Sanford, Cannon, Adams & McCullough by Hugh Cannon, E. D. Gaskins, Jr., and Richard G. Singer for defendant appellant.

HEDRICK, Judge.

[1] The defendant protestant first assigns as error the ruling of the Banking Commission chairman that members of the Commission who had not heard all of the evidence and oral arguments could vote on the application of First-Citizens provided that those members had received transcripts of the proceedings prior to voting.

In *Crawford v. Board of Education,* 275 N.C. 354, 168 S.E. 2d 33 (1969), our Supreme Court stated:

> "While there are some decisions reaching a contrary result upon specific statutes involved, and not as a matter of due process, it is generally held that an administrative decision is not invalid merely because an officer who was not present when the evidence was taken made or participated in the decision, provided he considers and acts upon the evidence received in his absence. See Annot. 18 A.L.R. 2d 606, and cases cited therein."

The appellant concedes in its brief that members of the Commission were furnished copies of the transcript of the hearings held on 23 July and 5 August 1970. Exhibit F indicates that the transcripts were mailed to the members on 23 August 1970, a month before the vote was taken on 23 September 1970. This assignment of error is overruled.

[2] By assignment of error No. 2 the appellant contends that the Banking Commission committed prejudicial error by allowing one of its members, the Commissioner of Banks, to give his opinion during the hearing that the solvency of the protestant bank would not be materially affected by the approval of the application. Appellant argues first that the Commissioner was not tendered and accepted by the Commission as an expert witness. It is well settled that where there is sufficient evidence in the record to support a finding that the witness in question was an expert in his field, it will be presumed that the trial tribunal found the witness to be an expert, notwithstanding the absence of a specific finding to that effect. *Mills, Inc. v. Terminal, Inc.,* 273 N.C. 519, 160 S.E. 2d 735 (1968), and cases cited therein. The record is replete with evidence that the witness is an expert in his field.

[3] The appellant next argues that the witness was allowed to give his opinion without a proper foundation having been laid

as the basis thereof. Before stating his opinion, the witness testified that it was based on "information that we have available to us in the files, and based on the reports of examination that we make of this bank. . . . "

It should also be noted that the witness was called to testify by the Commission itself, and not by one of the parties; and that the protestant appellant was allowed to cross-examine the witness. For the reasons stated above, this assignment of error is overruled.

[4] Appellant's third assignment of error is as follows:

> "3. To the sending of a newspaper article denominated Exhibit D entitled 'Statistics Covering Five-Year Period—Chamber Report Shows Strong Economic Growth Here,' to the Commission by mail, and the providing of a copy to each member of the Commission and consideration of such article by the Commission, for that these things were done without the knowledge of the protestant and in violation of G.S. § 143-318."

This assignment of error is not supported by a proper exception in the record. We are not directed to any place in the record which would indicate that the Commission ever received the article in question. Furthermore, assuming, *arguendo,* that the article was sent to the Commission, there is nothing in the record to indicate that the members of the Commission considered the article as stated by the appellant. This assignment of error is without merit.

[5] The remainder of appellant's assignments of error deal primarily with its contention that the evidence is insufficient to support the findings and conclusions of the Commission that the branch bank applied for by First-Citizens is needed, and that its presence will not have a detrimental effect upon the solvency of existing banks in the community. G.S. 53-62 provides for the establishment of branch banks and reads in pertinent part: "Such approval shall not be given until he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency

of said branch or teller's window and of the existing bank or banks in said community."

In a proceeding such as this, the administrative agency is the finder of fact, and its findings and conclusions will not be disturbed if supported by competent evidence, even though there may be evidence which would support contrary findings and conclusions. *Campbell v. Board of Alcoholic Control,* 263 N.C. 224, 139 S.E. 2d 197 (1964).

We have carefully reviewed the record and conclude that the findings of the Commission are supported by competent evidence, and that the findings, in turn, support the conclusions of law. The judgment of the superior court affirming the action of the State Banking Commission is affirmed.

Affirmed.

Judges BROCK and MORRIS concur.

J. B. NICHOLS v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 713DC441

(Filed 4 August 1971)

1. **Insurance § 6— construction of policy — ambiguities**

Since the words in an insurance policy were selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder or beneficiary and against the company.

2. **Insurance § 130— fire insurance — tobacco warehouse — notice and proof of loss — "insured"**

In a fire insurance policy issued to the owners of a tobacco warehouse and insuring tobacco owned by others while in the custody of the warehouse for auction, requirement that the "insured" give notice and proof of loss referred to the named insureds, the warehouse owners, and not to other owners of tobacco covered by the policy.

3. **Bailment § 5; Insurance § 130— fire insurance — failure of bailor to give notice and proof of loss**

A bailor cannot void the effect of insurance providing coverage on the property of others in his custody simply by failing to file proofs of loss for the bailees' property in his possession.

4. Appeal and Error § 57— findings of fact — review on appeal

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

5. Insurance § 120— fire insurance — unloaded tobacco in warehouse

Where plaintiff left his tobacco overnight on his truck inside a tobacco sales warehouse, the tobacco was in the custody of the warehouse for auction within the coverage of a fire insurance policy issued to the owners of the tobacco warehouse, notwithstanding the tobacco had not been weighed or accepted for sale pursuant to U. S. Department of Agriculture regulations.

APPEAL by defendant from *Roberts, District Judge,* 15 February 1971 Session of PITT County District Court.

Plaintiff instituted this action seeking to recover as a third party beneficiary on a contract of fire insurance issued by defendant to William T. Cannon and Carlton J. Dail, T/A Cannon's Warehouse (Warehouse). Plaintiff alleged that the policy of insurance issued to Warehouse insured tobacco belonging to others while in the custody of Warehouse for the purpose of sale; that plaintiff's tobacco was in the custody of Warehouse for the purpose of sale; and that plaintiff's tobacco was destroyed by fire on 15 September 1969.

It was stipulated that there was a policy of insurance in force covering Warehouse and issued by defendant at the time of the loss complained of. The policy stated that it covered "leaf, loose, scrap and stem tobacco, the property of others while in the custody of the Insured for auction . . . all while on the premises of the above described tobacco sales warehouse or while located within 100 feet thereof whether in the open or in vehicles."

Plaintiff's evidence tended to show: On 15 September 1969 plaintiff loaded 18 sheets of tobacco, averaging about 180 lbs. per sheet onto his pickup truck and carried it to Cannon's Warehouse where he had to wait in line outside the warehouse. Plaintiff got his truck into the warehouse that night but did not get the tobacco unloaded and weighed. He was still in line behind several other trucks. Plaintiff left the warehouse about 8:00 or 8:30 that night, taking his truck keys with him but leaving the truck unlocked with the tobacco still tied up on the back. The door to the warehouse was shut around 9:30 p.m. When plaintiff returned the next morning, he found that

the warehouse had burned, totally destroying his truck and tobacco. He noted that the truck had been moved within the warehouse from where he left it the night before. Plaintiff contacted Mr. Cannon the following day and notified him of the quantity of tobacco on the truck. Mr. Cannon made a written notation of that amount. Plaintiff thereafter learned that Mr. Cannon had been paid by defendant but was told by Mr. Cannon that the insurance did not cover tobacco inside the warehouse on vehicles that had not been unloaded.

Mr. Cannon, appearing as a witness for plaintiff, testified on cross-examination that tobacco cannot be accepted for sale until the farmer presenting it has also presented an ASCS (Agriculture Stabilization and Conservation Service) card and the tobacco has been weighed; that this must be done pursuant to regulations of the U. S. Department of Agriculture. (At the time of the fire, plaintiff's tobacco had not been weighed or accepted for sale pursuant to the USDA regulations.)

Defendant did not put on any evidence. At the close of all the evidence, the trial judge, sitting without a jury, made findings of fact as contended by plaintiff. Based on the findings of fact, the trial judge concluded as a matter of law that plaintiff's tobacco was in the custody of the named insured for the purpose of being sold at auction; that the policy of insurance issued by defendant to Warehouse insured plaintiff's tobacco against loss by fire and the tobacco was destroyed by fire on 15 September 1969; and that plaintiff is entitled to recover $2,268.00.

Judgment was entered in favor of plaintiff and defendant appealed.

Milton C. Williamson and M. E. Cavendish for plaintiff appellee.

Smith, Anderson, Dorsett, Blount and Ragsdale for defendant appellant.

BRITT, Judge.

Defendant first contends that plaintiff is not entitled to maintain this action for the reason that he did not file proof or notice of loss with defendant as required by the insurance policy. We do not agree with this contention.

The policy provides:

> "The insured shall give immediate written notice to this Company of any loss . . . and within sixty days after the loss, unless such time be extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto. . . .
>
> . . .
>
> No suit or action on this policy for the recovery of any claim shall be sustainable in court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

[1, 2] It is settled law that, the words in an insurance policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). Nowhere in the policy is there a definition of the word "insured" but it appears from the usage of the word in the policy that "insured" refers only to the named insured, William T. Cannon and Carlton Dail, T/A Cannon's Warehouse. While the policy makes provision for the coverage of tobacco owned by others but in the custody of Warehouse, it does not define the owners of the tobacco as "insureds" but does refer to them as "owners." Indeed, the provision requiring submission of notice and proof of loss states that "*the insured* shall render to the Company a proof of loss . . . stating . . . *the interest of the insured and of all others in the property* . . . . " (Emphasis added.)

[3] When plaintiff left his tobacco and truck in the custody of Warehouse, as the facts found by the trial judge and supported by the evidence so show, a bailee-bailor relationship for the mutual benefit of both was created. The facts show that Warehouse did receive proceeds of the insurance to cover the tobacco already weighed and ready for sale. Warehouse, apparently believing that plaintiff's tobacco was not covered by the policy

of insurance, failed or refused to include the claims of plaintiff and others similarly situated in the proof of loss. It has been held that a bailor cannot void the effect of insurance providing coverage on the property of others in his custody simply by failing to file proofs of loss for the bailees' property in his possession. *United States Fidelity & Guaranty Co. v. Slifkin,* 200 F. Supp. 563 (N.D. Ala. 1961). See also *Exton & Co. v. Home Fire & Marine Ins. Co.,* 249 N.Y. 258, 164 N.E. 43 (1928). We hold that plaintiff was not required by the policy to give defendant notice and render proof of loss.

[4, 5] Defendant also contends that the trial judge erred in finding that plaintiff's tobacco was in the custody of insured for auction. This contention is without merit. Where a jury trial is waived, the court's findings of fact are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed. *Piping, Inc. v. Indemnity Co.,* 9 N.C. App. 561, 176 S.E. 2d 835 (1970). Plaintiff testified that he brought the tobacco to the warehouse for the purpose of selling it at auction. He left his truck in the warehouse and the doors to the warehouse were shut. When he returned the following morning, he noticed the truck had been moved to allow additional trucks to enter the warehouse. Defendant's contention that the ASCS regulations govern the question of custody are erroneous. Those regulations merely provide a system for the enforcement of tobacco allotments.

The language of the policy providing coverage would seem to have contemplated this precise situation. The policy provided coverage for tobacco "the property of others while in the custody of the Insured . . . while on the premises of the above described tobacco sales warehouse or while located within 100 feet there of *whether in the open or in vehicles.*" (Emphasis added.) We hold that the evidence supports the finding that plaintiff's tobacco was in the custody of the insured for auction.

All pertinent facts found by the trial court are fully supported by the evidence, and the conclusions of law are supported by the findings of fact. The judgment is

Affirmed.

Judges MORRIS and PARKER concur.

TYRUS ROBERT SPINELLA v. WAYNE CROSBY PEARCE AND STATESVILLE FLOUR MILLS CO., A NORTH CAROLINA CORPORATION

No. 7110SC288

(Filed 4 August 1971)

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

The exclusion of testimony cannot be held prejudicial on appeal where the record fails to show what the answers of the witnesses would have been or that a request was made pursuant to G.S. 1A-1, Rule 43(c), to have a record made of the answers which the witnesses would have given.

2. **Appeal and Error § 49— exclusion of testimony as nonresponsive — absence of prejudice**

Plaintiff was not prejudiced when the trial court sustained defendant's motion to strike as nonresponsive an answer of plaintiff's witness to a question asked by plaintiff's counsel, where the answer was not clearly responsive to the question and could have served at most only to corroborate plaintiff's prior testimony.

3. **Trial § 36— instructions — expression of opinion**

In this action involving a factual dispute as to whether plaintiff's eye condition, a cataract or opacity in his right eye, resulted from the automobile collision in question, the trial court did not express an opinion as to the cause of the opacity in summarizing the testimony of two doctors in its charge to the jury when the court stated that one doctor testified that he could not say what the opacity came from or when it developed, and that the other doctor testified that in his opinion plaintiff most probably did not have a traumatic type cataract, the court's statements being clearly supported by the doctors' testimony.

4. **Trial § 52— refusal to set aside award as inadequate**

The trial court did not abuse its discretion in refusing to set aside as inadequate an award to plaintiff of $225 damages, the jury on conflicting evidence having apparently determined that plaintiff's eye condition did not result from the collision in question, and the evidence being consistent with the view that any injuries which did result from the collision were not substantial.

APPEAL by plaintiff from *Hall, Judge,* 30 November 1970 Civil Session of Superior Court held in WAKE County.

Civil action to recover damages for personal injuries which plaintiff alleged were caused by defendants' actionable negligence. The jury found plaintiff was injured by the negligence of defendants as alleged in the complaint and awarded plaintiff $225.00 damages. From judgment on the verdict, plaintiff appealed.

Vaughan S. Winborne for plaintiff appellant.

Smith, Anderson, Dorsett, Blount & Ragsdale, by James D. Blount, Jr., for defendant appellees.

PARKER, Judge.

[1] Appellant has noted ten assignments of error. Numbers 1, 2, 3 and 5 relate to rulings of the court sustaining objections to questions asked of witnesses by plaintiff's counsel. The answers which the witnesses would have given if permitted to answer these questions do not appear in the record. "It is elemental that the exclusion of testimony cannot be held prejudicial on appeal unless the appellant shows what the witness would have testified if permitted to do so." *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745. Further, the record before us does not show any request made pursuant to Rule 43(c) of our Rules of Civil Procedure that a record be made of the answers which the witnesses would have given. Therefore, no prejudicial error has been made to appear insofar as the rulings which are the subject of assignments of error 1, 2, 3 and 5 are concerned.

[2] Assignment of error No. 4 relates to the trial court's sustaining defendants' motion to strike an unresponsive answer given by one of plaintiff's witnesses to a question asked by plaintiff's counsel. In this we find no prejudicial error. The witness' answer was not clearly responsive to the question, and the testimony could have served at most only to corroborate the plaintiff's prior testimony. "The burden is on appellant to show not only that there was error in the trial but also that there is a reasonable probability that 'the result was materially affected thereby to his hurt.' " *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E. 2d 766. On the record before us we find no reasonable probability that the jury's verdict in this case would have been materially affected one way or the other whether the court had overruled or sustained the motion to strike to which appellant's assignment No. 4 related.

[3] In essence, this case involved a factual dispute between the parties as to whether plaintiff's eye condition, a cataract or opacity in his right eye, resulted from injuries which he received in the automobile collision which gave rise to this

action. In appellant's assignments of error 6 and 7, he contends that in summarizing the testimony of two doctors in its charge to the jury, the court expressed an opinion as to the cause of the opacity. We do not agree. Assignment of error No. 6 is to the following portion of the court's summary of the testimony of Dr. Smith, a witness for plaintiff:

> "He testified that he could not say what this opacity came from and that he didn't know when it developed."

This summary was clearly supported by the following portion of Dr. Smith's testimony:

> "Opacity can come from many things, any dietary problems, disease, possibly so. Diabetes is a known cause of them. Opacities can develop over a period of time and this one could have developed from any number of causes between 1966 and 1969, the dates of my two examinations. At the time as I said it appeared like it could have been caused from his traumatic injury. Generally speaking this type of opacity, opacities that I have observed are mostly in elderly people, they come with age. Over the period of years I would say that since 1966 my last examination there was nothing appearing there. To be entirely fair and objective I cannot state in my opinion what this one came from. With certain reservations you can probably look at an opacity of this type and tell how long it has been there. I did not observe it in 1966 and I did observe it in 1969. I have no exact way of knowing when it developed but I do have when something has occurred there is a possibility. A possibility but it could have come from any one of the known causes or come with no known explanation."

Assignment of error No. 7 is to the following portion of the court's summary of the testimony of Dr. Hedgpeth, a witness for defendant:

> "[A]nd testified in his opinion it is most probably not traumatic, not a traumatic type cataract which the plaintiff has."

This summary was clearly supported by the following portion of Dr. Hedgpeth's testimony given on direct examination:

> "I think this most probably is a developmental lens opacity and I think that it is probably not a traumatic lens

opacity, and I think it is probably unassociated with trauma, and that was my impression on that day as noted here."

Later, on cross-examination by plaintiff's attorney, Dr. Hedgpeth testified:

"In my opinion I said that it is most probably not traumatic."

Examination of the court's charge to the jury as a whole reveals that the court accurately and fairly summarized the evidence to the extent necessary to explain the application of the law thereto, as required by Rule of Civil Procedure 51(a), and that the court did not express any opinion in contravention of that rule. Assignments of error 6 and 7 are accordingly overruled.

[4] Plaintiff moved to set aside the verdict for inadequacy and for a new trial on the issue of damages. Assignments of error 8, 9 and 10 are directed to the court's refusal to grant these motions and to the entering of the judgment on the verdict as rendered in the sum of $225.00. "The granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge. . . . His decision on the motion will not be disturbed on appeal unless it is obvious that he abused his discretion." *Hinton v. Cline,* 238 N.C. 136, 76 S.E. 2d 162. An abuse of discretion does not appear in the present case. On conflicting evidence the jury apparently determined that plaintiff's eye condition did not result from the collision, and the evidence was consistent with the view that any injuries which did result from the collision were not substantial.

In the trial and judgment appealed from we find

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHNNY REEP

No. 7126SC407

(Filed 4 August 1971)

1. Crime Against Nature § 2— sufficiency of indictment

Bill of indictment charging that defendant on a specified date "unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature with" a named male person is sufficient to withstand defendant's motion to quash.

2. Indictment and Warrant § 5— return through grand jury foreman — indictment delivered by solicitor

G.S. 15-141 does not make it mandatory that the grand jury foreman personally deliver bills of indictment to the court, and the bill of indictment was not improperly delivered to the court where the foreman delivered it to the officer serving the grand jury, and the officer gave the indictment to the solicitor who carried it into the courtroom.

3. Constitutional Law § 30— incarceration under invalid process — solitary confinement — speedy trial

In this prosecution for crime against nature, the trial court did not err in the denial of defendant's motion to quash and to dismiss the charge against him on grounds that (1) he was incarcerated for an excessive time under invalid process, (2) he was incarcerated for an excessive time in solitary confinement without certain privileges, thereby being punished as though he had been convicted, and (3) he was denied a speedy trial.

4. Criminal Law § 122— deadlocked jury — instructions urging jury to reach verdict

It was not error for the court, after the jury had deliberated for an hour and fifty minutes and had informed the court that they were hopelessly deadlocked, to instruct the jury, "I might say there is not any reason to hurry in the case. This is a full week here and another week, if necessary, and you have until Saturday night," where the court also instructed the jury that no juror should surrender his conscientious opinion about the case and should not participate in a verdict that did not reflect his conscientious opinion.

APPEAL by defendant from *McLean, Judge*, at the 1 February 1971 Schedule "A" Criminal Session, MECKLENBURG Superior Court.

Defendant was tried on a bill of indictment charging crime against nature. The jury returned a verdict of guilty and from judgment imposing prison term of six years, defendant appealed.

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

Edward T. Cook for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the refusal of the trial court to quash the bill of indictment for that it did not with sufficient particularity charge defendant with a crime. The bill of indictment on which defendant was tried charged in pertinent part as follows: "That Johnny Reep * * * on the 26 day of September, 1970, * * * unlawfully, wilfully, and feloniously did commit the abominable and detestable crime against nature with Leland Reed Tickle, a male person, 17 years of age." Under authority of *State v. O'Keefe,* 263 N.C. 53, 138 S.E. 2d 767 (1964), we hold that the bill of indictment is sufficient and the assignment of error is overruled.

[2] Defendant assigns as error the failure of the trial court to quash the bill of indictment for that it was improperly delivered to the court. Following a *voir dire,* the trial court found that the foreman of the grand jury delivered the bill of indictment to the officer serving the grand jury, which officer in turn gave the indictment to the solicitor who carried it into the courtroom. Defendant contends that the action of the solicitor was violative of G.S. 15-141 which provides as follows: "Grand juries shall return all bills of indictment in open court *through* their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body." (Emphasis added.) In providing that grand juries shall return their bills *through* their foreman (as opposed to *by* their foremen), we do not think the statute makes it mandatory that the foreman personally deliver bills of indictment to the court. We perceive no prejudice to the defendant in the instant case, therefore, the assignment of error is overruled.

[3] In his third assignment of error, defendant contends that the trial court erred in denying his motion to quash the bill of indictment and dismiss the charges on the grounds that defendant's constitutional rights had been violated in that: (a) he was incarcerated for an excessive length of time under invalid process; (b) he was incarcerated for an excessive length of time in

solitary confinement, was denied regular shaving, showers, exercise and change of clothing, thereby being punished as though he had been convicted of the charge against him; and (c) he was denied his right to a speedy trial on the charge against him. Although defendant appears to have been arrested on 27 September 1970 and confined until his trial on or about 1 February 1971, on the facts appearing in the record we hold that the court did not err in denying defendant's motion to quash the indictment and dismiss the case. It is noted that the sentence imposed is considerably less than the maximum allowed by statute. The assignment of error is overruled.

[4] Finally, defendant assigns as error the additional instructions given to the jury after they had deliberated for a period of time, then returned to the courtroom and announced that they were hopelessly deadlocked. The additional instructions challenged were: "I might say there is not any reason to hurry in the case. This is a full week here and another week, if necessary, and you have until Saturday night. You don't have to hurry. But, suppose you go out and try again, don't give up too soon. You may retire."

Defendant contends the additional instructions had the tendency of coercing a guilty verdict and cites *Trantham v. Furniture Company,* 194 N.C. 615, 140 S.E. 300 (1927) and *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767 (1966).

The additional instructions in *McKissick* appear to have been declared erroneous for the reason that the trial judge failed to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict. This was not true in the instant case. Before giving the instructions complained of, the court, among other things, said: " * * * [A]ccording to my watch, you have been out about an hour and fifty minutes. I don't want any member of the jury to surrender any conscientious opinion that he has about this matter * * *. I do not ask and would not permit a single one of you to participate in a verdict that did not reflect your conscientious opinion. I do not ask or want you to do that." We hold that the additional instructions were free from prejudicial error and the assignment of error is overruled. *State v. Fuller,* 2 N.C. App. 204, 162 S.E. 2d, 517 (1968).

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. STEVE LEMMOND

No. 718SC445

(Filed 4 August 1971)

1. **Indictment and Warrant § 17— date of offense — variance between indictment and proof**

Where time is not of the essence of the offense and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal.

2. **Indictment and Warrant § 17; Narcotics § 4— possession and sale of narcotics — date of offenses — variance between indictment and proof**

There was no fatal variance between an indictment charging the unlawful possession and sale of heroin on 10 October 1970 and evidence that the crimes occurred on 6 October 1970, where the statute of limitations was not involved and alibi was not relied on as a defense.

3. **Criminal Law § 99— expression of opinion — sustaining of court's own objections**

In this prosecution for the unlawful possession and sale of heroin, the trial judge expressed an opinion in violation of G.S. 1-180 when he sustained his own objections to seven questions propounded by defense counsel to one State's witness, sustained his own objections to nine questions propounded by defense counsel to another State's witness, and told defense counsel on two occasions after sustaining his own objections, "You know better than that."

APPEAL by defendant from *Cooper, Judge,* 7 December 1970 Session of WAYNE Superior Court.

At the November 1970 Session of Wayne Superior Court the solicitor signed and submitted to the grand jury two bills of indictment against the defendant. No. 70-CR-9818 charged defendant with unlawful possession and sale on 10 October 1970 of the narcotic drug heroin. No. 70-CR-9819 charged defendant with unlawful possession and sale of the narcotic drug heroin on 6 October 1970. The two bills of indictment are identical except for the dates the offenses are alleged to have been committed. The grand jury found and returned both bills as true bills.

At the 7 December 1970 session of the court, defendant was arraigned on indictment No. 70-CR-9818 which charged that he committed the offenses of unlawful possession and sale of the narcotic drug heroin on 10 October 1970. He pleaded not guilty. The State introduced evidence showing unlawful posses-

sion and sale of heroin by defendant on 6 October 1970. Defendant did not introduce evidence, but moved for nonsuit at the close of the State's evidence. The motion was overruled, and the court instructed the jury that they were not to be concerned with the fact that the indictment alleged that the offenses had been committed on 10 October 1970 while all of the evidence presented related to events occurring on 6 October 1970. The jury returned verdict finding defendant guilty of the unlawful possession and sale of the narcotic drug heroin on 6 October 1970. From judgment imposing a prison sentence on this verdict, defendant appealed.

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

George F. Taylor for defendant appellant.

BRITT, Judge.

We hold that the court did not err in overruling defendant's motion for nonsuit.

[1] Where time is not of the essence of the offense and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal. G.S. 15-155; *State v. Wilson,* 264 N.C. 373, 141 S.E. 2d 801; *State v. Williams,* 261 N.C. 172, 134 S.E. 2d 163; *State v. Baxley,* 223 N.C. 210, 25 S.E. 2d 621; *State v. Gore,* 207 N.C. 618, 178 S.E. 209; *State v. Overcash,* 182 N.C. 889, 109 S.E. 626; *State v. Lilly,* 3 N.C. App. 276, 164 S.E. 2d 498. This rule, however, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to present his defense adequately, as where he relies upon alibi. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396.

[2] Here, time was not an essential ingredient of the offense charged. *State v. Knight,* 9 N.C. App. 62, 175 S.E. 2d 332. See also *State v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623. The statute of limitations was not involved, and alibi was not relied on as a defense. The record before us does not show that any action has been taken on the indictment in 70-CR-9819. We fail to see at this point any error prejudicial to defendant caused by the two indictments.

Defendant contends that the trial court denied him a fair and impartial trial by "injecting itself into the prosecution" of defendant, thereby expressing an opinion in violation of G.S. 1-180. We agree with this contention.

[3] The principle of law pertinent to this contention was well stated by Parker, Judge, in *State v. Cox,* 6 N.C. App. 18, 169 S.E. 2d 134 (1969) as follows:

> "Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481. To accord this right the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. He is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. G.S. 1-180. Our Supreme Court has said many times that G.S. 1-180 does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. *Galloway v. Lawrence,* 266 N.C. 250, 145 S.E. 2d 861, and cases cited therein. The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9."

In the instant case, W. H. Thompson and W. W. Campbell testified as witnesses for the State. During cross-examination of Thompson (set forth in six pages of the record) the court sustained its own objection to seven questions propounded by defense counsel. During cross-examination of Campbell (set forth in less than three pages of the record) the court sustained its own objection to nine questions propounded by defense counsel. On two occasions after sustaining its own objections, the court in the presence of the jury told defendant's counsel, "You know better than that."

We recognize the general rule that a trial court, in the exercise of its right to control and regulate the conduct of the trial, may, of its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence. *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912 (1960). But we think the instant case is analogous to *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971) where Justice Huskins, speaking for the Supreme Court said: "As already noted, some of the judge's comments run counter to the intent and meaning of G.S. 1-180. Some do not. Any one of them standing alone, even when erroneous, might not be regarded as prejudicial. But when all the incidents are viewed in light of their cumulative effect upon the jury, we are constrained to hold that the cold neutrality of the law was breached to the prejudice of this defendant. The content, tenor, and frequency of the remarks, and the persistence on the part of the trial judge portray an antagonistic attitude toward the defense and convey to the jury the impression of judicial leaning prohibited by G.S. 1-180. This requires a new trial."

For the reasons stated a new trial is ordered. We deem it unnecessary to consider the other questions raised in the briefs.

New trial.

Judges MORRIS and PARKER concur.

PERRY CLAY WILLIAMS, MARGARET B. WILLIAMS, ADMINISTRATRIX (SUBSTITUTE PLAINTIFF) v. NATIONWIDE INSURANCE COMPANY

No. 7110DC467

(Filed 4 August 1971)

1. Pleadings § 32; Rules of Civil Procedure § 15— amendment of answer after plaintiff's evidence

The trial court did not err in permitting defendant, after plaintiff had introduced her evidence, to amend its answer to allege additional acts of contributory negligence, plaintiff already being on notice that contributory negligence was one defense upon which defendant relied, and the amendments being consistent with the facts disclosed by plaintiff's evidence. G.S. 1A-1, Rule 15(a).

2. Automobiles § 88; Negligence § 34— contributory negligence of automobile mechanic — sufficiency of evidence

In this action to recover for personal injuries sustained by plaintiff's intestate when the car underneath which he was working fell or rolled on him after the owner had removed the lugs from the left front wheel and had jacked up the front end of the car, the trial court properly submitted an issue of contributory negligence to the jury, notwithstanding there was no evidence that plaintiff's intestate knew the owner had removed the lugs, where the evidence was plenary that he knew, or should have known, that the owner was engaged in changing the tire and that removal of the lugs is a normal step in that process.

APPEAL by plaintiff from *Barnette, District Judge,* 20 January 1971 Session of District Court held in WAKE County.

Civil action commenced in 1965 to recover for personal injuries under "uninsured motorists" coverage provided by an automobile liability insurance policy. The original plaintiff, Perry Clay Williams, was injured on 28 July 1964 while he was engaged in repairing an automobile belonging to the uninsured motorist, one James Singletary. (Williams died from other causes after the action was commenced, and his administratrix was named as substitute plaintiff.) Defendant demurred to the complaint, and the question of coverage under the policy was initially determined by the North Carolina Supreme Court in passing upon a ruling on the demurrer. *Williams v. Insurance Co.,* 269 N.C. 235, 152 S.E. 2d 102. Following that decision defendant filed answer, and on a first trial in the district court the jury returned a verdict finding the uninsured motorist negligent and the original plaintiff contributorily negligent. On appeal by plaintiff, this Court awarded a new trial for errors in the court's charge to the jury. *Williams v. Insurance Co.,* 5 N.C. App. 632, 169 S.E. 2d 12.

The case was again tried in the district court before judge and jury. While in certain details the evidence was conflicting, from the evidence of both parties the jury could legitimately find the following:

The original plaintiff, Williams, was an automobile mechanic. He was employed by Singletary (the uninsured motorist) to repair the transmission on Singletary's car. The work was done at Singletary's farm, and, in preparation for the work, Singletary drove the two front wheels of his car up a small

ramp and upon a beam which was about ten inches high, while the rear wheels remained on the ground. To secure the car in position, Singletary placed a smaller beam or sill on the ground against the rear of the back wheels. In order to work on the transmission, Williams lay on his back underneath the car. While Williams was still lying underneath the car, Singletary worked at changing a flat tire on the left front wheel. Singletary testified that Williams told him that he was through working on the transmission and said, "You can change that tire because I am ready to crank it up," and Singletary thought that Williams was sliding out from under the car. Singletary removed the wheel lugs from the left front wheel and then jacked the car up by using a bumper jack on the front bumper. When Singletary turned to speak to a visitor, the car fell or rolled backwards off of the jack and off of the beam, the back wheels rolled over the sill which had been placed against them, the left front wheel fell off, and Williams was crushed underneath the car, receiving serious injuries.

The case was submitted to the jury upon the following issues: (1) negligence of Singletary; (2) contributory negligence of Williams; (3) assumption of risk by Williams; and (4) damages. The jury answered the first and second issues "Yes," and did not answer the other issues. From judgment in accord with the verdict, plaintiff appealed.

Vaughan S. Winborne for plaintiff appellant.

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

PARKER, Judge.

[1] Appellant contends that the trial court erred when it permitted defendant to amend its answer after plaintiff had introduced her evidence. In its original answer defendant had alleged contributory negligence on the part of plaintiff's intestate, and at the first trial the jury had returned verdict finding him to have been contributorily negligent. Thus, plaintiff was already amply on notice that contributory negligence was one of the defenses upon which defendant relied. The amendments merely alleged additional acts of contributory negligence and were consistent with the facts disclosed by evidence introduced by plaintiff at the second trial. Under G.S. 1A-1, Rule 15(a),

a party may amend his pleading at any time by leave of court, "and leave shall be freely given when justice so requires." In this case there was no error in allowing the amendments.

[2] Appellant contends that there was error in submitting to the jury an issue as to contributory negligence on the part of her intestate. In this connection appellant argues that while Williams may have known that Singletary was engaged in jacking up the car, there was no evidence that Williams knew that the lugs had been removed from the wheel, and so long as the wheel remained securely fastened, Williams could not have been crushed even if the jack slipped. However, the evidence is plenary that Williams knew, or should have known, that Singletary was engaged in changing the tire and that removal of the lugs is a normal step in that process. It was for the jury to determine whether the fact that he remained under the car under such circumstances constituted negligence on his part which was a proximate cause of his injuries.

Appellant has directed a number of assignments of error to the trial court's rulings admitting or excluding evidence and to the court's charge to the jury. We have examined all of these carefully, and we find no prejudicial error which would justify sending this case back for a third trial. "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." *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159. This the appellant has not shown. Accordingly, we find

No error.

Judges BRITT and MORRIS concur.

JOE C. LINEBERGER v. COLONIAL LIFE & ACCIDENT INSURANCE COMPANY

No. 7127DC421

(Filed 4 August 1971)

1. **Evidence §§ 28.5, 48; Rules of Civil Procedure § 56— letters from physicians — incompetency on motion for summary judgment**

Letters written by various physicians relating to their examination and treatment of plaintiff, which were produced by plaintiff for defendant's inspection and copying under court order pursuant to G.S. 1A-1, Rule 34, were not competent for consideration by the court in passing upon defendant's motion for summary judgment, where (1) the letters were not under oath and could therefore not be considered as affidavits, and (2) the letters contain opinions which would be competent in court only if the physicians were established to be medical experts, and there was no admission that any of the witnesses were medical experts and none of the letters contain information which would support a finding that they were.

2. **Rules of Civil Procedure § 56— motion for summary judgment — burden of proof — burden of opposing party**

The burden is on the party moving for summary judgment to establish the lack of a triable issue of fact; where the evidentiary matter supporting the moving party's motion is insufficient to satisfy his burden of proof, it is not incumbent upon the opposing party to present any competent counter-affidavits or other materials. G.S. 1A-1, Rule 56.

APPEAL by plaintiff from *Mull, District Judge,* 22 February 1971 Session of District Court held in GASTON County.

On 13 November 1968, defendant issued to plaintiff a comprehensive accident indemnity policy providing, among other things, for indemnity in the event injuries "are sustained by the Insured and within twenty days from date of accident, independently of all other causes, wholly and continuously disable the Insured from performing any and every duty pertaining to his occupation. . . . "

Plaintiff brought this action on 29 March 1970 seeking recovery under the above provision on the ground he was totally and permanently disabled as a result of injuries sustained in an automobile collision on 21 March 1969.

Upon motion of defendant made under Rule 34 of the North Carolina Rules of Civil Procedure, the court ordered plaintiff to produce for defendant's inspection and copying medical reports and records relative to the action. These records, which

plaintiff produced pursuant to the court's order, consist essentially of letters written by various physicians relating to their examination and treatment of plaintiff. Some of the letters tend to show that plaintiff is not totally and permanently disabled, and further, that whatever disability he may have, resulted in part from injuries sustained in a 1952 motorcycle accident.

Defendant moved for summary judgment "in that the pleadings show that there is no genuine issue as to any material fact. . . . " The court allowed the motion and expressly stated in its judgment that the medical reports and records produced by plaintiff were considered in determining that the motion should be allowed. Plaintiff appealed.

Tim L. Harris by Don H. Bumgardner for plaintiff appellant.

Hollowell, Stott & Hollowell by L. B. Hollowell, Jr., for defendant appellee.

GRAHAM, Judge.

[1] The only evidence possibly justifying the entry of summary judgment for defendant arose from statements made by several examining physicians in the letters produced by plaintiff for defendant's examination and copying. These letters were not under oath and could therefore not be considered as affidavits. *Ogburn v. Sterchi Brothers Stores, Inc.*, 218 N.C. 507, 11 S.E. 2d 460.

The letters were lacking in still another respect. G.S. 1A-1, Rule 56(e) provides: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, *and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*" (Emphasis added.) The letters in question contain various opinions which the physicians would be competent to relate in court only if they first were established to be medical experts. Stansbury, N. C. Evidence 2d, §§ 133, 135. There was no admission before the court that any of the witnesses were medical experts and none of the letters contain information which would support a finding that they were.

[2] The burden is on the party moving for summary judgment to establish the lack of a triable issue of fact. *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425. Where the evidentiary matter supporting the moving party's motion is insufficient to satisfy his burden of proof, it is not incumbent upon the opposing party to present any competent counter-affidavits or other materials. *Griffith v. William Penn Broadcasting Co.,* (E.D. Pa. 1945), 4 F.R.D. 475. Here defendant did not carry its burden of proof by establishing by competent evidence that there was no triable issue of fact. Hence, judgment granting summary judgment to defendant may not be affirmed, even though defendant failed to come forward with any evidence showing that he is entitled to recover as alleged in the complaint.

Reversed.

Judges BROCK and VAUGHN concur.

HOOD LOGGING & TIMBER COMPANY, INC. v. CECIL SMITH

No. 718DC438

(Filed 4 August 1971)

Animals § 3— collision between truck and cow — contributory negligence of truck driver

In this action to recover for damages to plaintiff's truck when it collided with one or more of defendant's cows while they were being driven across the road, plaintiff's evidence did not disclose contributory negligence as a matter of law on the part of its driver where it tended to show that the collision occurred around 6:00 p.m. in December, that it was dark and the truck lights were on, that the truck was traveling 35 mph, well within the lawful speed limit, that the cows were black, and that the driver did not see any cows on the road or on the shoulder of the road until the moment of collision.

APPEAL by defendant from *Nowell, District Judge,* 15 February 1971 Session of District Court held in WAYNE County.

Plaintiff sued for damages to his truck which allegedly occurred when the truck struck one or more of defendant's cows as they were being driven across the road.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict, stating as the only ground therefor

"[t]hat the evidence taken in the light most favorable to the plaintiff, shows the plaintiff to have been contributorily negligent as a matter of law." The motion was denied. Defendant offered no evidence. The jury returned a verdict for plaintiff, awarding damages in the amount of $550, and defendant moved for a judgment N.O.V. This motion was also denied and defendant appealed.

Braswell, Strickland, Merritt & Rouse by David M. Rouse for plaintiff appellee.

Dees, Dees, Smith & Powell by Tommy W. Jarrett for defendant appellant.

GRAHAM, Judge.

Defendant did not assert in either his motion for a directed verdict or his motion for judgment N.O.V. that the evidence was insufficient to show negligence on his part. Neither does he make any assertion to this effect here. His sole contention is that plaintiff's evidence establishes, as a matter of law, that plaintiff's employee was negligent in the operation of the truck and that his negligence was a proximate cause of the collision and resulting damages.

Testimony of plaintiff's truck driver tended to show that the collision occurred at around 6:00 p.m. on the evening of 2 December 1969. It was dark and the truck lights were on. The speed of the truck immediately before the collision was approximately 35 miles per hour, well within the lawful speed limit. The cows were black. The driver did not see any cows on the road or on the shoulder of the road until the moment of the collision. He stated "Only thing I know it just jumped out and hit me, I tried to stop."

The evidence is similar to that considered by this Court in *Duke v. Tankard,* 3 N.C. App. 563, 165 S.E. 2d 524. In that case the plaintiff was traveling 50 to 55 miles per hour along a road in open country where the posted speed limit was 60 miles per hour. Defendant's cow suddenly appeared in front of plaintiff's vehicle when it was only 10 to 12 feet away. This Court held that the evidence did not show that plaintiff was contributorily negligent as a matter of law. See also *Bullard v. Phillips,* 246 N.C. 87, 97 S.E. 2d 449, and *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711.

Defendant relies upon *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657, where the court held that the plaintiff was contributorily negligent as a matter of law under the following undisputed facts: Plaintiff was operating his car on a straight road on a bright, moonlit night. Defendant's mule was grazing beside the road, and started walking slowly across the highway when plaintiff was 100 yards away. Without slackening his speed plaintiff drove on, and collided with the mule, when only her hindquarters and rear feet were on the pavement. There was also uncontradicted evidence that plaintiff's headlights picked up the mule when the car was 100 or 150 yards away.

Defendant's son, who was called by plaintiff as a witness, testified as to facts quite similar to those considered by the Supreme Court in *Johnson.* However, his testimony conflicted with other evidence which, when considered in the light most favorable to plaintiff, tended to show that the black cow suddenly appeared from out of the darkness, "jumping" out and striking the truck as plaintiff's driver tried to bring it to a stop. It is elementary that in considering whether a plaintiff is entitled to have his case passed upon by a jury, all contradictions, conflicts, and inconsistencies must be resolved in his favor. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47, and cases therein cited.

We are of the opinion and so hold that plaintiff's evidence did not show that plaintiff was contributorily negligent as a matter of law.

No error.

Judges BROCK and VAUGHN concur.

W. T. YANCEY v. LOUISE H. WATKINS, WIDOW, EXECUTRIX OF THE ESTATE OF G. B. WATKINS, AND INDIVIDUALLY

No. 719SC459

(Filed 4 August 1971)

Rules of Civil Procedure § 12— premature motion for judgment on pleadings

Defendants' motion for judgment on the pleadings and the hearing on the motion were premature where the motion was filed before defendants had filed answer, and the hearing was held before plaintiff had the opportunity to file a reply. G.S. 1A-1, Rule 12(c).

APPEAL by substituted plaintiffs from judgment of *Brewer, Judge,* entered 14 April 1971 following hearing at December 1970 Civil Session, GRANVILLE Superior Court.

The original plaintiff instituted this action asking for specific performance of an alleged contract to convey land. Numerous pleadings and motions were filed but only the following are pertinent to this appeal:

On 16 September 1969, plaintiff filed an amended complaint and on 7 March 1970 an amendment to the amended complaint was allowed. On 18 November 1970, defendants filed motion for judgment on the pleadings and on 19 November 1970 filed answer to the amended complaint. On 20 November 1970, pursuant to petition, an order was entered allowing substitution of parties plaintiff due to the death of the original plaintiff on 28 November 1969.

On 15 April 1971, a judgment signed by Judge Brewer was filed. In this judgment he recited that the cause was heard before him at the regular December 1970 Session of Granville Superior Court on a motion for judgment on the pleadings and that by stipulation of the parties, the judgment was signed "out of the Term, and out of the county." The judgment set forth findings of fact; also conclusions of law including conclusions that the action is barred by the statute of limitations, plaintiffs are guilty of laches, and the matter is *res judicata* in that ownership of the interest plaintiffs attempt to establish in the subject land has been previously determined in another action between the parties.

From the judgment dismissing the action and taxing them with the costs, plaintiffs appealed.

Perry, Kittrell, Blackburn & Blackburn and Royster & Royster by Charles F. Blackburn for plaintiff appellant.

Watkins & Edmundson by R. Gene Edmundson for defendant appellees.

BRITT, Judge.

Plaintiffs contend that defendants' motion for judgment on the pleadings was premature; therefore, the court erred in entering its judgment pursuant to the motion. The point is well taken.

The record discloses: On 18 November 1970, defendants filed a motion for judgment on the pleadings "under Rule 12(c) and Rule 56 of the Rules of Civil Procedure, as amended." On 19 November 1970, defendants filed their answer to the amended complaint, setting forth 12 affirmative defenses including invalidity of the alleged contract, statute of limitations, laches, and *res judicata.* The judgment appealed from recites that the cause was heard at the regular December 1970 Session of Granville Superior Court but does not indicate the date or dates of the hearing; we take judicial notice of the fact that this session of Granville Superior Court was a one week session, convening on 7 December 1970.

Rule 12(c) provides that *"after the pleadings are closed* but within such time as not to delay the trial, any party may move for judgment on the pleadings." (Emphasis added.) At the time defendants moved for judgment on the pleadings, the pleadings were not closed. Defendants had not filed answer. Plaintiff had not had opportunity to file a reply; in fact, the session of court at which the motion was heard convened on the eighteenth day after the answer was filed. We hold that the filing of, and hearing on, the motion for judgment on the pleadings was premature.

Defendants strenuously argue that a former action between the parties (see *Yancey v. Watkins,* 2 N.C. App. 672, 163 S.E. 2d 625 [1968]) is *res judicata* to this action and the trial court so held. We deem it unnecessary to pass on this contention but observe that the proceedings and judgment in the former action were not submitted as evidence at the hearing of this action and were not included in the record on appeal. As to whether

this court can take judicial notice of the record on appeal in another action, *quaere.*

For the reason stated, the judgment appealed from is vacated and this action is remanded for further proceedings consistent with this opinion.

Error and remanded.

Judges MORRIS and PARKER concur.

IN RE: JOHN RAY COLLINS

No. 7126DC409

(Filed 4 August 1971)

Courts § 15; Infants § 10— juvenile delinquency proceeding — failure of record to show time of service of process

Failure of the record of a juvenile delinquency proceeding to show the exact time and manner of service of the summons and petition upon the juvenile and his parents was not fatal where the record affirmatively shows that the juvenile and his mother were in fact accorded sufficient notice of the hearing at which he was adjudicated delinquent to provide adequate opportunity to prepare, that at least seven days prior to the hearing he had been represented by privately employed counsel, and that he was represented by such counsel at the hearing, which had already been once continued.

APPEAL by a juvenile from *Johnson, District Judge,* 12 February 1971 Session of District Court held in MECKLENBURG County.

This is an appeal by a juvenile from an order of the District Judge, entered after a hearing, finding the juvenile to be a delinquent and committing him to the North Carolina Board of Juvenile Correction for an indefinite period of time.

Attorney General Robert Morgan by Staff Attorney Charles A. Lloyd for the State.

Charles B. Merryman, Jr., for the juvenile appellant.

PARKER, Judge.

Appellant raises no question on this appeal as to the sufficiency of the evidence to support the court's finding that he is delinquent. His sole contention is that the proceeding is fatally defective and he is entitled to have the judgment arrested and the proceeding dismissed because the record fails to show affirmatively that summons and copy of the petition were served upon his parents and upon him "not less than five days prior to the date scheduled for the hearing" as provided by statute, G.S. 7A-283. On the facts presented by this record, there is no merit in appellant's contention.

While the record on this appeal fails to show the manner or time of service of the summons, it does show unequivocally the following: Two petitions, one dated 23 November 1970 and one dated 18 December 1970, were filed, in each of which it was alleged that John Ray Collins is a child less than sixteen years of age and is delinquent in that he had engaged in specifically alleged acts of misconduct (in one case the alleged unlawful acts, if committed by an adult, would have amounted to felonious breaking and entering and in the other case would have constituted the unlawful taking of a motor vehicle). On 5 February 1971 an order was entered continuing the matter until 11 February 1971 and directing that the juvenile be placed at the Juvenile Diagnostic Center "pending further social investigation." The name of the juvenile's privately employed counsel appears on this order, indicating that the juvenile was being represented by counsel at least as early as 5 February 1971. The hearing was not actually held until 12 February 1971, at which time the juvenile appeared before the court, along with his mother and his privately retained counsel. Witnesses appeared who testified in support of the allegations contained in the petitions. The juvenile's brother also appeared at the hearing and testified for him in connection with one of the cases.

The record before us, though deficient in not showing the exact time and manner of service of process, thus does affirmatively disclose that in this proceeding the juvenile and his mother were in fact accorded sufficient notice of the hearing at which he was adjudicated delinquent to provide adequate opportunity to prepare. For at least seven days prior to the hearing he had been represented by privately employed counsel. He was represented by such counsel at the hearing, which had already

been once continued. Counsel had opportunity to move for further continuance had that been desired. At the hearing, the juvenile was confronted by witnesses against him who were subject to cross-examination by his counsel. He was given the opportunity, which he took advantage of, to produce witnesses in his own behalf.

Whatever the nature of juvenile delinquency proceedings may ultimately be determined to be (see *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 and *McKeiver v. Pennsylvania* and *In re Burrus,* decided by the United States Supreme Court 21 June 1971), it is apparent that in this proceeding the petitioner has been accorded due process. The judgment appealed from is

Affirmed.

Judges BRITT and MORRIS concur.

CURTIS LEE McNEILL v. MALCOLM A. MINTER

No. 7111DC464

(Filed 4 August 1971)

1. **Trover and Conversion § 1— conversion defined**

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.

2. **Trover and Conversion § 1— nonapplicability to realty**

Conversion applies only to personal property and does not apply to real property.

APPEAL by defendant from *Lyon, District Judge,* 11 January 1971 Session of LEE County District Court.

Plaintiff instituted this action to recover $650.00 in damages from defendant. Plaintiff's evidence tended to show: He signed a note and a contract to purchase a certain lot in a real estate subdivision owned by Minter Realty Company, of which defendant was an officer and shareholder. The sale of the lot was made to plaintiff by defendant, acting on behalf of the realty company. Plaintiff paid $50.00 down and his note obligating him to pay $30.00 per month was assigned to Southern National Bank; he was to receive a deed to the property at the

completion of the payments. Plaintiff's contract for the purchase of the lot was signed by him only and was never recorded. Over a year after this transaction, defendant, as vice president of Minter Realty Company, negotiated a sale of the lot plaintiff had agreed to purchase, as well as other lots in the subdivision, to Carr Creek Estates, Inc. Acting as assistant secretary of Minter Realty Company, defendant signed the deed transferring the property to Carr Creek Estates, Inc. Then defendant, as president of Carr Creek Estates, Inc., signed a deed of trust on the lots in the subdivision from Carr Creek Estates, Inc. to E. T. Newton and S. C. Brawley, Jr., Trustees. Plaintiff subsequently discovered a house on "his" lot with people living in it and stopped making payments to Southern National Bank.

Defendant's evidence tended to show that defendant was acting in a corporate capacity when he engaged in the transactions complained of, and that he did not receive any personal remuneration from the transactions. Defendant has since been adjudged a bankrupt, the discharge in bankruptcy being granted over the objection of plaintiff.

At the conclusion of all the evidence, the trial judge made findings of fact and conclusions of law and entered judgment in favor of plaintiff for $650.00 plus interest. The judgment also provided for execution against the person of defendant. Defendant appealed.

Hoyle & Hoyle by J. W. Hoyle for plaintiff appellee.

Cameron & Harrington by J. Allen Harrington (by brief) for defendant appellant.

BRITT, Judge.

Defendant assigns as error the conclusion of law of the trial judge that "[t]he plaintiff was damaged by defendant's deceit and conversion of real property to the extent and in the amount of $650.00, with six (6%) percent interest thereon from June 25, 1968." The assignment of error must be sustained.

[1, 2] "Conversion" is defined as "an unauthorized assumption and exercise of the right of ownership over *goods* or *personal chattels* belonging to another, to the alteration of their condition or the exclusion of an owner's rights." (Emphasis ours.) *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E. 2d 559 (1966); *Peed v.*

Burleson's, Inc., 244 N.C. 437, 94 S.E. 2d 351 (1956); 89 C.J.S., Trover & Conversion, § 1, p. 531 (1955). While there appears to be no North Carolina case that expressly so holds, the language quoted above indicates that conversion applies only to goods and personal property and does not apply to real property. Other jurisdictions have expressed this view. See *Graner v. Hogsett*, 84 Cal. App. 2d 657, 191 P. 2d 497 (1948) and *Eadus v. Hunter*, 268 Mich. 233, 256 N.W. 323 (1934). C.J.S. states: "An action of trover lies only for the conversion of personal chattels. Such action does not lie for a wrongful deprivation of, or for injuries to, land or other real property . . . . " 89 C.J.S., Trover & Conversion, § 11, p. 538 (1955).

As the trial judge erroneously concluded that there was a conversion of real property, the judgment based upon that conclusion is

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN PAUL WRENN

No. 7110SC410

(Filed 4 August 1971)

1. **Searches and Seizures § 3— sufficiency of affidavit for search warrant**

   Affidavit was sufficient under [former] G.S. 15-25.1 for issuance of a search warrant for marijuana where the affiant had observed marijuana plants growing in defendant's backyard.

2. **Criminal Law § 84— statements to police as fruits of search**

   Contention that statements made by defendant to officers should have been excluded as "fruits of an illegal search" is without merit where the search was conducted under a valid warrant.

3. **Constitutional Law § 30— speedy trial**

   The record on appeal fails to show that defendant was denied a speedy trial where it shows only that defendant was arrested on 15 July 1968 and was tried in February 1971, the passage of time standing alone showing no prejudice to defendant.

APPEAL by defendant from *Brewer, Judge*, 1 February 1971 Session of Superior Court held in WAKE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of the narcotic drug marijuana.

State's evidence tended to show the following: On 15 July 1968 defendant resided in a duplex apartment in Knightdale. On that date law enforcement officers served a search warrant on defendant at his residence for the purpose of searching for marijuana. Defendant led the officers to an upstairs bedroom and pointed out vegetable material in a bowl and some in a bag. The contents of this bowl and bag were identified by a chemist as 154 grams of marijuana. During the course of the search marijuana plants were found growing in defendant's backyard.

Defendant offered no evidence.

From a verdict of guilty of possession of marijuana in excess of one gram, and a prison sentence of not less than one nor more than two years, defendant appealed.

Attorney General Morgan, by Trial Attorney Cole, for the State.

Tharrington & Smith, by Roger W. Smith, for the defendant.

BROCK, Judge.

Defendant argues much of his assignments of error as though he had been charged and convicted under G.S. 90-111.1 of the felony of growing marijuana. Defendant was charged and convicted of the felony of possession of marijuana under G.S. 90-88.

[1] Defendant assigns as error that no probable cause for issuance of the search warrant is set out in the affidavit. Defendant relies upon the requirements of G.S. 15-25.1 prior to its repeal and rewrite in 1969, and relies upon our decision in *State v. Milton,* 7 N.C. App. 425, 173 S.E. 2d 60. The search warrant in the instant case was issued while G.S. 15-25.1, cited above, was in effect. However the affidavit in this case passes the tests which the affidavit in *Milton* failed to pass. In the present case the affiant observed marijuana plants growing in defendant's backyard. This alone justified a finding of probable cause to issue the search warrant. The evidence on *voir dire*

only serves to strengthen the probable cause. This assignment of error is overruled.

[2] Defendant assigns as error that statements made by defendant to the officers should have been excluded as "fruits of an illegal search." We have held the search warrant valid; therefore, this assignment of error is overruled without further discussion.

[3] Defendant assigns as error that the trial judge denied his motion to quash the indictment. The minutes of the Court show the following: "2/1/71 Upon the calling of this case for trial, defendant through counsel, Carl Churchill, made a motion to quash the bill of indictment. Motion denied." The Record on Appeal discloses no grounds for the motion, nor any evidence in support of any grounds to quash the indictment. For the first time, in his brief, defendant undertakes to argue that the indictment should be quashed because he was denied a speedy trial. From the Record on Appeal we can see that defendant was arrested on 15 July 1968, the same date the search warrant was issued, and that defendant was tried in February 1971. This passage of time standing alone shows no prejudice to defendant; so far as we can tell the delay may have been at defendant's requests. This assignment of error is overruled.

Upon an examination of the entire record we conclude that defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

JOYCE N. GAY, WIDOW AND JOYCE N. GAY, NEXT FRIEND OF SANDRA GAY, THE MINOR CHILD OF JOSEPH H. GAY, DECEASED (EMPLOYEE) v. GUARANTEED SUPPLY COMPANY, INC., (EMPLOYER) AND AETNA CASUALTY & SURETY COMPANY, INSURER

No. 7118IC472

(Filed 4 August 1971)

1. Master and Servant § 93; Rules of Civil Procedure § 26— adverse examination of defendant's president — admissibility

In a workmen's compensation hearing held on 28 May 1970, the admissibility of an adverse examination of defendant's president taken on 2 January 1968 was governed by G.S. 1A-1, Rule 26(d)(1), and portions of the adverse examination offered by plaintiffs should have been received in evidence, notwithstanding defendant's president had testified in one of the hearings and resided within 75 miles of the hearing site.

2. Evidence § 11— opening the door to testimony of telephone conversation with decedent

In a workmen's compensation proceeding in which plaintiff contended that the employee's death in an automobile accident occurred while he was returning home on a weekend from his job site in Kentucky not only to see his family but also in connection with his employer's business, defendant's cross-examination of the deceased employee's widow as to whether the employee had told her in a telephone conversation that he was coming home to bring her a new car "opened the door" for the admission of the widow's previously excluded testimony that the employee had told her by telephone that his employer's president "had asked him to come in," and plaintiff's reoffer of the excluded testimony was improperly refused.

3. Evidence § 33; Master and Servant § 93— workmen's compensation — exclusion of hearsay testimony

In this workmen's compensation proceeding, the hearing commissioner did not err in the exclusion of testimony that two days before the accident the employee had received a telephone call and had told the witness that his employer's president had called and "he guessed he would go home; he wanted him to come in something about the job."

4. Evidence §§ 11, 33; Master and Servant § 93— workmen's compensation — declaration of decedent showing intention — exception to hearsay rule

In this workmen's compensation proceeding in which plaintiff contended that the employee's death in an automobile accident occurred while he was returning home on a weekend from his job site in Kentucky not only to see his family but also in connection with his employer's business, testimony that on the afternoon before the fatal accident that night the witness was with the employee in a motel and that the employee said he had to "go in" because his employer's

president "wanted him to bring some papers," *held* admissible as an exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention.

APPEAL by plaintiffs from award of the North Carolina Industrial Commission filed 23 November 1970.

Plaintiffs attempt to recover benefits under the Workmen's Compensation Act which they contend are due them because of the death of Joseph H. Gay (Joseph). They contend that Joseph's death was caused by accident arising out of and in the course of his employment with defendant employer.

The stipulations and evidence tended to show: Joseph was employed by defendant employer, a Greensboro contractor, as a job foreman. He made his home with his family in Greensboro. In September 1967, defendant employer sent Joseph to Richmond, Kentucky, to recruit labor and supervise the repair of certain Army facilities near Lexington, Kentucky. Joseph furnished his own transportation from Greensboro to Kentucky. He was employed at a weekly salary of $175.00 and, in addition, defendant employer paid all his living expenses while in Kentucky, all gas, oil and maintenance expenses on his pickup truck which was used in connection with the Kentucky project; Joseph was also paid ten cents per mile for driving his vehicle to Kentucky and was promised a minimum of one round trip plane ticket monthly from Kentucky to Greensboro.

Joseph returned to Greensboro on alternate weekends. Plaintiffs contend these trips were not only for Joseph to see his family but in connection with employer's business. On the weekend of 18 November 1967 while returning to Greensboro in his own automobile, at around 12:10 a.m., his car went over the side of a mountain on a curve near Boone, N. C., and he was fatally injured.

After several hearings, the hearing commissioner entered an order in which he found and concluded that Joseph's accidental death did not arise out of and during the course of his employment. The full commission approved the order of the hearing commissioner and plaintiffs appealed.

Narron, Holdford & Babb by Talmadge L. Narron for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellees.

BRITT, Judge.

[1] Plaintiffs first assign as error the hearing commissioner's refusal to admit portions of an adverse examination of E. J. Sachs, employer's president and general manager. The record indicates that the hearing commissioner regarded the adverse examination as a deposition and refused to admit portions offered by plaintiffs for that Mr. Sachs had testified in one of the hearings and resided within 75 miles of the place of the hearing. Plaintiffs contend that while the adverse examination (or deposition as claimed by defendants) was taken on 2 January 1968 that it was offered into evidence at a hearing on 28 May 1970, therefore, the admissibility was governed by Rule 26(d) (1) of the Rules of Civil Procedure, G.S. 1A-1.

The assignment of error is sustained. We think Rule 26(d) (1) applies and that the portions of the Sachs' examination offered by plaintiffs should have been received in evidence. G.S. 1A-1. Ch. 954, Sec. 10, 1967 Session Laws as amended by Ch. 803, Sec. 1, 1969 Session Laws.

[2] Plaintiffs assign as error the exclusion of certain testimony of the widow. Plaintiffs offered testimony of Mrs. Gay to the effect that on Thursday night prior to the fatal accident on Friday night, Joseph called her over the telephone from Kentucky; that he called to let her know that he would be home that weekend; that there had been a change in plans; "that Mr. Sachs had asked him to come in." The obvious purpose of the testimony was to show that Joseph was coming to Greensboro not only to see his family but at the request of his employer. The hearing commissioner sustained defendants' objection to the testimony but permitted it entered into the record. Thereafter defendants' counsel cross-examined Mrs. Gay about the telephone conversation; defense counsel asked her if her husband did not state that he was coming home for purpose of bringing Mrs. Gay a new car. Following the cross-examination, plaintiffs reoffered Mrs. Gay's direct testimony, contending that the cross-examination regarding the telephone conversation made the portion offered by plaintiffs admissible.

The assignment of error is sustained. When defendants' counsel attempted by cross-examination of Mrs. Gay to establish defendants' contention as to why Joseph was coming home on the night of his death, counsel "opened the door" as to the por-

tion plaintiffs sought to introduce. Stansbury N. C. Evidence, Second Edition, Sec. 75 and cases therein cited. The instant case is clearly distinguishable from *Shelton v. Railroad,* 193 N.C. 670, 139 S.E. 232 (1937) because here defendant's objection to the testimony had been sustained and there was no reason for cross-examination regarding it.

[3] Plaintiffs assign as error the refusal of the hearing commissioner to admit into evidence testimony of Marvin Farmer relating to a telephone call allegedly received by Joseph on Wednesday evening from Mr. Sachs. Over defendants' sustained objection, Farmer testified for the record that he and Joseph were eating supper, that the manager of the motel came over and told Joseph that he had a long distance phone call; that in a few minutes Joseph returned and stated that Sachs had called and "he guessed he would go home; he (Sachs) wanted him to come in something about the job." This evidence was clearly inadmissible and the assignment of error is overruled.

[4] Plaintiffs assign as error the exclusion of testimony by Connie Baines to the effect that on Friday afternoon before the fatal accident that night, he was with Joseph at a motel in Kentucky; that he (Baines) left in another automobile a few minutes before Joseph left; that Joseph said that he had to "go in because Mr. Sachs wanted him to bring some papers." Plaintiff contends that this evidence was admissible as part of the *res gestae.*

The assignment of error is sustained. We hold that the evidence was admissible but not necessarily as a part of the *res gestae.* The evidence appears to meet the requirements set forth in *Little v. Brake Company,* 255 N.C. 451, 121 S.E. 2d 889 (1961) ; moreover, it is strikingly similar to the evidence which the Supreme Court declared admissible in the very recent case of *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). In *State v. Vestal, supra,* in the opinion written by Lake, Justice, we find the following: "The sound basis for its admission is not the *res gestae* doctrine, but the exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention, when the intention is relevant *per se* and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind."

In their remaining assignments of error, plaintiffs contend that the hearing commissioner erred (1) in failing to make

certain findings of fact, and (2) in making erroneous findings. In view of our disposition of this appeal, we find it unnecessary to pass upon these assignments.

Taking into consideration the aggregate of the evidence we think was erroneously excluded, we cannot say that plaintiffs were not prejudiced thereby; therefore, we vacate the order appealed from and remand the proceeding to the Industrial Commission. In its further deliberations the commission will consider the evidence offered by plaintiffs and declared by us to have been erroneously excluded.

Error and remanded.

Judges MORRIS and PARKER concur.

GIRARD TRUST BANK v. F. E. EASTON

No. 718SC439

(Filed 4 August 1971)

1. **Rules of Civil Procedure § 63— substitute judge for disabled or deceased judge**

Under G.S. 1A-1, Rule 63, an appropriate judge may substitute for a disabled or a deceased judge before whom an action has been tried only with respect to duties remaining to be performed after a verdict has been returned or findings of fact and conclusions of law have been filed.

2. **Rules of Civil Procedure § 63— nonjury trial — death of judge before judgment signed — substitute judge**

Where, at the conclusion of the evidence in an action tried before the court without a jury, the trial judge orally indicated answers in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial, and instructed plaintiff's counsel to submit a proposed judgment containing appropriate findings of fact and conclusions of law, but the trial judge died before signing the judgment which had been submitted to him, *held*, the issues and the court's answers thereto constituted neither a verdict nor findings of fact and conclusions of law which would permit a substitute judge to proceed under Rule 63 to enter judgment in the case.

APPEAL by plaintiff from *Peel, Judge*, 14 December 1970 Session of Superior Court held in WAYNE County.

This action was tried before Judge Bundy, without a jury, at the May 1970 Session of Superior Court held in Wayne County. At the conclusion of the evidence Judge Bundy indicated his intention to rule in favor of the plaintiff. The parties agreed that the judgment and exceptions thereto could be signed out of session and out of district. Plaintiff's counsel was instructed to prepare and submit to Judge Bundy a proposed judgment containing appropriate findings of fact and conclusions of law. This was done shortly before Judge Bundy left on a trip to Europe. While in Europe, Judge Bundy died without having signed the proposed judgment.

Plaintiff moved before Judge Peel, judge presiding over a regular session of Superior Court in Wayne County, that he sign the proposed judgment which had been tendered to Judge Bundy. Judge Peel concluded that he was without jurisdiction to do so and denied the motion. This conclusion was based upon findings, as a matter of law, that no verdict was returned in the trial and no findings of fact and conclusions of law were filed.

Dees, Dees, Smith & Powell by William W. Smith for plaintiff appellant.

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

GRAHAM, Judge.

G.S. 1A-1, Rule 63, provides that an appropriate substitute judge may perform duties remaining to be performed after a verdict is returned or findings of fact and conclusions of law are filed where the judge before whom the action was tried is unable to do so by reason of death, sickness or other disability.

[1] It is not disputed that under this rule an appropriate judge may substitute for a disabled or a deceased judge before whom an action has been tried, only with respect to duties remaining to be performed after a verdict has been returned or findings of fact and conclusions of law have been filed. Consequently, the question here is simply whether Judge Peel correctly found that no verdict had been returned and that no findings of fact and conclusions of law had been filed. We hold that he did.

[2] During the course of the trial the parties waived a trial by jury and proceeded to try the case before the court without

a jury. At the conclusion of all of the evidence, Judge Bundy stated:

> "It is not a matter of issues except as a basis of findings of facts and conclusions of law and the judgment. I will ask counsel to carefully draw up the findings based on this, and the conclusions of law, and the judgment."

Judge Bundy then proceeded to orally indicate an answer in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial. Plaintiff argues that in answering these issues the court returned a verdict within the meaning of Rule 63. We disagree. G.S. 1A-1, Rule 52(a)(1), provides that in all actions tried without a jury, the court shall find the facts and state separately its conclusions of law thereon. Hence, it would have been inappropriate for Judge Bundy to have disposed of the merits of the case upon answers to jury type issues. His statement indicates that he did not intend to do so.

Plaintiff also argues that the issues, when considered together with the court's answers thereto, constitute sufficient findings of fact and conclusions of law to permit a substitute judge to proceed under Rule 63. We do not so find. The issues were intended as nothing more than a guide to assist counsel in preparing findings of fact and conclusions of law which might, or might not, be adopted by the court. The issues are insufficient to form any basis for review and a judgment based upon the issues alone would require a remand for sufficient findings of fact and conclusions of law.

Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only that he may perform such acts as are necessary under our rules of procedure to effectuate a decision already made. Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision making process.

Affirmed.

Judges BROCK and VAUGHN concur.

CORTNEY R. KING v. WILLIAM M. DANIELS, JR. AND LEON R. RANDOLPH, JR.

No. 712SC468

(Filed 4 August 1971)

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

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from, no order extending the time for docketing having been entered.

2. **Conspiracy § 2— civil conspiracy — insufficiency of evidence**

Plaintiff's evidence was insufficient to be submitted to the jury in this action to recover damages for civil conspiracy to prevent plaintiff from being reemployed as a school teacher.

APPEAL by plaintiff from *May, Special Judge,* 15 February 1971 Session, BEAUFORT Superior Court.

In this tort action, plaintiff seeks to recover damages from defendants, alleging that defendants wrongfully prevented her from being reemployed as a teacher in the Washington City Schools.

After plaintiff presented her evidence, defendants moved for a directed verdict. The motion was allowed and from judgment that plaintiff recover nothing of defendants and taxing her with the costs, plaintiff appealed.

Wilkinson, Vosburgh & Thompson by John A. Wilkinson and LeRoy Scott for plaintiff appellant.

Rodman & Rodman by Edward N. Rodman for defendant appellees.

BRITT, Judge.

[1] The judgment appealed from was entered and filed on 17 February 1971. The record on appeal was docketed in this court on 25 May 1971, 97 days after the judgment was signed. Rule 5 of the Rules of Practice in the Court of Appeals requires that the record on appeal, absent an order extending the time, be docketed within 90 days after the date of the judgment or order appealed from. The record before us contains no order extending time for docketing the record on appeal; therefore, for failure to docket the record within the time prescribed by the rules, this appeal is dismissed. *Williford v. Williford,* 10

N.C. App. 541, 179 S.E. 2d 118 (1971); *James v. Harris,* 9 N.C. App. 733, 177 S.E. 2d 306 (1970); *Public Service Company v. Lovin,* 9 N.C. App. 709, 177 S.E. 2d 448 (1970).

[2] Although we have dismissed the appeal for the reason stated, we have nevertheless carefully reviewed the record and conclude that the trial court properly allowed defendants' motion for a directed verdict. Plaintiff contends that her action is based on the civil conspiracy theory; we do not think that the evidence introduced, together with the competent evidence disallowed by the court, was sufficient to make out a case of civil conspiracy.

Appeal dismissed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. SHELLEY CHARLES KING

No. 7121SC436

(Filed 4 August 1971)

Criminal Law § 172— verdict of guilty of lesser offense — error in submission of greater offenses

Error, if any, in the submission to the jury of the issues of second degree murder and manslaughter was not prejudicial where the jury found defendant guilty of involuntary manslaughter, and there is no showing that the verdict of guilty of the lesser offense was affected by submission of the greater offenses.

APPEAL by defendant from *Kivett, Judge,* 4 January 1971 Session of Superior Court held in FORSYTH County.

Defendant was charged in a bill of indictment, proper in form, with the capital felony of murder. The Solicitor elected to try defendant upon a charge of second-degree murder.

State's evidence tended to show the following: During the evening hours of 25 September 1970 defendant went to the home of his niece at 1422 Wilson Street in Winston-Salem. He was carrying a .22-calibre pistol tucked in his belt. Upon arrival he went into the kitchen where deceased, Allen Tyrone Dendy, and several others were playing cards. Deceased asked defendant about a stain on his (defendant's) shirt, and defendant re-

plied that it was none of his business. Defendant pulled the pistol from his belt and cocked it; deceased pushed his chair back from the table and ran down the hall towards the front door; the pistol in defendant's hand was fired; and the shot struck deceased in the back causing his death shortly thereafter.

Defendant's evidence tended to show the following: Defendant carried the pistol to his niece's apartment for the purpose of pawning it to his nephew. When he arrived his nephew was in the kitchen with several others. He cocked the pistol, and as he was uncocking it, something hit his arm and it went off. Defendant did not intend to fire the pistol and did not intend to shoot the deceased.

From a verdict of guilty of involuntary manslaughter, and an active prison sentence imposed, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Ray, for the State.

Green, Teeter & Parrish, by Carol L. Teeter, for the defendant.

BROCK, Judge.

Defendant's court-appointed counsel has diligently preserved his exceptions, has assigned them as error and fully argued them upon appeal. However, we hold that defendant had a fair trial, free from prejudicial error.

The assignments of error relating to submitting to the jury the possible verdicts of second-degree murder and voluntary manslaughter are without merit. The jury found defendant guilty of involuntary manslaughter and there is no showing that the verdict of guilty of the lesser offense was affected by submitting the issues of the greater offenses. Therefore, if there was error, it was not prejudicial to submit the issues of the greater offenses. *State v. Hearns*, 9 N.C. App. 42, 175 S.E. 2d 376.

The remaining assignments of error are to the charge of the court to the jury. When read in context the charge fairly presents the case to the jury upon appropriate principles of law.

No error.

Chief Judge MALLARD and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHNNY WARD, ALIAS JOHNNY SPARROW

No. 713SC502

(Filed 4 August 1971)

Larceny § 7— automobile larceny — recent possession

The State's evidence was sufficient for submission to the jury under the doctrine of recent possession in this prosecution on an indictment charging larceny of an automobile and temporary larceny of an automobile.

APPEAL by defendant from *Rouse, Judge,* 10 May 1971 Session of Superior Court held in CRAVEN County.

Defendant was charged in an indictment with larceny of a motor vehicle, receiving a motor vehicle knowing the same to have been stolen, and unlawful taking of a vehicle.

The State's evidence tended to show the following. The automobile in question, a 1967 model Oldsmobile belonging to Charles F. Bolden, Jr., was stolen from in front of the Psychedelic Shack in the city of New Bern, North Carolina, at sometime between the hours of 12:30 a.m. and 3:30 a.m. on 14 November 1970. About 7:00 a.m. on the same date, the automobile was found in a ditch in the town of Bridgeton, North Carolina, a short distance from New Bern. As the automobile was being towed from the ditch, the defendant arrived in a truck and informed Mr. Joseph Hamilton, the Chief of Police of Bridgeton, that it was his car and that he had been driving.

Defendant offered no evidence. From a verdict of guilty of unlawful taking of a vehicle, and judgment entered thereupon, defendant appealed to this Court.

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

John H. Harmon for defendant-appellant.

BROCK, Judge.

Defendant assigns as error the denial of his motion for judgment of nonsuit, and the portion of the Court's charge to the jury relating to the doctrine of recent possession. Viewing the evidence in the light most favorable to the State, as we must upon a motion for nonsuit, we think that the evidence

was sufficient to carry the case to the jury under the doctrine of recent possession. The portion of the charge to which defendant excepts was a correct statement of the law.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. MAX V. ROGERS

No. 7127SC469

(Filed 4 August 1971)

Constitutional Law § 32— allowing defendant to examine witnesses

No prejudicial error or abuse of discretion has been shown by fact that trial court, at defendant's request, allowed defendant, who was represented by appointed counsel, to examine and cross-examine some of the witnesses himself.

APPEAL by defendant from *Thornburg, Judge,* 1 February 1971 Session of Superior Court held in GASTON County.

Defendant was charged in two counts in a bill of indictment, proper in form, with the felony of breaking and entering and the felony of larceny by breaking and entering.

The facts are sufficiently set out in an opinion of this court upon a former appeal by defendant. See *State v. Rogers,* 9 N.C. App. 702, 177 S.E. 2d 301.

Upon this second trial defendant was again found guilty as charged, and again appeals.

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

Jeffrey M. Guller, for the defendant.

BROCK, Judge.

Defendant has been supplied with court-appointed counsel for two trials and two appeals. Counsel was successful in obtaining a new trial for defendant after his first conviction but defendant nevertheless undertook to vilify counsel and undertook to partially represent himself on his second trial. Despite

defendant's conduct counsel has diligently pursued this appeal. Indigent defendants are constitutionally entitled to have counsel to represent them, but this constitutional right in no way gives a defendant the right to insult and degrade counsel merely because he is unable to obtain a verdict of acquittal. Defendant's conduct produces the evidence upon which the jury passes, and he has no one to blame but himself if his conduct constitutes a crime of which he is found guilty.

Defendant assigns as error the admission of certain testimony and certain exhibits in evidence. We have examined these carefully and conclude that no prejudicial error is shown.

Defendant assigns as error certain portions of the judge's charge to the jury. We have carefully reviewed the charge and in our opinion it fairly submits the case to the jury upon appropriate principles of law. Prejudicial error is not shown.

Defendant assigns as error that the trial judge allowed defendant to examine and cross-examine some of the witnesses himself. This was at defendant's request, and so long as defendant conducted himself within customary rules it was discretionary with the trial judge to allow defendant to examine witnesses. No prejudicial error or abuse of discretion has been shown.

Defendant had a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. JERRY M. WILLIAMS

No. 7129SC483

(Filed 4 August 1971)

1. **Criminal Law § 87— allowance of leading questions by solicitor**

The trial court did not err in allowing the solicitor to cross-examine by leading questions a State's witness whose testimony in court conflicted with his prior statements to a deputy sheriff.

2. **Criminal Law § 101— permitting solicitor to confer privately with witness — change in witness' testimony**

Where the testimony of a State's witness conflicted with his prior statements to a deputy sheriff implicating defendant in the crimes

charged, and the witness admitted in the absence of the jury that he had implicated defendant, but stated that "now he could not say for sure," the trial court did not err in calling the solicitor to the bench for a conference, and in allowing the solicitor to confer privately with the witness, after which the witness returned to the stand in the presence of the jury and testified consistently with the statements he had made before trial.

APPEAL by defendant from *Beal, Special Judge,* 15 March 1971 Session of Superior Court held in RUTHERFORD County.

Defendant appeals from judgment of imprisonment imposed upon verdicts of guilty to charges of breaking and entering and larceny.

In statements made to a deputy sheriff before trial, a State's witness implicated defendant in the offenses charged. The witness' testimony in court conflicted with his prior statements and the solicitor requested permission to cross-examine him. The court excused the jury and permitted the solictor to cross-examine the witness in the absence of the jury. The witness admitted having previously implicated defendant, but stated that "now he could not say for sure."

At the conclusion of the witness' testimony in the absence of the jury, the court called the solicitor to the bench for a conference. The solicitor then summoned the witness from the stand, and the witness, the solicitor, and the deputy left the courtroom for about ten minutes. Defendant objected. The court overruled the objection stating that in its discretion it would allow the solicitor to talk with his witness. The witness returned to the stand in the presence of the jury, contradicted his previous testimony, and testified consistently with the statements he made before trial.

Attorney General Morgan by Staff Attorney Davis for the State.

George R. Morrow for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error: (1) "[t]he action of the trial court in allowing the Solicitor to cross-examine his own witness," and (2) "the action of the Trial Judge in allowing and encouraging the Solicitor to take his own witness from the Courtroom for a 10 minute conference and return him to the stand for fur-

ther testimony after the Solicitor had completed his initial examination. . . . "

Defendant cites no authority in support of either assignment of error but argues generally that the court indicated its favoritism toward the State by allowing the solicitor to cross-examine the State's witness; that the court entered into the prosecution of the case by conferring with the solicitor; and that, the solicitor's conference with his witness during the trial constituted an "improper" and "unethical" procedure.

[1] We find these arguments unpersuasive. The allowance of leading questions is a matter entirely within the discretion of the trial judge and his rulings will not be reviewed on appeal in the absence of a showing of an abuse of discretion. Stansbury, N. C. Evidence 2d, § 31. Defendant points to no abuse of discretion on the part of the trial judge and we find none.

[2] The record does not show what was said during the conference between the court and the solicitor, nor does it show what, if anything, transpired between the deputy, the solicitor and the witness during their brief absence from the courtroom. A trial court is given large discretionary power as to the conduct of a trial, and in the exercise of this discretion may permit counsel to confer privately with a witness, even while the witness is on the stand. *Rooks v. Bruce,* 213 N.C. 58, 195 S.E. 26.

Both of defendant's assignments of error are overruled.

No error.

Judges BROCK and VAUGHN concur.

CHARLIE McCLURE, JR. v. AMOS MUNGO

No. 7126SC382

(Filed 4 August 1971)

Automobiles § 59— automobile accident — insufficiency of evidence for jury

Plaintiff's evidence was insufficient for the jury in this action for damages sustained in an automobile accident which occurred when defendant, at the direction of a police officer, drove out of a parking lot on the east side of a four-lane street and collided with plaintiff's southbound vehicle.

McClure v. Mungo

APPEAL by plaintiff from *Snepp, Judge,* 25 January 1971 Session of Superior Court held in MECKLENBURG County.

This is a civil action instituted by the plaintiff, Charlie McClure, Jr., to recover damages for injury to person and property allegedly resulting from an automobile collision occurring on 8 September 1967. The plaintiff offered evidence tending to show that on 8 September 1967, at approximately 4:50 p.m., a collision occurred on North Graham Street near the First Union National Bank in the City of Charlotte, N. C., between the plaintiff's automobile and an automobile owned and operated by the defendant. North Graham Street is a four-laned street with two lanes for southbound traffic and two lanes for northbound traffic. The bank is located on the eastern side of the street. The plaintiff was operating his automobile in the outside right-hand lane in a southerly direction. There was a line of traffic in the left-hand southbound lane. As the plaintiff neared the bank, traffic in the left-hand lane came to a stop, while the plaintiff proceeded in the right-hand lane passing the stopped cars.

E. J. Smith, a Charlotte Police Officer, was directing traffic out of the First Union National Bank parking lot. The officer, standing near the center line of the street, with no traffic going north on North Graham Street, stopped the southbound traffic by holding up his hand, and at the same time directed the defendant to enter the street from the bank parking lot and make his turn to proceed south. While making his turn, the defendant's automobile collided with the automobile of the plaintiff.

At the conclusion of plaintiff's evidence, defendant's motion for a directed verdict was allowed. The plaintiff appealed.

John D. Warren for plaintiff appellant.

Sanders, Walker & London by James Walker and Richard L. Stanley for defendant appellee.

HEDRICK, Judge.

The plaintiff's one assignment of error challenges the court's ruling on the defendant's motion for a directed verdict. When the evidence is considered in the light most favorable to

the plaintiff, it is our opinion that it is not sufficient to carry the case to the jury. The judgment appealed from is affirmed.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

JAMES C. EVANS AND WIFE, ALICE B. EVANS, AND T. R. LAWING REALTY, INC., PLAINTIFF-APPELLEES v. DOROTHY ROSE, DEFENDANT-APPELLANT

No. 7126DC424

(Filed 4 August 1971)

Ejectment § 1; Landlord and Tenant § 13— summary ejectment — retaliation for airing grievances of tenants

Allegations by a tenant that the landlords' efforts to eject her from her apartment are in retaliation for her conduct in airing grievances of several other tenants constitute no defense to the landlords' action in summary ejectment to remove the tenant from the apartment, and were properly stricken by the court.

APPEAL by defendant from *Stukes, District Judge,* 1 February 1971 Session of District Court held in MECKLENBURG County.

Plaintiffs instituted an action in summary ejectment to move defendant from an apartment owned by plaintiffs. Defendant admits that she is a week-to-week tenant of plaintiffs, that plaintiffs have demanded possession of the premises, and that she has refused to surrender same. Defendant alleges, under what she entitled "first affirmative defense," "second affirmative defense," and "third and final affirmative defense," in effect that plaintiffs' effort to eject her is in retaliation for her conduct in airing grievances of several of plaintiffs' tenants.

Upon plaintiffs' motion the trial judge entered an order effectively striking all of defendant's first, second, and third affirmative defenses upon the grounds that they were irrelevant because if "found and considered to be true, the same would be insufficient in law to establish any affirmative defense to plaintiffs' complaint." The trial judge further rendered judgment for plaintiffs upon the pleadings under G.S. 1A-1, Rule 12(c).

No appearance for plaintiffs.

Legal Aid Society of Mecklenburg County, by Gail F. Barber and James A. Long IV for the defendant.

BROCK, Judge.

The only question presented to this Court is whether the trial judge erred in striking from the answer defendant's "affirmative defenses." The questions argued by defendant are succinctly stated in defendant's brief as follows:

> "The lower court erred in striking those portions of defendant's answer which alleged that plaintiff sought to evict defendant solely in retaliation for defendant's exercise of constitutionally protected rights
>
> "A. The requirements of the Fourteenth Amendment to the United States Constitution must be observed when the parties to an action assert conflicting claims of right and the conflict is resolved by a state court according to state law. Consequently, the competing private rights of the plaintiff and defendant must be determined by the balancing of interests requirements of the Fourteenth Amendment to the United States Constitution
>
> "B. In an action in summary ejectment, the allegation of a retaliatory motive on the part of a landlord against the tenant for the exercise of constitutional rights by the tenant, if proved, constitutes an affirmative defense to the action where the retaliatory motive was the primary reason for the institution of the action"

We hold that the trial judge was correct in striking the defendant's "affirmative defenses" as being irrelevant to the landlords' right to recover possession of their property.

Affirmed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHN Q. TREADWAY

No. 713SC290

(Filed 4 August 1971)

1. **Criminal Law § 154— service of case on appeal — extension of time**

Order of the trial court extending the time for defendant to serve his case on appeal on the solicitor was ineffective where it was entered after expiration of the 15 days allowed by statute in a case in which the trial court originally fixed no time for service of the case on appeal. G.S. 1-282.

2. **Criminal Law § 155.5— failure to docket record on appeal in apt time**

Appeal is subject to dismissal for failure of appellant to docket the record on appeal within 90 days from entry of the judgment appealed from. Court of Appeals Rule No. 5.

3. **Criminal Law § 25— plea of nolo contendere — failure of court to determine that plea was voluntary**

Defendant is entitled to have his plea of *nolo contendere* vacated and to replead to the charge against him where the record fails to show affirmatively that the court made any inquiry, finding or adjudication that defendant's plea was understandingly and voluntarily entered.

APPEAL by defendant, John Q. Treadway, from *James, Judge,* 5 November 1970 Session of CARTERET Superior Court.

The defendant was charged in a bill of indictment, proper in form, with possession of narcotic drugs for the purpose of sale, in violation of G.S. 90-88. The defendant, represented by privately employed counsel, entered a plea of *nolo contendere.* From a judgment imposing a prison sentence of eighteen months, the defendant appealed.

Attorney General Robert Morgan and Staff Attorney Walter S. Ricks III for the State.

Paul and Keenan by James Keenan for defendant appellant.

HEDRICK, Judge.

[1] The judgment in this case was signed on 5 November 1970. Notice of appeal to this Court was given on the same date. The record on appeal does not indicate that the court fixed the time for the defendant to prepare and serve the case on appeal upon the solicitor; therefore, G.S. 1-282, allowing the

appellant fifteen days in which to prepare and serve the case on appeal, was applicable. On 11 December 1970, the trial judge signed an "Order for Extension of Time" which, in pertinent part, reads as follows:

> "[T]hat the defendants be allowed an additional 30 days to prepare and serve and docket their case on appeal and the State be allowed 30 days thereafter to serve countercase."

G.S. 1-282 requires that "[t]he initial order of extension must be entered prior to expiration of the statutory time for service of the case on appeal." Obviously, the "extension of time" dated 11 December 1970 was ineffective.

On 5 January 1971, defendant's counsel and the solicitor entered into a stipulation as to what constituted the record on appeal. The record on appeal was docketed in this Court on 8 March 1971.

[2] The appeal is subject to dismissal for failure of the appellant to docket the record on appeal within 90 days from entry of the judgment as required by Rule 5 of the Rules of Practice of this Court.

[3] The defendant, by his one assignment of error, contends that the court committed error by accepting the defendant's plea of *nolo contendere* and entering judgment thereon without first conducting a hearing and making a finding and an adjudication that the plea was understandingly and voluntarily entered. In the recent case of *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971), Judge Brock, in applying the rule laid down in *Boykin v. Alabama,* 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709 (1969), said: "[W]e hold that where a defendant has entered a plea of guilty, or a plea of *nolo contendere,* it must affirmatively appear in the record that he did so understandingly and voluntarily."

From the record before us, it does not affirmatively appear that the court made any inquiry, finding or adjudication that the defendant's plea was understandingly and voluntarily entered. Therefore, the defendant's assignment of error is sustained, and the defendant's plea and the judgment entered thereon are vacated and the case is remanded to the superior

court where the defendant will be entitled to replead to the bill of indictment.

Vacated and remanded.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. JEFF ATKINS

No. 713SC291

(Filed 4 August 1971)

APPEAL by defendant, Jeff Atkins, from *James, Judge,* 5 November 1970 Session of CARTERET Superior Court.

The defendant was charged in a bill of indictment, proper in form, with possession of narcotic drugs for the purpose of sale, in violation of G.S. 90-88. The defendant, represented by privately employed counsel, entered a plea of *nolo contendere.* From a judgment imposing a prison sentence of eighteen months, the defendant appealed.

Attorney General Robert Morgan and Staff Attorney Walter E. Ricks III for the State.

Paul and Keenan by James Keenan for defendant appellant.

HEDRICK, Judge.

The questions presented on this appeal are identical with those presented in the case of *State v. Treadway, ante,* 167. For the reasons stated therein, the defendant's plea of *nolo contendere* and the judgment entered thereon are vacated and the case is remanded to the superior court where the defendant will be entitled to replead to the bill of indictment.

Vacated and remanded.

Judges BROCK and MORRIS concur.

JEAN BAUKNIGHT WILLIAMS v. CHARLIE R. WILLIAMS

No. 7126DC384

(Filed 4 August 1971)

Divorce and Alimony § 18— action for annulment and child custody and support — alimony, counsel fees and child support pendente lite

Where plaintiff's complaint specifically sought annulment of her marriage to defendant and custody and support of a minor child of the parties, plaintiff's motion in the cause seeking alimony and counsel fees *pendente lite* and child support was properly before the court. G.S. 50-13.4(a); G.S. 50-13.5; G.S. 50-13.6; G.S. 50-16.3(a); G.S. 50-16.4.

APPEAL by plaintiff from *Stukes, District Judge,* 22 February 1971 Session of District Court held in MECKLENBURG County.

Plaintiff instituted this action for annulment of her marriage to defendant. As grounds therefor she alleged the existence of a prior marriage of defendant. Plaintiff also alleged that one child was born of her purported marriage to defendant, and that the child had been in her exclusive care and custody since its birth.

Plaintiff filed a motion in the cause seeking alimony and counsel fees *pendente lite,* and seeking support for the minor child of plaintiff and defendant.

Judge Stukes denied plaintiff's motion in its entirety, stating reasons as follows:

"That the plaintiff has not set forth in her complaint or in any subsequent pleading, any cause of action upon which alimony PENDENTE LITE might be awarded; and

"That, although the plaintiff's complaint prays that the custody of the minor child born of the parties be awarded to said plaintiff, the plaintiff's motion does not request a determination of the custody issue and further that a motion for support and maintenance of the minor child herein involved is not at this time properly before the Court."

Plaintiff appealed.

Lila Belar attorney for plaintiff.

No appearance for defendant.

BROCK, Judge.

Plaintiff's complaint specifically seeks an annulment of her marriage to defendant, specifically seeks custody and support of the minor child, and specifically seeks an award of attorney fees for services in connection with the custody and support of the minor child.

Plaintiff's motion in the cause specifically seeks alimony and counsel fees *pendente lite,* and support for the minor child.

It seems clear that plaintiff has stated a cause of action in which alimony *pendente lite* may be awarded. And it seems clear that the matter of support for the minor child was before the court.

G.S. 50-16.3(a) provides that in an action for annulment a dependent spouse shall be entitled to an order for alimony *pendente lite* when the conditions set forth in sub-sections (1) and (2) are shown to exist. And G.S. 50-16.4 provides authority for an award of counsel fees when alimony *pendente lite* is available under G.S. 50-16.3(a).

G.S. 50-13.4(a) provides, *inter alia,* that any parent having custody of a minor child may bring an action for support of said child as provided in G.S. 50-13.5; which in turn provides that the action for custody and support, or either, may be joined in an action for annulment. G.S. 50-13.6 provides authority for an award of counsel fees in proceedings for custody and support of minor children.

The order appealed from is reversed and this cause is remanded to the District Court of Mecklenburg County for a proper hearing upon plaintiff's motion for alimony and counsel fees *pendente lite,* and for support for the minor child of the parties.

Reversed and remanded.

Judges VAUGHN and GRAHAM concur.

SIS RADIO, INC., D/B/A RADIO STATION WAYS v. JAMES C. BROGAN, D/B/A BROGAN'S STUDIO OF PHOTOGRAPHY

No. 7126DC478

(Filed 4 August 1971)

1. **Contracts § 25— contract as part of complaint — conclusions of pleader**

Where alleged contract is made a part of the complaint and is the only basis upon which plaintiff alleges a right of recovery, the court will be governed by its particular provisions rather than the conclusions alleged by plaintiff.

2. **Contracts § 4— failure of consideration**

Purported contract to reserve for defendant one booth at plaintiff's bridal fair is invalid for failure of consideration where it does not specify any type of performance by plaintiff, when plaintiff was to begin performance, or how long plaintiff was to perform.

APPEAL by plaintiff from *Stukes, District Judge,* 12 April 1971 Session of District Court held in MECKLENBURG County.

Plaintiff alleges that it entered into a contract with defendant whereby it was to reserve for defendant one booth at plaintiff's 1969 Bridal Fair in consideration of payment by defendant of the sum of $1,500.00. Plaintiff alleges performance by it and breach by defendant, and seeks recovery of $1,500.00 plus interest and costs.

When the cause came on for trial in District Court the trial judge allowed defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff appealed.

Hedrick, McKnight, Parham, Helms, Warley & Jolly, by Thomas A. McNeely, for plaintiff.

Osborne & Griffin, by Wallace S. Osborne, for defendant.

BROCK, Judge.

In its complaint plaintiff alleges in paragraph 3 that a copy of the said contract is attached and incorporated by reference. Because the alleged contract is made a part of the complaint and is the only basis upon which plaintiff alleges a right of recovery, we will be governed by its particular provisions rather than the conclusions alleged by plaintiff. *Williamson v. Miller,* 231 N.C. 722, 58 S.E. 2d 743.

The document relied upon by plaintiff does not specify any type of performance by plaintiff. If defendant had undertaken to sue plaintiff upon this document, he could not show by it what plaintiff's performance was to be, he could not show when plaintiff was to begin performance, and he could not show how long plaintiff was to perform. In short the document does not specify a consideration moving from plaintiff to defendant. "It is well settled, as a general rule, that consideration is an essential element of, and is necessary to the enforceability or validity of, a contract." 17 Am. Jur. 2d, Contracts, § 86, p. 428.

Affirmed.

Chief Judge MALLARD and Judge VAUGHN concur.

SIS RADIO, INC., D/B/A RADIO STATION WAYS v. AMERICAN BEAUTY FLORIST

No. 7126DC479

(Filed 4 August 1971)

APPEAL by plaintiff from *Stukes, D.J.*, 12 April 1971 Session of District Court held in MECKLENBURG County.

Hedrick, McKnight, Parham, Helms, Warley and Jolly by Thomas A. McNeely for plaintiff appellant.

Osborne and Griffin by Wallace S. Osborne for defendant appellee.

VAUGHN, Judge.

This case presents the same question that was decided in *Sis Radio v. Brogan* filed this date by Brock, J. For the reasons therein expressed the judgment is affirmed.

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. BOBBY DAVIS

No. 7127SC457

(Filed 4 August 1971)

Criminal Law § 155.5— failure to docket record in apt time

Appeal is subject to dismissal for failure to docket the record on appeal within the time allowed by Court of Appeals Rule No. 5.

APPEAL by defendant from *Falls, Judge,* 7 December 1970 Session of Superior Court held in CLEVELAND County.

Defendant was charged in an indictment with the crimes of felonious breaking and entering, felonious larceny, and felonious receiving of stolen property. From a verdict of guilty of felonious breaking and entering and felonious larceny, and judgment entered thereupon, defendant appealed to this Court.

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

William E. Lamb, Jr., for defendant-appellant.

BROCK, Judge.

The judgment in this case was entered on 16 December 1970 and the Record on Appeal was docketed in this Court on 24 May 1971. No order extending the time in which to docket the appeal appears of record. Thus, the appeal was docketed sixty-nine days late, and is subject to dismissal. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. However, we have examined defendant's assignments of error and find them to be without merit.

No error.

Judges VAUGHN and GRAHAM concur.

PLINIE A. WHITE v. MACK JORDAN AND ALPHONZA JORDAN

No. 719SC207

(Filed 4 August 1971)

Automobiles § 53— failure to stay on right side of highway — summary judgment

In this action to recover for injuries received in an automobile collision, defendants' motion for summary judgment was properly allowed where they offered a deposition of plaintiff tending to show that the driver of the automobile in which plaintiff was riding lost control of the automobile on an icy road and that it skidded completely into the opposite lane and struck defendants' oncoming vehicle, which had been driven partially off the highway in an attempt to avoid the collision, and plaintiff submitted nothing in opposition to the motion.

APPEAL by plaintiff from *Brewer, Judge,* 16 November 1970 Session of Superior Court held in FRANKLIN County.

Plaintiff instituted this civil action to recover damages for injuries sustained when the automobile in which he was a passenger, and which was being driven by one Hudson, collided, on 17 February 1969, with an automobile being driven by defendant Mack Jordan and owned by defendant Alphonza Jordan.

Defendants filed a motion for summary judgment and submitted in support thereof the deposition of plaintiff, which tended to show that the driver of the automobile in which plaintiff was riding lost control of the automobile on the icy road and skidded completely into the opposite lane where it struck the oncoming automobile driven by defendant Jordan, who had partially left the road to his right in an attempt to avoid the collision. Plaintiff submitted nothing in opposition to the motion. From the granting of defendants' motion, and judgment entered thereupon, plaintiff appealed to this Court.

Hubert H. Senter for plaintiff-appellant.

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

BROCK, Judge.

In our opinion, plaintiff's deposition, offered by defendant upon motion for summary judgment, amply demonstrates that

there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law.

Affirmed.

Judges MORRIS and HEDRICK concur.

GERTRUDE EDWARDS CROW v. CLARENCE H. CROW

No. 718DC374

(Filed 4 August 1971)

Appeal and Error § 39— failure to docket record on appeal in apt time

Appeal is subject to dismissal for failure of appellant to docket the record on appeal within 90 days from the date of the judgment appealed from. Court of Appeals Rule No. 5.

APPEAL by defendant from *Nowell, District Judge,* 16 November 1970 Session of District Court held in WAYNE County.

Dees, Dees, Smith and Powell by Tommy W. Jarrett for plaintiff appellee.

Sasser, Duke and Brown by John E. Duke and J. Thomas Brown, Jr., for defendant appellant.

VAUGHN, Judge.

The judgment from which defendant appealed was entered 19 November 1970. Among other things it required defendant to pay a monthly sum for the support of his two minor children. The record on appeal in this case should have been docketed not later than 17 February 1971. It was not docketed until 19 April 1971, thus missing this Court's first call of cases from the Eighth District for our spring session.

> " . . . The record on appeal must be docketed in the Court of Appeals within ninety (90) days after the day of the judgment, order, decree or determination appealed from. Within this period of ninety (90) days, but not after the expiration thereof, the trial tribunal may for good cause extend the time not exceeding sixty (60) days for docketing

the record on appeal. . . . " *Roberts v. Stewart and Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58.

See also *Dixon v. Dixon,* 6 N.C. App. 623, 170 S.E. 2d 561 and *Distributing Corp. v. Parts, Inc.,* 10 N.C. App. 737, 179 S.E. 2d 793.

For failure to comply with the rules of this Court, the appeal is subject to dismissal. We have, however, considered the case on its merits and conclude that the order from which defendant appealed should be affirmed.

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. TEMPIE MOYE

No. 718SC347

(Filed 18 August 1971)

1. **Narcotics § 4— illegal possession — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury in this prosecution for illegal possession of marijuana.

2. **Searches and Seizures § 3— affidavit for search warrant — confidential informant**

Affidavit of a police officer, based on information supplied by a confidential informant who had previously given information resulting in a charge of possession of narcotics and convictions for other crimes, *held* sufficient under G.S. Ch. 15, Art. 4, to support a magistrate's finding of probable cause for issuance of a warrant to search defendant's premises for marijuana.

3. **Criminal Law §§ 101, 130— misconduct of jurors — denial of motion for mistrial**

The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown.

4. **Criminal Law §§ 101, 128— misconduct of jurors — motion for mistrial or new trial**

A motion for mistrial or for a new trial on the ground of misconduct of the jurors is addressed to the discretion of the trial judge.

5. **Criminal Law §§ 101, 130— news report heard by jurors — reference to defendant as "dope pusher" — denial of mistrial**

In this prosecution for illegal possession of marijuana, the trial court did not abuse its discretion in refusing to declare a mistrial when some of the jurors indicated during the trial that they had heard radio news reports about the trial in which defendant was referred to as "a long-time Lenoir County peddler of bootleg whiskey, now dope pusher," the trial court having questioned the jurors and found by its denial of defendant's motion for mistrial that prejudicial misconduct had not been shown.

APPEAL by defendant from *Copeland, Judge,* 2 November 1970 Criminal Session of Superior Court held in LENOIR County.

Defendant was tried upon a bill of indictment, proper in form, charging her with the felony of illegal possession of narcotic drugs.

The evidence for the State tended to show that police officers, armed with a valid search warrant, searched the resi-

dence of the defendant at 427 Sampson Street in the City of Kinston on 9 October 1970 at about 9:00 p.m. The defendant was the only person there when the officers arrived. The officers found a brown package with a rubber band around it containing 5.5 grams of marihuana in the pocket of a dress in the defendant's bedroom clothes closet.

The defendant's evidence tended to show that if there was any marihuana or "marilla" in the pocket of her dress, the officers put it there. She had never seen any marihuana and did not possess any marihuana.

From a verdict of guilty and a judgment of imprisonment, the defendant appealed to the Court of Appeals.

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

White, Allen, Hooten & Hines by Thomas J. White and Thomas J. White III for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant assigns as error the failure of the trial judge to allow her motion for judgment of nonsuit. This assignment of error is overruled. There was ample evidence to require submission of the case to the jury. See *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

[2] Defendant also assigns as error the failure of the trial judge to suppress the evidence on the grounds that it was obtained with the use of an invalid search warrant. Defendant contends that the affidavit failed to set forth facts from which the issuing magistrate could properly find probable cause for the issuance thereof.

The affidavit upon which the search warrant was based is as follows:

"Paul W. Young, Lenoir County A. B. C. Officer; (Insert name and address; or if a law officer, then insert name, rank and agency)

being duly sworn and examined under oath, says under oath that he has probable cause to believe that Tempie Moye
(Insert name of Possessor)

has on her premises

(Insert one or more of these phrases: on his premises; in his vehicle; on his person)

certain property, to wit: Narcotic Drugs

(Describe the property sought)

the possession of which is

(Insert one of these phrases: the possession of which is; which was used in the commission of; which constitutes evidence of)

a crime, to wit:

Possession of Narcotic Drugs. October 9th, 1970, 427 Sampson St. Kinston, N. C.

(Insert name of crime; and date, location — if known)

The property described above is located at 427 Sampson St. Kinston, N. C.

(Insert one of (sic) more of these phrases:

On the premises described as follows: on the premises; in the vehicle; on the person)

a frame one store building consisting of 3 rooms and bath.

(Unmistakably describe the building, premises, vehicle, or person — or combination — to be searched)

The facts which establish probably (sic) cause for the issuance of a search warrant are as follows: Information furnished by a reliable and confidential informant who states that he has personal knowledge of marihuana being on the above premises at Tempie Moye, 427 Sampson St. Kinston, N. C. This informer has given information in July 1970 and a search was made and narcotic drugs were found and a subject charged with the crime of possession of narcotics. This have (sic) given information on other types of crimes in the years of 1969 and 1970 and his information was found to be true and correct and resulted in convictions of subjects being involved."

We hold that the search warrant, including the attached affidavit, is in substantial compliance with the provisions of Article 4, Chapter 15 of the General Statutes of North Carolina, which was rewritten in 1969 to be effective upon its ratification

on 19 June 1969. See *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). We think *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509 (1964), and the other cases cited by defendant are distinguishable.

[5] The defendant assigns as error the failure of the trial judge to declare a mistrial as a matter of law because defendant contends that eight jurors indicated during the trial that they had heard radio news reports during the trial in which the defendant was referred to by name as a "dope peddler."

On the second day of the trial which was being held in the City of Kinston, in the absence of the jury, the defendant made a motion for a mistrial stating as follows:

> "If the court pleases, the defendant's motion for a mistrial is based upon news publicity which has been given narcotics cases in general and this case in particular by Mr. Jack Ryder of H.G.R. Broadcasting Company, Station W.F.T.C. in Kinston, both yesterday morning at about 8:20 a.m. prior to the beginning of the trial of this case, then yesterday at 12:20 p.m. after the trial of this case had been commenced, and yesterday evening at 6:20 p.m. after the jury had been excused for the evening, and then again this morning at 8:20 a.m. on Mr. Ryder's 'Local News and Comment' prior to the reconvening of this court at 10:00 a.m. The first such instance was contained in an editorial, copy of which I have marked as 'Exhibit A' and at this point introduced into evidence, which is entitled 'Editorial November 4, 1970, H.G.R. Broadcasting Company by Jack Ryder,' and which reads as follows: (Defendant's Exhibit A, filed November 5, 1970)
>
> 'If anyone has any lingering question about the cause of crime running loose in our nation today it should be answered by just such abuse of common sense as that exhibited in Lenoir County Superior Court Monday in the name of law. . . A pair of 24-carat New Jersey crums were caught by local law enforcement officers and they were found to have more than 30 packages of heroin hidden on their person. . . one had it hidden in a secret compartment in the waistband of his trousers and the other had it tucked in the top of his sock. . . This pair of hiding places came as the result of information for

which the people of Lenoir County paid $1000 in reward. . . The informer not only told who the crums were, but where they would be, at what time, the license number of their car and further told the officers where the dope would be hidden on these two vermin—both of whom had gonhorrea in addition to his moral degeneracy in the peddling of dope to our children here in Lenoir County. . . But because there was in the opinion of the Judge some misplaced, or misstated phrase in the search warrant the officers used when they arrested this pair the courts have found them not guilty of having heroin which was found hidden on their person. . . Fortunately one of the pair had sold some of his heroin to an undercover officer and the court did manage to bend over backwards and find him guilty and give him a 3-to-5 year jail term, which means that he will probably be in jail one fourth of 36 months—unless some santa claus parole board turns him loose ahead of schedule. . . We do not need more laws. . . We do not need more police. . . What we need is different judges. Different interpretations of the existing laws. . . Now the last place in the world one can expect to find justice is in the courts. . . Technicalities every day turn mad-dogs loose on society and lawyers stuff their pockets with money they have earned as accessories to the lowest kind of crime. . . But the lawyers could not stuff their pockets and the guilty could not walk the streets if we just had a few. . . not many—just a few judges who would forget the technicalities and pay some attention to whether the thugs before them are guilty or innocent. . . To turn loose on our children a known peddler of the vilest kind of drugs on such a thin and stupid pretext is a prostitution of reason, of the law, and our entire civilization. . . In this the court was more criminal than the criminals themselves.'

Then, this morning, Mr. Ryder in the news portion of his editorial referred to the defendant, Mrs. Moye, as 'a long-time Lenoir County peddler of bootleg whiskey, now dope pusher' and referred to her case as the one presently being tried here in our Superior Court. This misconduct on the part of Mr. Ryder was totally inexcusable, both as to the attack on the court in his editorial yesterday and as

to his specific comments and accusations directed against this defendant this morning who is presently on trial before this jury. * * * This publicity is grossly prejudicial to her and I see no way now that she can obtain a fair and impartial trial if any members of the jury have heard this publicity directed at her. I would appreciate your Honor inquiring of each of the jurors individually as to whether or not they did hear the editorial yesterday and particularly the news commentary this morning in which Mrs. Moye was specifically referred to by Mr. Ryder."

In Annot., 31 A.L.R. 2d 420, 421, 426 (1953), there appears the following:

"It has been stated that the test in determining whether a new trial, mistrial, or reversal should be granted in a criminal action upon a showing that the jurors had read newspaper accounts of the trial depends upon whether or not a fair trial, under the circumstances, has been interfered with. There is not one rule, however, which defines just what does or does not so interfere. The inquiry, therefore, must center primarily around the facts in each case, and the ultimate decision, as is pointed out in § 3, *infra*, rests in the sound judicial discretion of the court.

* * *

On the other hand a newspaper account which is of a tenor to prejudice a party's rights in the minds of the jurors and influence the decision of those who read it has been held to constitute an improper interference with the normal course of justice upon which a ground may be established for setting the verdict aside. * * *

* * *

* * * Likewise, the verdict has not been disturbed where the jury could not have honestly and intelligently returned any other verdict than the one it did return.

* * *

Thus, in *Babb v. State* (1917) 18 Ariz. 505, 163 P 259, Ann Cas 1918B 925, it was held that a new trial would be granted where jurors had been permitted to read newspaper reports which departed from a fair and honest statement of the evidence and interpreted facts derogatorily and

in a manner likely to excite passion and prejudice on the part of the jury."

In the case of *Marshall v. United States,* 360 U.S. 310, 3 L. Ed. 2d 1250, 79 S.Ct. 1171 (1959), the Supreme Court, in awarding the defendant a new trial in the exercise of its supervisory power, said:

> "The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles. Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.
>
> The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt v. United States,* 218 U.S. 245, 251, 54 L. ed. 1021, 1029, 31 S.Ct. 2, 20 Ann Cas 1138. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States,* 335 U.S. 469, 475, 93 L. ed. 168, 173, 69 S.Ct. 213. It may indeed be greater for it is then tempered by protective procedures."

It has been held that where a jury had been clearly admonished not to read a newspaper account of a trial, a denial of a defendant's request that the jurors be interrogated during the trial as to whether they had read articles appearing in a newspaper about the trial was not an abuse of discretion. *State v. DeZeler,* 230 Minn. 39, 41 N.W. 2d 313 (1950). We think the reading of newspaper accounts and listening to reports

of a trial over the radio or television are analogous. In the case before us the judge, in the exercise of his discretion, chose to interrogate the jurors concerning the contents of the defendant's motion. In doing so, the following transpired:

"THE COURT: (To Jurors): Yesterday afternoon when we took a recess you recall that the court told you at that time that you were not to listen to anything on the radio, or read anything in the newspaper about the case you are trying, or anything along that line. When you were examined yesterday as jurors, you were asked by counsel as to whether you could render a fair and impartial verdict in this case, based on the evidence, charge of the court, and argument of counsel; that is, render a fair and impartial verdict, both for the State and for the defendant. You were also asked if you could give the defendant the benefit of a doubt, that is what in law is called a reasonable doubt which the court will tell you about in the charge. Every one charged with a crime in this country is presumed to be innocent until he is proven guilty beyond a reasonable doubt. The court tells you when he charges you that a reasonable doubt is not a vain doubt, or imaginary doubt, or a fanciful doubt, but it is a sane and rational doubt, a doubt based on common sense.

Now, during this week, and particularly yesterday, it has come to the attention of the court that one of the local news commentators, Mr. Jack Ryder, by name, has seen fit in his editorial of yesterday morning at about 8:30, and another repeat during the middle of the day, and again yesterday afternoon something after 6:00 p.m., to have certain things to say about the operation of the courts with particular regard to crimes somewhat similar to the crime with which the defendant is charged in this case. And again this morning the court is advised that there was something else said about that general subject, about similar type crimes. The only way that a court can function properly is to take the evidence from the witnesses while they are on the stand; that is the only way a jury can properly function; and the only way they can take the law is to take it from the court, and when the court rules on matters in the course of a trial and charges the jury. And based on those things, plus the contentions of the lawyers and their argu-

ments to you, render a fair and impartial verdict for the State and the defendant.

That does not disturb me personally that Mr. Ryder has had something to say about me, that is neither here nor there. If I wasn't thick-skinned I wouldn't be here. This court is just going to do its duty under the law.

But, the question arises at this time as to whether or not anybody has listened to his editorials or read anything in the newspaper (if there has been anything in the newspaper about it—I don't know if there has). First, I would like to inquire of the jury at this time as to whether anybody listened to any of these editorials yesterday or this morning, at the times the court has related, and I will have to ask you one at the time. After that I may have to ask you some other questions. So, Mrs. Mayo, if you will call the name of each juror I will ask that question.

(Each juror questioned as follows):

Q. Whether or not you have listened to any of these editorials as of yesterday or this morning?

Q. Did you create any impression in your mind?

Q. Do you think that it prejudiced you against the defendant in any way?

Q. So you say that regardless of anything you may have heard or read that you can render a fair and impartial verdict, both for the State and the defendant in this case?

Eight (8) jurors indicated to the court that they had either heard the editorial November 4, or Mr. Ryder's comments specifically as to the defendant this morning prior to coming to court.

THE COURT (Con't.): Now to the eight I have just spoken to, I take it that none of you have expressed any opinion this week about the guilt or innocence of anybody who was here for trial pertaining to these types of crime. I assume that nobody has?

None of the jurors made any reply.

Now I take it that, taking the evidence from the witnesses on the stand, plus the contentions of the lawyers and their arguments, and taking the law from the court, you can render a fair and impartial verdict both for the State and the defendant?

All the jurors nodded their heads.

MOTIONS OF DEFENDANT OVERRULED.

DEFENDANT'S EXCEPTION NO. 7.

THE DEFENDANT OBJECTS AND EXCEPTS TO HIS HONOR'S MANNER OF INTERROGATING THE JURORS.

DEFENDANT'S EXCEPTION NO. 8."

It appears from the record that Judge Copeland had admonished the jurors not to listen to anything on the radio, or read anything in the newspaper *about the case they were trying.* It further appears that some of the jurors (the record does not reveal how many) did not heed this admonition. It is noted that the quoted editorial alleged to have been broadcast on the preceding day did not specifically refer to the defendant's case. The full contents of the editorial asserted to have been broadcast on the morning of 5 November 1970 referring specifically to the defendant, who was then being tried, as "a long-time Lenoir County peddler of bootleg whiskey, now dope pusher" is not set out in the motion or elsewhere in the record. Neither does the record before us contain the answers of the jurors to the questions propounded by the court. The interrogation of the jurors appears in summary form, and their answers can only be inferred.

In 39 Am. Jur., New Trial, § 95, p. 109, it is said:

"The law contemplates that no outside influences shall be brought to bear upon a jury impaneled to try a case, and where it appears that the jury has been subjected to extra-judicial influences or suggestions, upon the part of a party or his counsel, the judge, or any third person, during the pendency of the case which they are sworn to try, a new trial may be granted unless it appears that no prejudice resulted from such misconduct. An impartial jury, selected and kept free from all outside or improper influences, has always been regarded as necessary to a fair and impartial

trial; and anything not legitimately arising out of the trial of the case, which tends to destroy the impartiality of the juror, should be discountenanced. It is said that where it is made to appear that anything has occurred which may have improperly influenced the action of the jury in a criminal case, the accused will be granted a new trial, although he may appear to be guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law. When a juror enters upon the trial of a criminal case, the law contemplates his withdrawal from the public and makes no provision for addresses to him from outside sources, for his entertainment or otherwise, which are calculated directly or indirectly to excite any passions or emotions with respect to the matter upon which he is to sit in judgment."

[3] The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown. 3 Strong, N. C. Index 2d, Criminal Law, § 130 (1971 Supplement); *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968). In the case of *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477 (1968), it is said:

> "The burden is on the appellants not only to show error but that the alleged error was prejudicial and amounted to the denial of some substantial right."

In the case at bar the trial judge found that prejudicial misconduct had not been shown by denying the motion for a mistrial.

The defendant contends, however, that the trial judge, as a matter of law, was required to declare a mistrial. The case of *State v. Tilghman,* 33 N.C. 513 (1850), seems to support that position. Justice Pearson (later Chief Justice), in writing the opinion of the Court, made a distinction between a cause for a new trial and a cause for a mistrial, holding that granting the former is a matter of discretion and the latter is a matter of law. The case involved misconduct of the jury, among other things, by failing to heed the admonitions of the court as to their conduct during recesses of the court. In holding there was no error, it is there said:

" * * * We take this plain position: if the circumstances are such as merely to put suspicion on the verdict by showing, not that there *was,* but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it—it is a matter within the discretion of the presiding judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or of the prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered on the trial, in all such cases there has in contemplation of law been no trial; and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner."

See also *State v. Perry,* 121 N.C. 533, 27 S.E. 997 (1897), where jurors in a rape case visited the scene of the crime, without permission, questioned a passerby, and while there discussed the case among themselves. The superior court judge refused to set aside the verdict. In awarding a new trial because the jury elicited other evidence than that offered on the trial, the Supreme Court quoted with approval from *State v. Tilghman, supra.*

[4] The distinction made by Justice Pearson in *Tilghman* in holding that a cause for a new trial is discretionary and a cause for a mistrial is a matter of law is no longer made. The law now is that motions for mistrial, or a new trial, on the grounds of misconduct of the jurors is addressed to the discretion of the trial judge.

In *State v. Sneeden, supra,* Justice Huskins, speaking for the Court, said:

"Motions for mistrial or a new trial based on misconduct affecting the jury are addressed to the discretion of the trial court. *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1. Unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be disturbed. *Stone v. Baking Co.,* 257 N.C. 103, 125 S.E. 2d 363; *O'Berry v. Perry,* 266 N.C. 77, 145 S.E. 2d 321; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19. 'The circumstances must be such as not merely to put suspicion on the

verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.' *Lewis v. Fountain,* 168 N.C. 277, 279, 84 S.E. 278, 279."

In the case of *State v. Shedd, supra,* Chief Justice Parker said:

"The trial judge is clothed with power of discretion as to whether he should order a mistrial or set aside a verdict by reason of alleged misconduct of a juror or jurors 'because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However, great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though, doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere.' *Moore v. Edmiston,* 70 N.C. 471."

In *State v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924 (1949), the defendant was being tried for murder. One of the jurors permitted a sister of the victim to ride with him in his car while the case was in progress. The juror stated under oath that he did not know of the relationship. After a thorough investigation, the trial judge found that there were other people in the car with them at the time, the case was not discussed, the result of the case had not been affected thereby, and declined to set aside the verdict either as a matter of law or in his discretion. In holding that there was no error, the Supreme Court said:

"It is provided by statute, G.S. 9-14, that the judge 'shall decide all questions as to the competency of jurors,' and his rulings thereon are final and 'not subject to review on appeal unless accompanied by some imputed error of law,' *S. v. DeGraffenreid,* 224 N.C. 517, 13 S.E. 2d 523; *S. v. Hill,* 225 N.C. 74, 33 S.E. 2d 470; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. This exception presents no reviewable question of law and will not be sustained."

In *State v. Kinsauls,* 126 N.C. 1095, 36 S.E. 31 (1900), the jurors, who had been sequestered, attended church services with

the defendant's consent. The preacher urged the jury to be careful, and if the defendant was guilty to say so and if not to say so. He also told them to do their duty. In his prayer, the preacher prayed for a fair and impartial trial. The Supreme Court held that this did not constitute misconduct of the jury prejudicial to the defendant.

In 5 Am. Jur. 2d, Appeal & Error, § 889, it is said:

> "The determination of the existence and effect of jury misconduct is primarily for the trial court, whose decision will be given great weight on appeal."

In the case of *State v. Hart,* 226 N.C. 200, 37 S.E. 2d 487 (1946), the court officer who was placed in charge of the jury was a witness for the State. The trial judge refused to set aside the verdict and order a new trial on that grounds. In holding that there was no error, the Supreme Court said:

> " * * * It is our opinion, and we so hold, that actual prejudice must be shown before the result of the trial can be, as a matter of right, disturbed.
>
> In North Carolina, in instances when the contention was made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and *the findings of the trial judge upon the evidence and facts are conclusive and not reviewable. S. v. Hill,* 225 N.C., 74, 33 S.E. (2d), 470; *S. v. DeGraffenreid,* 224 N.C., 517, 31 S.E. (2d), 523." (Emphasis added.)

It is regrettable that news reporters at times add to or distort court proceedings. Sometimes zealous reporters are unable to discipline themselves in order to preserve the proper nicety of discrimination as to what should be published by ethical news media concerning a trial in order to keep from interfering with a defendant's constitutional right to a fair trial. The power of the spoken and printed word in the news media is evidenced by the fact that advertisers pay to advertise therein. Therefore, the news media ought not to, and do not ethically, use the power of the news media to deprive any accused person of his basic constitutional right to a fair trial. In this connection we quote with approval the following words

of Judge Haynsworth of the United States 4th Circuit Court of Appeals in the case of *Holmes v. United States,* 284 F. 2d 716 (1960):

> "When, shortly before and during a trial, public news media irresponsibly publish incompetent and prejudicial information, the difficulty of maintenance of fairness in the administration of justice is manifest."

In the case before us, after making such investigation as he deemed to be necessary and after questioning the jurors, the trial judge did not declare a mistrial and did not cite the jurors for contempt for disobeying his admonition not to listen to anything on the radio or read anything in the newspaper about the case but overruled the defendant's motion for a mistrial. Defendant had requested that the jurors be questioned. Her objection to the manner the court interrogated the jurors is overruled.

[5] One of the basic and absolutely necessary ingredients of political freedom is the unqualified right to a fair and public trial by a legally constituted court, presided over by a fair and impartial judge, and being represented by competent counsel, with one's guilt or innocence determined by a fair and impartial jury under modes of procedure established by lawful authority. In the case at bar the defendant was tried by a legally constituted court, presided over by a fair and impartial judge, represented by able, experienced and competent counsel. Her guilt was determined under established modes of procedure by a jury found to be fair and impartial. Upon the facts in the record in this case, it is our opinion, and we so hold, that the learned judge who presided at this trial had large discretion as to whether he should order a mistrial, and he was not required as a matter of law to order a mistrial.

We quote with approval the following from *State v. Tilghman, supra:*

> " * * * Perhaps it would have been well had his Honor in his discretion set aside the verdict and given a new trial, as a rebuke to the jury and an assertion of the principle that trials must not only be *fair, but above suspicion.* This, however, was a matter of discretion * * * ."

In the case at bar, actual prejudice has not been shown, and no abuse of discretion on the part of the judge appears.

In the trial we find no error.

No error.

Judges CAMPBELL and HEDRICK concur.

ALEXANDER RAYNOR v. ONWILLARD JUNIOR FOSTER, JOANNE FOSTER, AND MILDRED JEAN WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF JAMES DANIEL WILLIAMS, DECEASED

— AND —

HAZEL MARTIN v. ONWILLARD JUNIOR FOSTER, JOANNE FOSTER, AND MILDRED JEAN WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF JAMES DANIEL WILLIAMS, DECEASED

No. 7111SC461

(Filed 18 August 1971)

1. **Rules of Civil Procedure § 50— motion for directed verdict**

A defendant's motion made in a jury trial for a directed verdict under G.S. 1A-1, Rule 50(a), presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit, namely, whether the evidence was sufficient to entitle the jury to pass on it.

2. **Automobiles § 87— negligence in operation of car — insulating negligence — proximate cause**

The evidence was sufficient for the jury to find that defendant's intestate was negligent in driving too fast and in failing to keep his car under control, and that such negligence was one of the proximate causes of plaintiffs' injuries, where there was evidence tending to show that the car in which plaintiffs were riding as passengers was traveling immediately behind a car driven by defendant's intestate at 4:00 a.m., that it was raining and foggy, that defendant's intestate had drunk a quantity of alcohol, that the cars were traveling at 65 to 70 mph, that the car driven by defendant's intestate rounded a curve leading to a bridge, struck a guardrail of the bridge, overturned on the bridge and came to rest blocking the highway, and that the overturned vehicle was struck by the car in which plaintiffs were riding.

APPEAL by defendant, Mildred Jean Williams, Administratrix of the Estate of James Daniel Williams, from *Hall, Judge,* 25 January 1971 Session of Superior Court held in Johnston County.

These two cases were consolidated for trial and for this appeal. Plaintiffs were guest passengers in an automobile operated by defendant, Onwillard Junior Foster, and were injured when the Foster vehicle collided with an automobile owned by James Daniel Williams and which, immediately prior to the collision, had been operated by Williams. The collision occurred about 4 o'clock a.m. on 1 February 1969 on the southbound lanes of U.S. Highway I-95 about three miles south of the town of Kenly, N. C., at the point where the highway passes over Little River on a bridge. U. S. Highway 95 is a four-lane highway, with two lanes for northbound and two lanes for southbound traffic. The northbound lanes and the southbound lanes cross over Little River on separate bridges. The bridge carrying the southbound lanes is 24-feet wide, each lane being 12-feet wide. The road is generally level, and approaching the bridge from the north there is a slight curve to the right. Earlier on the night of the accident, plaintiffs Raynor and Martin had accompanied defendant Foster to the Forsyth Club, a music and dance place just outside the city limits of Kenly. After staying at the club two or three hours, they left in the Foster automobile, with Foster driving. It was drizzling rain and was foggy, which limited visibility to some extent. They proceeded south on I-95, plaintiffs' evidence being that Foster was driving at speeds between 65 and 70 miles per hour. As they approached the Little River bridge, the headlights on the Foster car disclosed a car, later found to be the Williams vehicle, turned upside down about the middle of the bridge and lying at an angle across the left-hand southbound lane and extending across a portion of the right-hand southbound lane. The Foster car struck the Williams car and then proceeded onward a distance of 360 feet, coming to rest against a pine tree off the road. Plaintiffs were injured as a result of the collision.

The Williams vehicle was damaged extensively and was also burned. Williams' body was found on the following day in Little River. All of the hair was burned from his head, and his face and arm were burned. His death certificate listed the immediate cause of his death as drowning, with conditions giving rise to the immediate cause being listed as acute alcoholism and first and second degree burns.

The guardrail on the right shoulder of the road immediately before entering the bridge from the north was damaged.

Dark blue paint of the same color as on the Williams car was found on the railing. Skid marks led from the point where the paint was found on the railing to the Williams car, a distance of 120 feet. Parts of the taillight lens of the type used on the Williams car were found at the bridge rail in the same general area where the blue paint was found. The trunk lid from the Williams car was found in a burned spot near the pine tree where the Foster car was found. The Foster car was not burned.

Plaintiffs' witness, Ernest Atkinson, testified: He saw Williams and Foster leave the Forsyth Club about the same time. "The Williams car was in front and Foster was right behind him." Williams was driving his car and there was only one person in the car. Atkinson waited a few minutes and then drove his car to the highway. He was delayed at a stop light, and approximately five minutes elapsed from the time Atkinson left Forsyth's place until he arrived at the Little River bridge. When he arrived, he found the Williams car burning, mostly on the inside. He attempted to open the door to see if there was anybody in it. He then moved back away from the car and at that time it exploded.

Plaintiff Raynor testified:

"As we approached the bridge down there, there was a car in front of us and I saw lights off at a distance in front of me. I know that it was in front of me. They had to be taillights on the right-hand side of 95 headed south. . . . The wreck bridge is the bridge I'm speaking about and I saw lights in front of us. They were in the southbound lane. I don't know whose car it was. I don't know where these lights went. The lights were between our car and the bridge. The bridge where the collision occurred. There is a curve in the road before you got to the bridge. The curve blocks the view of the bridge from where I saw the lights from the car. The lights could have been between where we were and in the curve but I couldn't see if they were around the curve.

"I kept looking ahead. As we came up to where I could see the bridge I didn't see any lights. I didn't see anything else. I saw this car when the lights got close enough to see it, I could design *(sic)* something in the bridge with no lights on it. Close enough I could see a car,

Jimmy's car, sitting catabiason *(sic)* on the highway. . . . After we came around the curve I could design *(sic)* seem like some lights in front of us and after that I didn't see any more lights. After we came out of the curve to a place if it had been daylight we could have seen the bridge, I saw some taillights but I lost them in the curve. I don't know whether I saw them any more or not after we came around the curve. I can't testify now that I saw any taillights as we came around the curve.

"I didn't see any lights on the Williams car. If the Williams car was on fire, I didn't see it. Sure I was looking straight ahead. I was aware that there was something on the bridge before Mr. Foster's car lights picked up this car on the bridge. Just about the time his car lights picked it up I could see that there was a car on the bridge. As the Foster car approached on the bridge I braced myself. We were going to hit it. I couldn't say which lane Foster was in. Up unto the time I threw myself down in the back seat to brace myself Foster had been operating his car in the right-hand lane."

At the close of plaintiffs' evidence and again at the close of all the evidence, defendant Mildred Jean Williams, Administratrix of the Estate of James Daniel Williams, moved for a directed verdict in each case under Rule 50(a) on the grounds that (1) no negligence was shown on the part of Williams and (2) if any negligence was shown on the part of Williams, such negligence was insulated by the intervening negligence of Foster. The motions were overruled, and the jury answered the first two issues in each case as follows:

"1. Was the plaintiff injured by the negligence of Onwillard Junior Foster?

Answer: Yes.

2. Was the plaintiff injured by the negligence of James Daniel Williams, deceased?

Answer: Yes."

The jury awarded damages to the plaintiff in each case, and from judgments in accord with the verdict, defendant-Administratrix of Williams' estate appealed. Defendant Foster did not appeal.

Corbett & Corbett by Albert A. Corbett, Sr. for plaintiff appellees Raynor and Martin.

Robert A. Spence for defendant appellant Williams.

PARKER, Judge.

Appellant's only assignment of error is that the trial court erred in overruling her motions for a directed verdict. In this we find no error.

[1] A defendant's motion made in a jury trial for a directed verdict under Rule 50(a) of the Rules of Civil Procedure, G.S. 1A-1, presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. In determining this question, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816, *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610. Therefore, the only question presented by this appeal is whether the evidence in these cases, when so viewed, was sufficient to justify a jury finding that appellant's intestate, Williams, was negligent in the manner in which he drove his automobile on the occasion which gave rise to these actions, and if so, whether such negligence was one of the proximate causes of plaintiffs' injuries.

"It is well-settled law in North Carolina that each person whose negligence is a proximate cause or one of the proximate causes of injury may be held liable, severally or as a joint tort feasor. If a person's negligence is in any degree a proximate cause of the injury, he may be held liable, since he may be exonerated from liability only if the total proximate cause of the injury is attributable to another or others." *Price v. Railroad*, 274 N.C. 32, 161 S.E. 2d 590.

When viewed in the light most favorable to plaintiffs, the evidence in the cases before us would justify a jury finding that the following events occurred: Appellant's intestate, Williams, after drinking some quantity of alcohol (his death certificate

listed acute alcoholism as a contributing cause), drove his automobile late at night from a dine and dance club in Kenly, N. C., onto an interstate highway a distance of approximately three miles to the point where the highway passed over Little River on a bridge. The Foster car, carrying plaintiffs as passengers, left the club about the same time and proceeded "right behind" the Williams car, the two cars remaining in that order, the taillights of the Williams car being visible to the occupants of the Foster car as the Williams car went into the curve leading to the bridge. It was raining and foggy, which reduced visibility. The following vehicle, driven by Foster, was traveling at 65 to 70 miles per hour, and it is a reasonable inference that the Williams vehicle which preceded it was moving at least as fast. The Williams car hit the right guardrail at the north end of the bridge, leaving blue paint and a portion of the taillight from the car on or near the guardrail. It then skidded 120 feet and came to rest near the center of the bridge, upside down and at an angle across the southbound lanes of the highway, entirely blocking the left-hand lane and partially blocking the right-hand lane. The lights on the Williams car were knocked out as a result of hitting the guardrail or of turning over. Almost immediately thereafter, the Foster vehicle came around the curve and onto the bridge, striking the overturned Williams car a glancing blow and then proceeding onward 360 feet before stopping against a tree off of the road. Plaintiff Raynor, riding in the Foster car, did not see any fire in the Williams car as the Foster car was approaching the bridge. The witness, Atkinson, who arrived at the scene a few minutes later, found the Williams car on fire and it exploded after Atkinson got there. Williams's body was badly burned, and it is a reasonable inference that he got out of his overturned car only after it caught fire and that this occurred after it was struck by the following Foster car. The exact manner in which Williams got out of his car and into the river is not shown by the evidence, but this is not relevant to the question raised by this appeal.

[2] The foregoing findings, if made by the jury, would in our opinion justify the jury in finding further that Williams was negligent in driving too fast and in failing to keep his car under control, and that as a result of his negligence his car struck the guardrail and overturned upon the bridge, blocking the highway and thereby making the collision with the immediately following vehicle almost inevitable. In our opinion

the jury would also be justified in finding that such negligence on the part of Williams was one of the proximate causes of plaintiffs' injuries. From their verdict the jury have so found. That they did so under appropriate and correct instructions from the able trial judge as to the law applicable to the evidence in these cases is apparent from the fact that no exception was taken to the charge.

No error.

Judges BRITT and MORRIS concur.

REGINALD S. HAMEL, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM THOMAS MCDOWELL, JR. v. YOUNG SPRING & WIRE CORPORATION, A MICHIGAN CORPORATION, PAUL HARDEMAN, INC., A CORPORATION, DAYBROOK-OTTAWA CORPORATION, AND TWIN-STATES TRUCK EQUIPMENT COMPANY, A CORPORATION

No. 7126SC363

(Filed 18 August 1971)

1. **Sales §§ 18, 22— implied warranty of fitness — negligent manufacture — purchaser's negligence in maintaining equipment — anticipation by manufacturer**

In this action for wrongful death based upon alleged breach of implied warranty of fitness and negligent construction of equipment sold to decedent's employer by defendants, the trial court did not err in instructing the jury that defendants were not required to anticipate negligence on the part of decedent's employer in maintaining and servicing the equipment.

2. **Sales § 23— inherently dangerous machine — duty of manufacturer — instructions**

The trial court did not err in instructing the jury that the manufacturer of a machine which is dangerous because of the way it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and defects which are concealed dangers.

3. **Evidence § 48— opinion testimony — failure to qualify witness as expert**

In an action for wrongful death based upon alleged breach of warranty of fitness and negligent construction of equipment sold to decedent's employer by defendants, the trial court did not err in the exclusion of opinion testimony by employees of decedent's employer as to the safeness of the equipment, where none of the witnesses had been tendered or qualified as an expert.

4. **Evidence § 48— competency of witness as expert — discretion of court**

The competency of a witness to testify as an expert is addressed to the sound discretion of the trial judge, and his discretion is ordinarily conclusive.

5. **Rules of Civil Procedure § 50— motion for directed verdict — ruling withheld until after jury verdict**

Procedure whereby the trial judge withheld his ruling on a motion for a directed verdict until after the jury had returned its verdict is disapproved; after a case has been submitted to the jury, the proper motion to be ruled upon is a motion for judgment notwithstanding the verdict under Rule 50.

BOTH the plaintiff and defendant Twin-States Truck Equipment Company appealed from *Martin, (Harry C.) Judge,* 19 October 1970 Session of MECKLENBURG County Superior Court.

Plaintiff, as Ancillary Administrator of the Estate of William Thomas McDowell, Jr., (McDowell) instituted this action for wrongful death of McDowell. The pleadings, admissions and evidence establish the following facts. McDowell died 9 October 1965 as the result of injuries sustained 7 October 1965. At the time of the injuries, McDowell was an employee of Duke Power Company (Duke) in Spartanburg, South Carolina. He and a fellow employee were working at the time from a bucket which was attached to a boom on a truck. The boom and bucket were raised by a hydraulic lift and was used to work on high-tension lines at a considerable distance above the ground. The piece of equipment was known as a Strata-Tower. The Strata-Tower was manufactured by Young Spring & Wire Corporation, (Young) prior to the Summer of 1961. In the Summer of 1961 Duke purchased the Strata-Tower through the North Carolina distributor of Young, the defendant Twin-States Truck Equipment Company (Twin-States). Young had actively participated with Twin-States in negotiating the sale as this type of equipment was specialty equipment and made only on special orders.

Duke delivered its truck chassis to Young in Bowling Green, Ohio, where the Strata-Tower was mounted on the chassis; and then the truck with the Strata-Tower was sent to Cleveland, Ohio, where a special utility body was fitted to the truck. Thereafter, the truck, fully equipped, was brought back to Charlotte, North Carolina, and delivered by Twin-States to Duke in November 1961. Duke caused this equipment to then be taken to Spartanburg, South Carolina, and it was in that

locality that the equipment was placed in use and where it stayed in use from that time until after the injuries in question on 7 October 1965.

Sometime after the manufacture of this Strata-Tower, Young merged with Paul Hardeman, Inc.; and Young was the surviving corporation but changed its name to Paul Hardeman, Inc. In the Spring of 1965 Paul Hardeman, Inc., caused Daybrook-Ottawa Corporation, (Daybrook) to be formed as a wholly-owned subsidiary of Hardeman. Hardeman conveyed to Daybrook a portion of Hardeman's business, including the manufacturing facilities in Bowling Green, Ohio, where the Strata-Tower was manufactured. In turn, Daybrook assumed all liabilities of this particular division of Hardeman. This was on 14 June 1965 preceding the fatal injuries to McDowell of 7 October 1965.

The bucket of the Strata-Tower was attached to the end of a boom. The boom consisted of two sections. The end of one section was attached to the bucket and then there was an elbow attaching that section of the boom to the second portion of the boom, and in turn the second portion of the boom was fixed to the chassis of the truck. At the elbow of the two portions of the two sections of the boom, there were pulleys. The bucket was stabilized and kept level for a platform for the men to work from by means of two wire cables. These cables went over the pulleys in the elbow of the two sections of the boom. The equipment was so designed that when the bucket was raised to its full height of some 45 feet, the wire cables would move across the pulleys at the elbow for a distance of 19½ inches. The wire cables themselves were not continuous but were interrupted by having inserted a piece of fiber glass. This piece of fiber glass at each end had a metal piece to which the cable was attached. The purpose of the fiber glass insert was to serve as insulation on the Strata-Towers being used for high-tension electrical work. Both the cables and the fiber glass insert were enclosed in the covering of the boom and could be seen only at the elbow when the boom was in an extended position.

McDowell sustained his fatal injuries on 7 October 1965 when he and his fellow employee were in the process of descending in the Strata-Tower bucket from working on overhead high-tension lines. The bucket had reached a point some twelve feet above the street surface on its descent when, with a loud noise,

the bucket turned over spilling the two men onto the hard surface of the street. Inspection thereafter revealed that one of the two cables designed to keep the bucket level had frayed and separated. The other cable had broken in a clean break. The pulley over which the frayed cable had run had a broken flange on one side which enabled the cable to slide off the pulley and down to the hub of the pulley.

Plaintiff sought to recover on two alternative causes of action, the first being implied warranty that the Strata-Tower was sound, fit, suitable and safe for use in raising employees a considerable distance off the ground. Plaintiff alleged that this implied warranty was breached in that both the design and construction of the Strata-Tower was such that it was inherently dangerous and that it was sold without informing Duke of the hidden dangers and that this Strata-Tower was not fit, suitable and safe for its intended use.

In the second cause of action plaintiff alleged that the Strata-Tower was negligently constructed, was inherently dangerous and did not have proper safety devices; that improper instructions for maintenance had been given and that both the original parts and replacement parts were defective and improper.

Plaintiff offered expert testimony as to the improper design of the equipment, improper materials, and that at least one wire cable was permitted to fray out due to the broken pulley flange; that the broken pulley flange was caused by the metal end of the fiber glass insulator coming in contact with it at the elbow and that one cable having broken, the strain was too much on the other cable causing it to snap; that there were inadequate safety devices to prevent the bucket from tipping over when the cables broke; and in general that the Strata-Tower was a dangerous instrumentality which danger could not be detected by the average employee using the equipment.

At the close of plaintiff's evidence the trial judge granted the motion of Twin-States for a directed verdict against the plaintiff on the issue of negligence but denied it on the issue of implied warranty.

The defendants' evidence was to the effect that the equipment had not been properly maintained; that the equipment

came with 6-inch pulleys, and 4-inch pulleys had been substituted in lieu thereof; that if properly maintained, the equipment was safe and adequate for the purpose for which designed.

At the close of all the evidence, a directed verdict was given in favor of Twin-States as against the other defendants, except Daybrook, on the issue of indemnity on the implied warranty.

The motion of Daybrook for a directed verdict in its favor was held in abeyance by the trial judge until after the jury verdict.

The case was submitted to the jury and the verdict was returned finding no breach of implied warranty and on another issue finding no negligence.

From a judgment that plaintiff recover nothing of the defendants, the plaintiff appealed. Twin-States likewise appealed from the refusal of the trial judge to sustain its motion for a directed verdict against Daybrook on the issue of indemnity on the implied warranty.

Claude R. Dunbar; Hunter M. Jones for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding and Michael K. Gordon for defendant appellant-appellee, Twin States Truck Equipment Company.

John H. Small; R. C. Carmichael, Jr., for defendant appellees, Young Spring & Wire Corporation, Paul Hardeman, Inc., and Daybrook-Ottawa Corporation.

CAMPBELL, Judge.

[1] Plaintiff assigns as error that portion of the charge to the jury that defendants were not required to anticipate negligence on the part of Duke in maintaining and servicing the Strata-Tower. We are of the opinion that this portion of the charge was proper and correct. To hold that defendants had to anticipate negligence on the part of Duke in maintaining the Strata-Tower would impose an improper burden. In effect, it would mean that manufacturers would have a duty to oversee the maintenance and servicing of all equipment manufactured and sold by them, wherever situated; otherwise, they might be held liable for injuries resulting through no defect in the manufac-

ture of the equipment but through the negligence of a third party in the maintenance of the equipment. Generally, " 'one is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety.' " *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17 (1953).

Negligence by a third party in maintaining or servicing equipment is to be distinguished from negligence by a third party in failing to discover a negligently manufactured part. In the latter case, the negligence of the third party in failing to discover the defect does not intervene and supersede the original negligence of the manufacturer. *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302 (1960). But that is not the situation here in reference to that portion of the charge complained of. " . . . A manufacturer does not warrant that his product is incapable of deteriorating into a dangerous state if *mishandled* or kept too long before being used. . . . " (Emphasis added) *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753 (1964), concurring opinion by Sharp, J.

[2] Plaintiff also contends that the trial judge erred in charging the jury as to the duty of the manufacturer. That portion of the charge was as follows:

> "Members of the jury, I instruct you that the manufacturer of a machine which is dangerous because of the way in which it functions and patently so, owes to those who use it a duty merely to make it free from latent defects or defects which are concealed danger. So in a case such as this the plaintiff must prove the existence of a latent defect or a danger not known to the plaintiff or other users of the Strata-tower in question."

The North Carolina Supreme Court approved of the same language used in the charge above in the case of *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14 (1957). No error is found to appear.

Plaintiff makes other assignments of error to the charge. We have considered each of these assignments of error and find that the charge, considered in its entirety, was fair and free from prejudicial error.

[3, 4] Plaintiff also assigns as error the exclusion of testimony by employees of Duke as to the safeness of the Strata-Tower. Such testimony calls for the opinion of the witnesses, yet none of the witnesses had been tendered or qualified as an expert. When an objection to such testimony is made, the proper procedure is for the party offering the witness as an expert to request a finding of his qualification; absent such a request and absent a finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed on appeal. *Highway Commission v. Matthis,* 2 N.C. App. 233, 163 S.E. 2d 35 (1968); Stansbury, N. C. Evidence 2d, § 133. The competency of a witness to testify as an expert is a question addressed to the sound discretion of the trial judge, and his discretion is ordinarily conclusive. *Highway Commission v. Matthis, supra.* No question of abuse of discretion is raised and none is found.

[5] We note that at the close of all the evidence the trial judge withheld a ruling on the motion of Daybrook for a directed verdict and did not rule on this motion until after the jury verdict. We do not approve of this procedure and think it preferable to rule upon a motion for a directed verdict prior to the submission of a case to the jury. After a case has been submitted to a jury, the proper motion to be ruled upon at that time is a motion for judgment notwithstanding the verdict under Rule 50.

The other assignments of error have been considered, but we are of the opinion that the trial was free of prejudicial error.

In light of the disposition of this case, we do not deem it necessary to discuss the appeal of the defendant Twin-States from the denial of its motion for a directed verdict against Daybrook on its cross-action for indemnity on the implied warranty.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

ANDREW LEE SADLER, A MINOR BY HIS NEXT FRIEND, JAMES M. SADLER
v. FLOYD MOSBY PURSER

No. 712SC450

(Filed 18 August 1971)

1. **Rules of Civil Procedure § 17— minor plaintiff — representation by guardian ad litem**

Under the new Rules of Civil Procedure, infants and incompetents who are plaintiffs in any action or special proceeding must appear therein by general or testamentary guardian, if they have any within the State, or by duly appointed guardian ad litem, and not by a next friend as under the former practice. G.S. 1A-1, Rule 17(b).

2. **Rules of Civil Procedure § 50— motion for directed verdict — question presented**

The motion for a directed verdict under Rule 50(a) presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it.

3. **Automobiles § 84; Negligence § 18— contributory negligence of 15 year old plaintiff**

A 15 year old plaintiff is presumed to have sufficient capacity to understand and avoid a clear danger, and absent evidence to rebut such presumption, he is chargeable with contributory negligence as a matter of law if the only inference which could reasonably be drawn from his own evidence is that he failed to do so.

4. **Automobiles § 39— bicycle as motor vehicle**

A bicycle is a vehicle and its rider is a driver within the meaning of our Motor Vehicle Law. G.S. 20-38(38).

5. **Automobiles § 85— contributory negligence by minor bicyclist**

Evidence of the 15 year old plaintiff disclosed his contributory negligence as a matter of law where it showed that plaintiff, after peddling slowly down the wrong side of the highway, attempted to drive his bicycle from the left-hand traffic lane across the right-hand lane to the shoulder of the road without first ascertaining that it was safe for him to do so and without giving any signal of his intention to make such a maneuver, and that in so doing, he drove his bicycle suddenly and directly into the path of defendant's oncoming car.

APPEAL by plaintiff from *Rouse, Judge,* 22 February 1971 Session of Superior Court held in BEAUFORT County.

This is a civil action to recover damages for personal injuries suffered by plaintiff when defendant's automobile collided with plaintiff's bicycle. The collision occurred on 20 August 1967 at approximately 2:30 p.m. on N.C. Highway #32 at a

point several miles south of Plymouth and north of Washington, N. C. The parties stipulated that at the time of the accident plaintiff was fifteen years old, that at the place of the accident the road was straight and level, and ran through generally open country, the weather was clear, the road was dry, and the posted speed limit was 60 miles per hour.

Plaintiff's evidence, when taken in the light most favorable to plaintiff, tends to show the following: At the scene of the accident the highway runs generally north and south and is a two-lane paved highway, with one lane for northbound and one lane for southbound traffic. The paved portion is 20-feet wide. There is a 15-foot wide grass shoulder on the west side and a 10-foot wide grass shoulder on the east side of the highway. Defendant was driving his 1963 Pontiac automobile south on the highway, coming from Plymouth and going toward Washington, and was traveling at a speed of 55 to 60 miles per hour. As defendant came up over a little rise in the road, he observed two young boys on bicycles about nine hundred feet ahead of him. When he first saw them they were riding their bicycles, one behind the other, on the east side of the highway and headed north toward the defendant. A third boy was walking toward the defendant on the shoulder on the east side of the highway. When defendant first saw the boys, he blew his horn and the boys on bicycles turned around and headed back south. One of the boys stopped and talked with the pedestrian by the east side of the road. The other boy, plaintiff in this action, continued riding his bicycle south, traveling on the east side of the highway, being the left-hand lane going south, about three feet onto the pavement. Defendant continued driving south down the highway, and did not begin to decrease speed until he was about fifty feet from plaintiff. Defendant blew his horn a second time, and about the time he did so, plaintiff rode his bicycle over on the right-hand side of the highway into the path of defendant's car. Defendant then applied his brakes. The front of defendant's automobile struck plaintiff when he had reached a point in the right-hand traffic lane about three feet from the right-hand shoulder, throwing plaintiff up over the hood and against the windshield. After defendant's car struck plaintiff, it went into a skid to the right and came to rest with its front wheels on the edge of the highway and with its back wheels on the edge of the ditch on the right-hand or west side of the highway. Plaintiff was found lying unconscious under-

neath the back of the car. His bicycle was partially beneath the right rear portion of the automobile. There was a total of 190 feet of skid marks leading from the automobile back north along the west shoulder to the edge of the pavement and then on the pavement.

Plaintiff was seriously injured as a result of the collision and was unable to remember the accident or anything that happened just before the collision. The other bicyclist, Chester Lee Spruill, testified as follows:

> "When I first observed the 1963 Pontiac, Andrew Sadler was going slow. . . . He was peddling slow. He was headed toward Washington, away from Plymouth. He was in the left lane, going toward Washington. . . . I was talking to Harris White and the car was coming down the road. I heard him blow his horn while he was down the road, it blew once or twice, beep, beep. About two telephone poles away, I heard it blow. Then the car got closer. It didn't break its speed and the car got closer. Then I was standing still talking to Harris. Then I glanced back again. I saw it getting close and Andrew, he was riding kind of close to the white line. Then he started toward the white line. I said 'Watch out.' He tried to get off the shoulder. He speeded up his bicycle, tried to get off the shoulder.
>
> "The car went off the shoulder. The car came back, tried to get back on the highway. . . . It hit him and he hit the windshield and got under the car somehow. Then the car skidded down the road sideways. . . .
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> * * * * *
>
> "I did not see the 1963 Pontiac's speed decrease until it was right on him. I would say about fifty feet. It was pretty close. I did not hear a horn prior to impact. The whole left side of the car was on the highway and I think Andrew's front wheel was off the highway when it hit him.
>
> The right side of the car was off the road. . . . I don't recall the automobile ever returning completely onto the highway after it struck Andrew. . . . There was no traffic behind the Purser vehicle. There was no traffic in front of it."

On cross-examination, Spruill testified:

"The only time I heard it blowing was down the highway, about two or three telephone poles back of me. That would have been back of Andrew. And I saw Andrew turn to his right, across the highway. And I hollered to him to look out. But he kept on going across the highway and I heard the squalling of the automobile brakes and when Andrew got about to the right-hand edge of the highway, that is when the collision occurred. He was peddling real fast at that time trying to get off the highway."

At the close of plaintiff's evidence, defendant moved for a directed verdict under Rule 50 of the Rules of Civil Procedure on the grounds that plaintiff's evidence failed to disclose actionable negligence on the part of defendant and established contributory negligence on the part of plaintiff as a matter of law. From judgment allowing the motion and adjudging that plaintiff recover nothing of defendant, plaintiff appealed.

Chambers, Stein, Ferguson & Lanning, by Fred A. Hicks for plaintiff appellant.

Rodman & Rodman, by Edward N. Rodman for defendant appellee.

PARKER, Judge.

[1] The title to this action would indicate that the infant plaintiff appears by his next friend, which would be in accord with the practice which formerly prevailed in this State. 1 McIntosh, N. C. Practice and Procedure, 2nd Ed., § 690, p. 375. This practice has been changed by our new Rules of Civil Procedure, which now provide that in actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, they must appear by general or testamentary guardian, if they have any within the State, or by duly appointed guardian *ad litem*. Rule 17(b) of the Rules of Civil Procedure. The change effected was more than a mere change in nomenclature, since substantial differences had been recognized between the powers and duties of a next friend and those of a duly appointed guardian *ad litem*. See *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E. 2d 492; *Johnston County v. Ellis*, 226 N.C. 268, 38 S.E. 2d 31. This action was commenced on 3 June 1970, after the effective date of the new Rules, and the infant plaintiff should have appeared by his duly appointed guardian *ad litem*. Realizing this, the

parties stipulated on final pretrial conference that although James M. Sadler is designated next friend for the minor plaintiff, he is properly qualified as guardian *ad litem* for said minor. Accordingly, we will ignore the incorrect designation in the title to this action and recognize the minor plaintiff as appearing by his duly appointed guardian *ad litem.*

[2] Appellant's sole assignment of error is that the trial court erred in granting defendant's motion for a directed verdict, which was made at the close of plaintiff's evidence on the dual grounds that the evidence failed to disclose actionable negligence on the part of defendant and established plaintiff's contributory negligence as a matter of law. The motion for a directed verdict under Rule 50(a) presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396.

"The very presence of a young boy riding a bicycle on the highway is, in itself, a danger signal to a motorist approaching him from the rear. Ordinarily, it is a question for the jury as to whether the motorist has responded to such danger signal as a reasonable man would have done." *Champion v. Waller,* 268 N.C. 426, 150 S.E. 2d 783. In the present case, however, we find it unnecessary to decide this question, since, even if it be conceded that the evidence was sufficient to require submission to the jury of an issue as to defendant's actionable negligence, in our opinion plaintiff's evidence so clearly established his own contributory negligence as a matter of law that the trial court's judgment must be sustained.

[3] At the time of the accident, plaintiff in this case was fifteen years old. Therefore, there is a rebuttal presumption that he possessed the capacity of an adult to protect himself and he is presumptively chargeable with the same standard of care for his own safety as if he were an adult. *Welch v. Jenkins,* 271 N.C. 138, 155 S.E. 2d 763. In this case there was no evidence to rebut that presumption nor was any contention made that plaintiff was lacking in the ability, capacity, or intelligence of the ordinary boy of his age. Thus, he was presumed to have sufficient capacity to understand and avoid a clear danger, and he is chargeable with contributory negligence as a matter of law if the only inference which could reasonably be drawn from

his own evidence is that he failed to do so. *Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577.

[4, 5] A bicycle is a vehicle and its rider is a driver within the meaning of our Motor Vehicle Law. G.S. 20-38(38); *Lowe v. Futrell,* 271 N.C. 550, 157 S.E. 2d 92. Here, all of the evidence establishes that plaintiff, after peddling slowly down the wrong side of a 60-mile per hour highway, attempted to drive his bicycle from the left-hand traffic lane across the right-hand lane to the shoulder of the road without ascertaining that it was safe for him to do so and without first giving any signal of his intention to make such a maneuver. In so doing, he drove his bicycle suddenly and directly into the path of defendant's oncoming car. He either failed to hear defendant's horn signals, which his companion heard and plaintiff should have heard, or, having heard, he ignored them. He either failed to look for what was plainly there for him to see, or, having seen, disregarded what he saw. In our opinion, the only inference which may reasonably be drawn from plaintiff's evidence is that he failed to exercise that degree of care for his own safety which a reasonably prudent person would have done under the circumstances and that such failure was a proximate cause contributing to his injuries.

The case of *Webb v. Felton,* 266 N.C. 707, 147 S.E. 2d 219, relied on by plaintiff, is distinguishable. There was here no evidence, as there was in that case, that plaintiff-bicyclist was startled into involuntary action by any sudden and frightening noise behind him or that his turning into the path of defendant's car was the result of anything other than his own deliberate action.

Defendant's motion for a directed verdict was properly allowed and the judgment appealed from is

Affirmed.

Judges BRITT and MORRIS concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. JOHN HENRY COTTEN, WILLIAM E. DIGGS, EVERLENA M. DIGGS, AND ALLSTATE INSURANCE COMPANY

No. 7110SC275

(Filed 18 August 1971)

1. **Insurance § 95— assigned risk policy — failure to pay renewal premium — cancellation of policy**

Where there was no evidence that the insured rejected the insurer's offer to renew an assigned risk policy, failure of the insured to pay the renewal premium within the time specified in the premium due notice and offer to renew did not constitute cancellation of the policy by the insured.

2. **Insurance § 95— assigned risk insurance — cancellation by insurer — failure to give timely notice to Motor Vehicles Department**

Insurer's attempted cancellation of an assigned risk policy for nonpayment of premium was ineffective where the insurer notified the Department of Motor Vehicles on 13 March 1968 that the insurance "terminates effective 12:01 a.m. 3-8-68," since G.S. 20-309(e) requires the insurer to give such notice 15 days prior to the effective date of cancellation, and the policy remained in effect when insured was involved in an accident on 26 May 1968.

APPEAL by plaintiff from *Clark, Judge,* January 1971 Regular Civil Session, WAKE Superior Court.

On 8 March 1966, Nationwide Mutual Insurance Company (Nationwide) issued its policy No. 61-679-575 to John Henry Cotten (Cotten) for a one-year period. The premium was paid, and the policy renewed for the second year by the payment of another premium by the insured. The policy was an assigned risk policy. On 21 January 1968, 45 days prior to 8 March 1968, Nationwide mailed to Cotten a premium due notice and offered to renew the policy for another year upon payment of premium. The notice gave the policy number, the termination date (8 March 1968), the amount of the premium due in order to renew ($77.80), and the payment date (14 February 1968). It contained the following language: "PREMIUM NOTICE FOR ASSIGNED RISK POLICY—Your automobile policy terminates on the date shown below. You may renew your policy for another year by paying the PREMIUM before the PAYMENT DATE." This notice was received by Cotten.

Cotten did not pay the premium necessary for renewal, and on 14 February 1968, Nationwide mailed him an "Assigned Risk

Termination Notice" as follows: "ASSIGNED RISK TERMINATION NOTICE—This is notice your Automobile Liability Policy expires at 12:01 A.M. on the TERMINATION DATE shown below. The Extension Certificate Endorsement 446-1B recently mailed is, therefore, null and void. IMPORTANT SEE OTHER SIDE." The notice recited the policy number, the termination date (8 March 1968) and the amount of premium ($77.80). In the lower right hand corner appeared the following: "NORTH CAROLINA POLICYHOLDERS ONLY: Financial responsibility is required to be maintained continuously throughout the registration period. The operation of a motor vehicle without maintaining financial responsibility is a misdemeanor, the penalty for which is loss of registration plate for 60 days and a fine or imprisonment in the discretion of the court." It was stipulated that Cotten received this notice and that a copy was received by the producer of record.

On 13 March 1968 Nationwide delivered to the Department of Motor Vehicles a form "FS-4 NORTH CAROLINA NOTICE OF TERMINATION" advising that the insurance of John Henry Cotten "terminates effective at 12:01 A.M. 3-8-68." The notice carried the policy number, 61-679-575 and showed also "date FS-4 prepared 3-13-68."

On 26 May 1968 the vehicle owned and operated by Cotten was involved in a collision, and the defendants, William E. Diggs and Everlena Diggs, brought separate actions against Cotten to recover for property damage and personal injuries allegedly sustained as the result of Cotten's negligence.

This action was brought by Nationwide asking that an injunction issue restraining the prosecution of the actions and that a declaratory judgment be entered adjudicating that Nationwide has no coverage for or obligation to defend Cotten and that defendant Allstate Insurance Company afford coverage under its Uninsured Motorist Insurance policy.

The matter was heard upon stipulated facts which are of record and were incorporated by reference in the judgment entered which adjudged the policy issued to Cotten by Nationwide to be in full force and effect at the time of the accident on 26 May 1968. To the signing and entry of the order, Nationwide excepted and appealed.

Smith, Anderson, Dorsett, Blount and Ragsdale, by Willis Smith, Jr., and Robert R. Gardner, for plaintiff appellant.

Cockman, Alvis and Aldridge, by Jerry S. Alvis, for defendant appellee, Allstate Insurance Company.

MORRIS, Judge.

Plaintiff's exceptions and assignments of error raise two questions: (1) Was the policy issued to Cotten by Nationwide cancelled by the insured, as Nationwide contends, or by the insurer, as Allstate contends? and (2) If the policy was cancelled by Nationwide, was its noncompliance with G.S. 20-309(e) cured by its notifying the Department of Motor Vehicles of cancellation on 13 March 1968?

Plaintiff concedes that it did not comply with the provisions of G.S. 20-309(e): "No insurance policy provided in subsection (d) may be terminated by cancellation or otherwise by the insurer without having given the North Carolina Motor Vehicles Department notice of such cancellation fifteen (15) days prior to effective date of cancellation. . . . " But plaintiff contends that it was not required to comply because the cancellation of the policy was effected by the insured, Cotten, and that in such event the statute required only immediate notification by the insurer to the Motor Vehicles Department. To sustain its position, plaintiff relies primarily on *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961). There Faizan applied for insurance and his risk was assigned to defendant. Defendant issued its policy effective 22 February 1958, and the premium was paid. In January 1959, pursuant to the rules of the Assigned Risk Plan, defendant sent plaintiff a notice that the policy would expire on 22 February 1959 and that in order to renew it plaintiff would have to pay renewal premium in advance by 5 February 1959, the date designated as premium due date. The notice stated the amount of premium due and advised that defendant would renew the policy if payment of premium was received by the premium due date; otherwise, defendant would assume plaintiff no longer desired coverage and would so notify the producer of record and the Assigned Risk Plan. Plaintiff received a copy of this notice, but failed to pay the premium. On 9 February 1959, defendant mailed to plaintiff a "Notice of Termination of Automobile Insurance" showing effective date of termination as 12:01 A.M. 24 February 1959 and notifying insured (plaintiff) that proof of financial responsibility is re-

quired to be maintained continuously throughout the registration period and operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor. The notice was received by plaintiff. Within 15 days after 22 February 1959 defendant sent to the Commissioner of Motor Vehicles notice that the insurance had terminated on 22 February 1959. At approximately 2:30 A.M. on 22 February 1959 the plaintiff's automobile was involved in a collision. Defendant denied coverage, contending that cancellation was effected by insured's failure to renew, and that any statutory notice deficiencies were applicable only to cancellation or failure to renew by insurer. In that case, insured not only failed to pay the renewal premium, but he applied through the Assigned Risk Plan for further insurance which was obtained from another insurer but was not effective at the time of the accident. The Court, in holding that the insured terminated the policy, said:

> "It seems clear that renewal was rejected by plaintiff. He was offered a renewal upon the condition that he pay the premium by 5 February 1959. This was in accordance with the rules of the Assigned Risk Plan. He was told that unless he paid the premium by that date he would be required to apply to the Assigned Risk Plan if he desired further insurance. He did not pay the premium on the date specified and did not offer to pay it on any other date. Instead, he applied to the Assigned Risk Plan for insurance.
>
> Under these conditions, we hold that there was no failure to renew on the part of defendant and it was under no obligation to give plaintiff further notice of termination under the provisions of G.S. 20-310. Therefore, the coverage period of the policy ended at 12:01 A.M., 22 February 1959."

Perkins v. Insurance Co., 274 N.C. 134, 161 S.E. 2d 536 (1968), was decided eight years later, the opinion for a unanimous Court being written by Bobbitt, J. (now C.J.). There the question again was whether defendant's liability under the policy issued to plaintiff terminated on account of plaintiff's failure to pay the renewal premium. The facts were these: Plaintiff's risk was assigned to defendant. Defendant issued its policy to plaintiff under the Assigned Risk Plan pursuant to the Vehicle Responsibility Act of 1957. The policy was effective beginning 7 February 1962 and its effectiveness ended at

12:01 A.M., 7 February 1963. Premium for that period was paid. Prior to 7 January 1963, defendant sent the producer of record a notice advising that in order to renew the policy plaintiff would have to pay the renewal premium 22 days in advance of the expiration date of the policy. The notice was dated 5 December 1962 and showed the renewal premium to be $55. Plaintiff received a copy of this notice prior to 7 January 1963. Plaintiff also received a notice from the producer of record. On 7 January 1963 plaintiff paid the producer of record a down payment of $15 on the premium, and the agency forwarded $43 to defendant and requested advice as to whether the premium was $43 or $55. Prior to 11 January 1963, defendant advised the agency to forward $12 so that the renewal could be processed. The agency notified plaintiff that defendant had advised the premium was $55 rather than $43 and asked that plaintiff pay the amount of $12 immediately so that the renewal could be issued. Two or three days later plaintiff telephoned the agency and was told that $12 must be paid for renewal of the policy. Plaintiff did not pay the additional sum prior to 7 February 1963. The sum of $43 was returned to the producer of record by defendant on 22 or 23 February 1963. Plaintiff's vehicle was involved in a collision on 18 February 1963. On 18 February 1963 plaintiff received a notice from defendant that his policy of insurance was terminated as of 12:01 A.M. 7 February 1963, the notice advising that proof of financial responsibility must be continuously maintained throughout the registration period and operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor. On 14 February 1963, and within 15 days after 7 February 1963, defendant sent to Commissioner of Motor Vehicles notice that the insurance had terminated on 7 February 1963. Defendant refused to defend actions brought against plaintiff and this suit was instituted by plaintiff to recover sums expended by him in defense of the suits. The trial court concluded that the coverage expired 7 February 1963 at 12:01 A.M. on account of plaintiff's failure to pay the renewal premium and entered judgment for defendant. On appeal defendant conceded that it did not give plaintiff the notice required by statute (15-day notice to insured marked with the words "Important Insurance Notice," containing effective date and hour of termination, and including the warning with respect to maintenance of financial responsibility and giving the penalty for failure to do so), but it contended that the policy was not terminated

by it but by plaintiff's failure to pay the premium. It was, therefore, not required to give plaintiff the notice, including the warning, required by G.S. 20-310. The Court noted that under the Assigned Risk Plan the risk is assigned to a designated company for three years, and, nothing else appearing, this defendant was obligated to renew the policy upon timely payment of the required premium by plaintiff. Here the only notice given to plaintiff by defendant prior to termination date was dated 5 December 1962, 45 days or more prior to 7 February 1963. The Court noted that defendant had ample opportunity to give the required 15-day notice. In reversing the trial court, the Supreme Court said that the decision in *Faizan* was grounded on the fact that the insured *rejected* defendant's offer to renew, that even though the notices to plaintiff were not in full compliance with the statute, they were sufficient to advise plaintiff of the consequences of his failure to renew. Insured made no response to the notices. Instead, he applied for other insurance. "In the present action, there is no evidence or finding that plaintiff *rejected* defendant's offer to renew upon payment of a premium of $55.00."

[1] In the case *sub judice,* there is no evidence or finding that plaintiff rejected defendant's offer. It does appear that the notices given are sufficient in form to satisfy the requirements of the statutory provisions and the interpretation thereof in *Faizan, Perkins, and Insurance Co. v. Davis,* 7 N.C. App. 152, 171 S.E. 2d 601 (1970), *cert. den.* 276 N.C. 327, which set out with particularity the necessary elements for an effective offer to renew. However, it is manifest that the purpose of the Vehicle Financial Responsibility Act of 1957 is to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. The Assigned Risk Plan provides for a risk to be assigned to a designated company for a period of three years. It also provided, at time pertinent hereto, that at least 45 days prior to the inception date of the first and second renewal policies, the company shall notify the insured that renewal policy will be issued if premium therefor is received at least 22 days prior to the inception date of the renewal policy. North Carolina Automobile Assigned Risk Plan, § 14. The statute, G.S. 20-309(e) requires 15 days notice to Commissioner of Motor Vehicles if cancellation is by insurer. G.S. 20-310(a) requires 15 days notice to insured, if cancellation is by insurer, together with the warning provided by that sec-

tion of the statute. The insurer is given ample opportunity to protect itself and avoid liability in cases where the insured does not pay the premium. In this case, insurer had ample opportunity to give the required notice to the Motor Vehicles Department. The insurer is in the best position to know whether the premium has been timely paid, and it is its responsibility and obligation to notify the Motor Vehicles Department, in accordance with the statute, of the termination of its coverage, absent a *rejection* by insured of insurer's offer to renew the policy.

Since there is no evidence or finding in this case of rejection of the offer by insured, we hold that there was no cancellation by the insured and the coverage was extended beyond the termination date of 8 March 1968.

[2] We come then to the question whether the notice given by the insured was effective to relieve it of its obligation to defend this action. G.S. 20-309(e) requires that no policy may be terminated by an insurer unless it gives to the Motor Vehicles Department "notice of such cancellation fifteen (15) days prior to effective date of cancellation." Nationwide takes the position that if notice was required, then the policy should be cancelled 15 days after notice was given, that is 15 days after 13 March 1968. If that position is correct, Nationwide would be relieved of obligation to defend, because the accident did not occur until 26 May 1968. While this position finds support in situations involving cancellations under contract provisions [See annotation 96 A.L.R. 2d 286 (1964)], the question of cancellation in accord with statutory provisions as here was decided in this jurisdiction in *Insurance Co. v. Hale,* 270 N.C. 195, 154 S.E. 2d 79 (1967). There the Court had decided that cancellation of the assigned risk policy was effected by the insurer and not the insured. The notice to the Motor Vehicles Department gave "12-19-64" as the date the cancellation became effective. The notice was sent to the Department on 29 December 1964. The notice was received by the Department on 11 January 1965. The accident did not occur until 30 August 1965. Insurer argued that if cancellation was by insurer and notice to the Department therefore required, cancellation was effective and the policy terminated 26 January 1965, 15 days after the Department received notice. Defendant contended that G.S. 20-309(e) did not contemplate nor did the Legislature intend that an insurer who had failed to give timely notice could avoid its obligation

to defend simply by claiming a new cancellation date arising 15 days after the Department received its notice. Justice Higgins wrote the opinion for a unanimous Court. He said:

> "The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway. Insurance covering liability arising out of the ownership, maintenance and use of a motor vehicle on the highway in the amount required by statute is mandatory. If the policy exceeds the amount required, the policy to the extent of the excess is voluntary. Voluntary insurance is contractual and determines the rights and liabilities of the parties *inter se.* Assigned risk insurance is compulsory both as to the insurer and the insured, made so by law. Such policy must be interpreted in the light of the statutory requirement rather than the agreement or understanding of the parties. *The requirements of the statute with respect to cancellation must be observed or the attempt at cancellation fails.* Such policies 'are generally construed with great liberality to accomplish their purpose.' *Ins. Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654; *Wheeler v. O'Connell,* 297 Mass. 549, 9 N.E. 2d 544, 111 A.L.R. 1038." (Emphasis supplied.)

We conclude that the first question raised by this appeal must be answered in the affirmative and the second question must be answered in the negative. The judgment of the trial tribunal is, therefore,

Affirmed.

Judges BRITT and PARKER concur.

COY BIGELOW, EMPLOYEE v. TIRE SALES COMPANY, INC., EMPLOYER; EMPLOYERS FIRE INSURANCE COMPANY, CARRIER

No. 7115IC310

(Filed 18 August 1971)

1. **Master and Servant § 55— workmen's compensation — compensable injury — accident**

An injury to be compensable under the Workmen's Compensation Act must result from an accident, which is to be considered as a separate event preceding and causing the injury, and the mere fact of injury does not of itself establish the fact of accident. G.S. 97-1.

2. **Master and Servant § 65— workmen's compensation — ruptured disc — installing tractor tire—accident**

A tire company employee who sustained a ruptured disc while he was attempting to put a 900-pound tire on a tractor hub sustained an "injury by accident" within the meaning of the Workmen's Compensation Act, where the position of the tractor on a hillside prevented the employee from following his customary work routine in installing the tire.

3. **Master and Servant § 94— workmen's compensation — conflicts in the evidence**

Conflicts in the evidence are for the Industrial Commission to resolve.

4. **Master and Servant § 65— workmen's compensation — ruptured disc — causal relation between injury and accident**

Medical expert testimony was sufficient to establish a causal relationship between a tire company employee's ruptured disc and the employee's accident which occurred while he was attempting to lift a 900-pound tractor tire onto a tractor hub.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 18 December 1970.

This is a claim for benefits under the Workmen's Compensation Act for injuries suffered by plaintiff on 6 September 1968 while in the employ of the defendant, Tire Sales Company, Inc. The jurisdictional facts were stipulated. The case was heard by Deputy Commissioner Thomas on 26 August 1969 and by Commissioner Shuford on 8 June 1970. Plaintiff's evidence tended to show: On 6 September 1968 plaintiff, then 48 years old and who had worked for his employer for 20 years, drove his employer's truck by himself to deliver a tractor tire to the farm of a customer. The tire was mounted on a rim and was inflated with approximately 110 gallons of water and as so

mounted and filled weighed approximately 900 pounds. Plaintiff lifted the tire from the truck by use of a chain hoist. He then rolled the tire about four feet to the tractor. The tractor was sitting on a hillside and the hub had been jacked up. It was necessary to lift the tire about six or seven inches to get it on the hub of the tractor. Plaintiff testified:

> "I lifted the tire from the bed of the truck down onto the ground and rolled the tire to the tractor and then leaned it and I had all my other things laying right there: a bar you run in it and slide it up on when it is on the level, lay the rim and the jack down and the wheel goes in the hub and jacks up. I couldn't do that on the hillside."

Plaintiff testified that on this occasion he put the bar under the bottom of the rubber tire by rolling the tire backwards enough to get the bar under it, and then he tried to pick up the outside end of the bar to raise the tire. When he had raised it about an inch, he felt a sharp pain in his back. It hurt so bad that he turned loose of the bar and stood there against the tire. Plaintiff testified:

> "I stood there about 15 minutes. I couldn't turn the tire and wheel aloose. I was by myself. And I went down again and it felt like something grabbing me in the bottom part of my back, just grabbed me, and I stood there about 30 minutes. I couldn't turn the tire aloose. When it got easy I went on and put the tire on. It was more like a cramp, like something pulling right in your back."

Plaintiff also testified:

> "After I got the tire that four feet over to the tractor, I had to lean it a little against the tractor. I couldn't lean it much because the tractor was leaning down the hill. All the weight come on me at one time. See, the tractor was setting on a hillside.
>
> * * * * *
>
> "If I had turned the tire aloose and went to the truck and called for help, see, when I had turned it aloose then it would have fell on me right then. I couldn't get to the truck to the radio. See, the truck has got a two-way radio on it, and if I had turned the tire aloose and it fell on me I couldn't get to the truck and call in for help. So I just leaned up against the tire until I got easy enough. . . . "

Plaintiff reported his injury to one of his bosses on the day it occurred. He continued to experience pain, and on 9 September 1968 he was examined by Dr. Ronald A. Pruitt, a specialist in orthopedics. Dr. Pruitt treated plaintiff for the pain in his back, and when he did not improve, Dr. Pruitt on 19 October 1968 referred him to the Neurosurgical Service at Duke Hospital, where he was subsequently operated on for a ruptured disc on 24 December 1968.

The Deputy Commissioner made findings of fact, stated his conclusions of law, and made an award allowing compensation. On appeal, the full Commission adopted the findings and conclusions of the Deputy Commissioner and affirmed the award. Defendants appealed to this Court.

Ross, Wood & Dodge by Clarence Ross for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by Larry B. Sitton for defendant appellants.

PARKER, Judge.

[1, 2] After twenty years of bending and lifting in service of his employer, plaintiff's back suddenly gave way when he called on it once again to strain in performance of an assigned task. In most jurisdictions this alone would have been enough to sustain an award of compensation under the Workmen's Compensation Laws. Vol. 1A, Larson's Workmen's Compensation Laws, § 38.20; 58 Am. Jur., Workmen's Compensation, § 255; 27 N.C. L.R. 599. However, under decisions of the North Carolina Supreme Court, here controlling, an injury to be compensable under our Workmen's Compensation Law, G.S. 97-1 *et seq.*, must result from an accident, which is to be considered as a separate event preceding and causing the injury, and the mere fact of injury does not of itself establish the fact of accident. *Jackson v. Highway Commission,* 272 N.C. 697, 158 S.E. 2d 865; *Lawrence v. Mill,* 265 N.C. 329, 144 S.E. 2d 3; *Pardue v. Tire Co.,* 260 N.C. 413, 132 S.E. 2d 747; *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124 S.E. 2d 109; *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289. The question presented by this appeal, therefore, is whether there was in this case sufficient evidence of an "accident," as that word has been defined by our Supreme Court, to sustain the finding made by the Hearing Commissioner and adopted by the full Industrial

Commission that plaintiff here sustained an "injury by accident" arising out of and in the course of his employment with the defendant employer. We think there was.

"To sustain an award of compensation in ruptured or slipped disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. . . . Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Harding v. Thomas & Howard Co., supra.*

In *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342, claimant suffered a ruptured disc when he picked up and removed a rock from a ditch he was digging. The ditch was fourteen inches deep and only twelve inches wide. The rock weighed 50 to 100 pounds and was two feet long and the same width as the ditch. This necessitated a twisting movement on the part of claimant when he picked up the rock from the bottom of the ditch and deposited it to one side. These facts were held sufficient to distinguish the case from *Harding v. Thomas & Howard Co., supra,* and *Hensley v. Cooperative, supra,* and accordingly the award made by the Industrial Commission was sustained.

In *Davis v. Summitt,* 259 N.C. 57, 129 S.E. 2d 588, claimant suffered injury when he attempted to elevate and hold a cabinet, weighing approximately 175 pounds, in place while another employee fastened it to the wall. The task of elevating and holding the cabinet in place was usually assigned to two men, but on this occasion plaintiff was performing it by himself. Evidence of these facts was held sufficient to support the Commission's finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment.

In *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175, plaintiff, who was regularly employed as a carpenter, was engaged in erecting a prefabricated chimney. The chimney was made in sections which weighed from 40 to 50 pounds each. Plaintiff had to lean over to his left to pick up the first section, and as he picked it up his body was in a twisted position. When he did so, he suffered a severe pain and was later operated on for a ruptured disc. The Industrial Commission adopted the Hearing Commissioner's finding that the plaintiff was injured

by accident arising out of and in the course of his employment and awarded compensation. On appeal the award was affirmed, the Supreme Court holding that there was competent evidence to support the Commission's crucial findings.

In *Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592, plaintiff was required to lift a plate weighing between 40 and 50 pounds from the floor and hand it to the pressman to his right, "kind of twisting." When he did so, he felt a severe pain in the lower part of his back. His condition was subsequently diagnosed as a ruptured disc. The Industrial Commission found that plaintiff had sustained an injury by accident and awarded compensation. On appeal the Supreme Court, in an opinion by Devin, J., (later C.J.) said:

> "The question here presented is whether, taking into consideration all the circumstances connected with plaintiff's claim, the rupture of his intervertebral disc occurred on 3 February, 1945, and, if so, whether it was the result of such an unlooked for and untoward event, produced by lifting the plate and handing it to another in a 'twisted' position as described by the plaintiff, as to come within the definition of an injury by accident, and hence to furnish the basis for an award of compensation under the remedial provisions of the Act. The Industrial Commission has so found and the Superior Court has affirmed.
>
> "This ruling must be upheld. The evidence of the sudden and unexpected displacement of the plaintiff's intervertebral disc under the strain of lifting and turning as described lends support to the conclusion that the injury complained of should be regarded as falling within the category of accident, rather than as the result of inherent weakness, or as being one of the ordinary and expected incidents of the employment."

[2] In the present case, the fact that the tractor was on a hillside prevented plaintiff from following the procedures which he would normally follow if the tractor had been on a level. For the same reason, he was unable to "turn the tire aloose" to go call for help, because had he done so the 900-pound tire "would have fell on (him) right then." In our opinion, these circumstances involved such an "interruption of the work routine and the introduction thereby of unusual conditions likely to

result in unexpected consequences," *Harding v. Thomas & Howard Co., supra,* as to furnish sufficient evidence to sustain the Commission's finding that plaintiff's injury was sustained "by accident."

[3] Appellants stress those portions of plaintiff's testimony, particularly elicted on cross-examination, in which he said there "was nothing unusual about the way I was putting the tire on," and in which he referred to the procedure he followed as "the way I always do it; there ain't no other way." However, there was also evidence that plaintiff had a speech impediment and was very difficult to understand, that he quit school when he was in the third grade, and that he did not know what the word "unusual" means. In any event, conflicts in the evidence were for the Industrial Commission to resolve. The Hearing Commissioner, who heard the testimony and observed the witnesses, has resolved the conflicts in plaintiff's favor. The only question for this Court on appeal is whether there was sufficient evidence to support the Commission's findings, not whether different findings might have been made. "The Court does not weigh the evidence. That is the function of the Commission. If there is any evidence of substance which directly, or by reasonable inference, tends to support the findings, the courts are bound by them, 'even though there is evidence that would have supported a finding to the contrary.' " *Keller v. Wiring Co., supra.* In our opinion there was in this case sufficient evidence to support the Commission's finding that plaintiff sustained an "injury by accident," as that phrase has been defined and applied in similar cases by our Supreme Court.

[4] Defendants also complain that there was insufficient competent medical testimony to establish a causal relationship between the accident and plaintiff's ruptured disc. On the day of the accident, plaintiff reported his injury to his boss. Three days after the accident, he consulted a physician and told the doctor what had happened. The doctor testified from his personal examination and treatment of the plaintiff that he found that plaintiff had "a preexisting condition of degenerative disc of the back in the lumbar spine," that in his opinion this condition was aggravated as a result of his injury in his work, and that the aggravation was of such severity that it required surgical correction. The surgeon who performed the operation testified that plaintiff told him that he had low back and bilateral

leg pain and that this came on at a specific time when he was at work, lifting a heavy tire. The surgeon also testified that he found plaintiff had four herniated discs, and that "everybody at his age has some back trouble to a certain degree and he probably has had degenerative disc disease for several years, but as frequently as the case is, this is markedly aggravated by some heavy lifting or twisting of the back which makes it worse." While defendants' objection to a portion of this evidence was sustained by the Hearing Commissioner, the doctor's answers appear in the record and in our opinion the evidence was competent. It was based on the doctor's own examination and treatment of the patient. In our opinion the evidence was sufficient to support the Commission's finding of a causal relationship between the accident and plaintiff's injury and resulting disability. See: *Soles v. Farm Equipment Co.*, 8 N.C. App. 658, 175 S.E. 2d 339.

The award of the Industrial Commission in this case is

Affirmed.

Judges BRITT and MORRIS concur.

MRS. ROBERT H. PEASELEY, EXECUTRIX OF THE WILL OF ROBERT H. PEASELEY, DECEASED v. VIRGINIA IRON, COAL AND COKE COMPANY, A CORPORATION

No. 7126SC481

(Filed 18 August 1971)

1. **Brokers and Factors § 6; Principal and Agent § 10— sales commission — death of sales agent — estate's right to commissions**

The estate of a sales agent who had negotiated a coal sales contract between the defendant seller of coal and a power company is entitled to the sales commissions on the coal which the seller has delivered to the power company since the agent's death, where the agent's commission contract did not contemplate that the agent was to perform personal services under the sales contract after the sales contract had been executed.

2. **Rules of Civil Procedure § 56— summary judgment**

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56.

3. Contracts § 12— construction of contract

Where a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court.

4. Contracts § 18— modification of contract — requisites of new agreement

To be effective as a modification, a new agreement, whatever its form and however evidenced, must possess all elements necessary to form a contract.

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

Defendant appeals from summary judgment entered for plaintiff on the question of defendant's liability for sales commissions on coal sold under a contract negotiated by defendant's sales agent, Robert H. Peaseley (Peaseley) before his death, but delivered after his death. The issue of damages was retained for jury determination.

This case was originally before this Court upon appeal by plaintiff from judgment of nonsuit entered at the close of her evidence. This Court reversed. *Peaseley v. Coke Co.,* 5 N.C. App. 713, 169 S.E. 2d 243, *cert. denied,* 275 N.C. 596. Reference is made to that opinion for a more detailed statement of facts.

Blakeney, Alexander & Machen by Whiteford S. Blakeney for plaintiff appellee.

Helms, Mulliss & Johnston by Fred B. Helms and E. Osborne Ayscue, Jr., for defendant appellant.

MALLARD, Chief Judge.

[1] In support of her motion for summary judgment, plaintiff offered in evidence, among other things, two contracts which defendant admitted having executed. The first contract (commission contract) was in the form of a letter written on behalf of defendant to Peaseley on 30 August 1960, and accepted by Peaseley on 6 September 1960. The letter provides in pertinent part:

"Beginning September 1, 1960, the Virginia Iron, Coal and Coke Company gives to you or your associates the exclusive right to offer and sell all coal produced and/or sold by Virginia Iron, Coal and Coke Company to Mill Power Supply Company for use by Duke Power Company.

"In consideration for the exclusive right to sell this account, you agree to limit your commission to (10¢) ten cents per net ton. This commission will be paid directly to you by separate remittance on tons actually shipped, determined by railroad weights.

"This agreement is to remain in effect as long as you are able to place for use by the Duke Power Company comparable Virginia Iron, Coal and Coke Company tonnage as shipped in 1959, or approximately 420,000 tons per year."

The second contract (sales contract) was between defendant, seller, and Mill Power Supply Company (Mill Power), buyer for its principal, Duke Power Company. Under this contract defendant agreed to sell and deliver and Mill Power agreed to buy and accept coal of a specified type and quality. 960,000 tons of coal were to be delivered under the contract during the first year, subject to the buyer's option to increase or decrease this amount by 10%. Quantity in subsequent years could, at buyer's option, be increased 10% over the preceding year by giving seller six months written notice, prior to the beginning of each new year under the contract. The new quantity was also subject to an increase or decrease of 10% at buyer's option.

The sales contract, which was for an initial period of three years, became effective 1 July 1963. It was to continue after the expiration of the three-year period unless terminated by either party giving 24 months written notice at any time after the completion of the first year of the contract.

It was admitted that the sales contract was brought about through Peaseley's efforts.

Peaseley died 11 May 1965. The contract continued in force and since Peaseley's death defendant has delivered coal in accordance with its terms. Commissions have been paid on the coal delivered before Peaseley's death, and the sole matter in dispute here is whether Peaseley's estate is entitled to commis-

sions on coal which has been delivered pursuant to the sales contract since Peaseley's death.

Defendant contends the case should be resolved, as a matter of law, in its favor, arguing that the commission contract was a contract for personal services which terminated upon Peaseley's death. A contract for personal services is terminated by the death of the person who was to perform, since his death makes further performance impossible. *Stagg v. Land Co.*, 171 N.C. 583, 89 S.E. 47; *Siler v. Gray*, 86 N.C. 566. A contract to sell a product is ordinarily one calling for personal services. See: *Home Sewing-Machine Co. v. Rosensteel*, 24 Fed. 583 (W.D. Pa. 1885); *Smith v. Preston*, 170 Ill. 179, 48 N.E. 688 (1897); *Smith v. Zuckman*, 203 Minn. 535, 282 N.W. 269 (1938).

However, as pointed out by Judge Parker in the opinion filed in the former appeal, plaintiff is not seeking to continue in effect the personal services aspect of the commission contract, but is seeking payment for personal services performed under the contract by Peaseley before his death; that is, commissions on coal sold pursuant to the sales contract negotiated by Peaseley between defendant and Mill Power.

"A sales agent whose efforts are the procuring cause of a sale made during the period the agency relationship existed is entitled to commissions thereon even though actual delivery of the article sold be made after termination of the agency, at least absent a clear understanding to the contrary. . . . " *Peaseley v. Coke Co., supra,* and cases there cited. Certainly no understanding can be inferred from the commission contract that defendant would be liable for commissions on sales of coal procured through Peaseley's efforts, only if Peaseley lived until the coal sold was actually delivered.

Defendant further contends that if the case cannot be decided in its favor, as a matter of law, summary judgment was nevertheless improper.

[2] Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56. Defendant insists that a factual question arises as to whether the commission contract required Peaseley to continue to perform personal

services, even after the sales contract was executed. In support of this position, defendant points to evidence which tended to show that after the sales contract was entered Peaseley continued to work to increase the volume of coal Mill Power purchased, negotiated settlements when disagreements arose about the quality of coal delivered and otherwise "serviced the account."

It was only natural for Peaseley to work to increase the volume of coal Mill Power purchased, because an increase in volume would mean an increase in commissions. It was also natural for him to perform services which would tend to insure an amicable relationship between the parties to the sales contract. After all, either party had the right to terminate the contract upon 24 months notice, and thus terminate Peaseley's future commissions. The question, however, is not what Peaseley voluntarily undertook to do, but what the contract required him to do in order to receive commissions.

All Peaseley was required to do under his commission contract in order to be entitled to commissions was to sell and place for use by Duke Power approximately 420,000 tons of coal a year. Under the sales contract which Peaseley negotiated, Mill Power became legally bound to accept and pay for 960,000 tons of coal a year (subject only to minor deviations in quantity as provided in the contract). Defendant became legally bound to furnish this coal. These obligations continued so long as the contract continued. As stated by Judge Parker in the former opinion in this case:

> "Certainly this coal was sold in the sense that the sales contract under which it moved was fully negotiated, reduced in detail to writing, and was signed by the contracting parties prior to Peaseley's death. . . . It may be assumed that both the buyer and seller contemplated that much of the coal sold under the contract was to be mined, processed, and shipped by the defendant subsequent to the date the contract was executed. That the coal covered by the contract may have been mined, processed and shipped before or after the date the contract was executed, or before or after the date of Peaseley's death, does not, in our view, relieve defendant of the obligation to pay commissions on the coal so sold and shipped." 5 N.C. App. at 721, 722, 169 S.E. 2d at 248.

[3] It is elementary that where a contract is plain and unambiguous the construction of the agreement is a matter of law for the court. 2 Strong, N. C. Index 2d, Contracts, § 12, p. 311. In the case of *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539, it is stated: "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. *Indemnity Co. v. Hood,* 226 N.C. 706, 710, 40 S.E. 2d 198. It is the province of the courts to construe and not to make contracts for the parties. *Williamson v. Miller,* 231 N.C. 722, 727, 58 S.E. 2d 743; *Green v. Insurance Co.,* 233 N.C. 321, 327, 64 S.E. 2d 162. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense. *Bailey v. Insurance Co.,* 222 N.C. 716, 722, 24 S.E. 2d 614."

The language of the commission contract and the sales contract is clear and unambiguous. We may not, under the guise of construction, place on defendant's agent Peaseley, duties which the contracts obviously did not contemplate. *Taylor v. Gibbs,* 268 N.C. 363, 150 S.E. 2d 506; *Indemnity Co. v. Hood, supra.* If the parties had intended that Peaseley be required to "continue to service" sales made under the sales contract between plaintiff and Mill Power, it would have been a simple matter for them to have so provided. See *Carson v. National Co.,* 267 N.C. 229, 147 S.E. 2d 898.

[4] Defendant offered an affidavit of its President F. X. Carroll in which Carroll stated that he had discussed with Peaseley, on several occasions before Peaseley's death, the fact that commissions on coal sold to Mill Power under the 1963 contract would cease at Peaseley's death, and that Peaseley understood this. The parties present vigorous arguments as to whether this evidence is precluded by the dead man's statute. G.S. 8-51. In our opinion this question is immaterial, for the evidence offered was insufficient to establish a modification of the commission contract which defendant has agreed it executed. To be effective as a modification, a new agreement, whatever its form and however evidenced, must possess all elements necessary to form a contract. *Electro Lift v. Equipment Co.,* 4 N.C. App. 203, 166 S.E. 2d 454, *cert. denied,* 275 N.C. 340.

It is not contended that Peaseley ever agreed, for a valuable consideration, to surrender any of the benefits he was

entitled to under his commission contract. His acquiescence in an understanding expressed by defendant's president as to what he thought certain legal effects of the contract to be did not alter the contract's actual legal effect.

The terms of the contracts involved having been admitted by defendant, the burden was on the defendant to show any modification which it contended had been made. *Russell v. Hardwood Co.*, 200 N.C. 210, 156 S.E. 492. The evidence presented by defendant, even when viewed in the light most favorable to defendant, was in our opinion insufficient to permit submission to the jury of any issue. We therefore hold that no triable issue of fact was presented and summary judgment was properly entered for plaintiff.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION, AND BRANCH BANKING AND TRUST COMPANY v. LEXINGTON STATE BANK

No. 7110SC113

(Filed 18 August 1971)

1. **Banks and Banking § 1— establishment of branch bank — findings and conclusions of Banking Commission**

In a proceeding to establish two branch banks, the Banking Commission is the finder of fact and its findings and conclusions will not be disturbed on appeal if supported by competent evidence, even though there may be evidence which would support contrary findings and conclusions.

2. **Banks and Banking § 1— approval of two branch banks — sufficiency of evidence**

Findings and conclusions of the Banking Commission in approving applications of a bank to establish two branches in the same city are supported by competent evidence.

3. **Banks and Banking § 1— applications to establish two branches — consolidated hearing**

The fact that the Banking Commission consolidated for hearing two applications by a bank to establish two branches in the same city and made findings and conclusions applicable to both branches

does not of itself invalidate the Commission's order approving the applications.

Judge MORRIS concurs in the result.

Judge BROCK dissenting.

APPEAL by protestant, Lexington State Bank, from *Clark, Judge,* 14 September 1970 Session of Superior Court held in WAKE County.

On 15 January 1970, Branch Banking and Trust Company filed applications for authority to establish two branch banks in Lexington, N. C. The Commissioner of Banks thereafter filed with the State Banking Commission his approval of the applications.

The two applications were consolidated for hearing before the Banking Commission. At this hearing, Lexington State Bank lodged a protest against the establishment of the requested branches. After hearing the evidence of both the applicant and the protestant, the Banking Commission made findings of fact and conclusions of law approving the applications.

The protestant petitioned the Superior Court of Wake County for review of the Commission's action. In a judgment dated 25 September 1970, Judge Clark ratified and affirmed the action of the Commission. The protestant appealed.

Carr & Gibbons by F. L. Carr; DeLapp, Ward & Hedrick by Hiram H. Ward for Branch Banking and Trust Company, plaintiff appellee.

Jordan, Morris and Hoke by John R. Jordan, Jr., and William R. Hoke; Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for defendant appellant.

HEDRICK, Judge.

By its three assignments of error, the appellant contends the superior court erred in affirming the findings of fact and order of the Banking Commission and in finding and concluding that the decision of the Banking Commission, approving the two applications of Branch Banking and Trust Company to

establish two branches in Lexington, North Carolina, is supported by competent, material and substantial evidence upon the entire record, and by not finding and concluding that the decision of the Commission was arbitrary and capricious.

G.S. 53-62, in pertinent part, provides:

"Such approval shall not be given until he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community."

[1] In a proceeding such as this, the administrative agency is the finder of fact, and its findings and conclusions will not be disturbed if supported by competent evidence, even though there may be evidence which would support contrary findings and conclusions. *Campbell v. Board of Alcoholic Control,* 263 N.C. 224, 139 S.E. 2d 197 (1964); State of North Carolina On Relation of the Banking Commission, and *First-Citizens Bank & Trust Company v. Bank of Rocky Mount,* 12 N.C. App. 112, 182 S.E. 2d 625 (1971).

[2, 3] The Commission's findings and conclusions are supported by competent evidence in the record. The fact that the Commission consolidated the two applications for hearing, and made findings and conclusions applicable to both branches, does not of itself invalidate the order approving the applications.

In our opinion, the Commission's experience, technical competence, and specialized knowledge enabled it to analyze and evaluate all the evidence in arriving at its findings and conclusions.

We hold that the action of the Commission is not arbitrary and capricious, for the findings and conclusions are supported by competent evidence.

The order appealed from is

Affirmed.

Judge MORRIS concurs in the result.

Judge BROCK dissents.

Judge BROCK dissenting.

It does not cause me concern that Branch Banking and Trust Company elected to file, at the same time, two applications for separate full service branches to be established in Lexington. Also, it does not cause me concern that the Banking Commission permitted a consolidated hearing upon the two applications. However, each application should stand on its own bottom, and the evidence must support findings by the Commission that each branch meets the criteria established by G.S. 53-62 without one leaning upon the other for support.

The Legislature clearly spoke in the singular when it provided that approval for the establishment of a branch shall not be given until it is found (1) that the establishment of *such branch* will meet the needs and promote the convenience of the community, and (2) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of *said branch*. G.S. 53-62. Whether the statutory criteria are adequate or inadequate is a matter for the Legislature. It is the function of the Commission and the courts to apply the standards created by the Legislature and not some standard that might seem more expedient at the moment.

In this case the Commission merely found and concluded in the aggregate, apparently treating the two full service branches as a composite unit. From the findings and conclusions of the Commission it is conceivable that one branch meets the needs and convenience of the community, that the other branch does not; but that, when considered as a composite unit, the two branches together do. In a like manner it is conceivable that maintaining the solvency of one of the branches is assured, while it is not assured as to the other; but that, when considered as a composite unit, the solvency of the two is assured. In both examples the inadequacy of one branch is buttressed by the extra strength of the other. It seems to me that such a result is precisely what the Legislature intended to prevent.

Also, although the Commission does not articulate the theory, it seems clear that it has been strongly influenced in

its opinion by, and has laid stress upon, the excellent and more than adequate solvency of the entire organization of Branch Banking and Trust Company. Upon the strength of Branch Banking and Trust Company it has concluded that the solvency of the proposed branches is assured. If this is the proper test I would certainly agree that the management and financial stability of Branch Banking and Trust Company is sufficient to assure the solvency of the two proposed branches even if both proposed branches consistently operated at a loss.

I recognize that the Federal Court adopted the view that the solvency requirement of G.S. 53-62 was satisfied by the solvency of an entire organization. *First-Citizens Bank & Trust Co. v. Camp*, 409 F. 2d 1086 (4th Circuit). However, I do not agree that such an interpretation correctly reflects the intent of our Legislature. It appears to me that our Legislature intended for the need and volume of business to be such that the ability of each branch to maintain its own solvency is reasonably assured. Otherwise the statute has little regulatory effect.

I vote to reverse and remand for definitive findings by the Commission as to each individual branch with respect to the need and convenience test and the solvency test.

JAMES M. PLEASANT, ADMINISTRATOR OF THE ESTATE OF E. L. PLEASANT v. MOTORS INSURANCE CORPORATION

No. 7111DC269

(Filed 18 August 1971)

Actions § 5; Insurance § 76— automobile fire insurance — intentional burning by deceased insured's son — recovery of insurance proceeds — public policy

Public policy prevents the administrator of the named insured from recovering under an insurance policy for the loss of an automobile by fire where the automobile was intentionally burned by the named insured's son, the primary operator of the automobile, and the son would be a substantial beneficiary of the attempted recovery, since the law does not permit one to profit from his own wrong.

Judge MORRIS dissenting.

APPEAL by plaintiff from *Lyon, District Judge*, at the 30 November 1970 Session of HARNETT District Court.

This action was instituted on 12 March 1962 by plaintiff's intestate to recover on a policy of insurance issued by defendant. The policy covered a 1960 model Corvair automobile which was destroyed by fire on or about 17 February 1961. Intestate died in 1963 and his administrator was substituted as plaintiff.

The case was heard on an agreed statement of facts, summarized in pertinent part as follows: On 30 August 1960, defendant issued to plaintiff's intestate its policy of insurance #96-75209 covering a described automobile belonging to intestate. Bobby Pleasant (Bobby), son of intestate, at all times pertinent to this action lived in the home with his parents and a brother and sister. Although the brother and sister occasionally operated the subject automobile, as did intestate, Bobby was the primary operator thereof. On 17 February 1961, Bobby and three of his friends conspired together to burn the automobile; they intentionally destroyed the automobile by burning, in an effort to obtain a new convertible automobile with the insurance money Bobby thought would be collected. Bobby was convicted in criminal court of burning the car. Damages resulting from the burning amounted to $1900.

The district court found facts as submitted and concluded that plaintiff was not entitled to recover. From judgment that plaintiff recover nothing, he appealed.

Bryan, Jones, Johnson, Hunter & Greene by K. Edward Greene for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Paul L. Cranfill and Grady S. Patterson, Jr., for defendant appellee.

BRITT, Judge.

The policy of insurance involved in this action obligated defendant to pay for loss to the automobile caused, among other things, by fire or lightning. The word "loss" is specifically defined in the policy under the section entitled "Definitions" as follows: "loss means direct and accidental loss of or damage to (a) the automobile, including its equipment or (b) other insured property." The policy defines the word "insured" to include a person " . . . using or having custody of said automobile with the permission of the named insured." Defendant contends that destruction of the automobile was not accidental

but resulted from the intentional act of intestate's son, an insured who was the primary operator of the automobile.

We do not deem it necessary to decide the questions posed by defendant's contentions. Suffice to say, we hold that under the facts presented the public policy of this State prevents a recovery.

Our research fails to reveal that this court or our Supreme Court has passed upon a case similar to the case at bar, but we think a proper analogy can be drawn from the cases hereinafter reviewed.

The law does not permit one to profit by his own fraud or take advantage of his own wrong. 1 Am. Jur. 2d, Actions, § 51, p. 583. In *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466 (1943), opinion by Stacy, C.J., it is said: "One *in flagrante delicto* is not permitted to recover in the courts. The courts are open for the determination of rights and the redress of grievances, but not for the rewarding of wrongs. To 'do justly' and to 'render to each one his due,' . . . , are the first commands of the law."

In *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203 (1947), Denny, J., (later C.J.) said: "Public policy in this jurisdiction, buttressed by the uniform decisions of this Court, will not permit a wrongdoer to enrich himself as a result of his own misconduct." In that case, an administrator instituted an action for wrongful death against intestate's husband upon allegations that the husband's negligence caused the death of intestate. Intestate left no children. The court held that the husband being the sole beneficiary of any recovery that it would look beyond the nominal party plaintiff and not allow any recovery.

In *Insulation Company v. Davidson County,* 243 N.C. 252, 90 S.E. 2d 496 (1955), plaintiff corporation, whose secretary-treasurer and substantial stockholder was chairman of defendant's board of commissioners, brought suit to recover for insulation work performed on certain county buildings. The question on appeal was whether plaintiff was entitled to recover on a *quantum meruit* basis. In answering the question in the negative the court, speaking through Barnhill, C.J., said: "No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of criminal

misconduct and which is in direct contravention of the public policy of the State (Citations)."

In re Estate of Ives, 248 N.C. 176, 102 S.E. 2d 807 (1958), opinion by Parker, J., (later C.J.) the court held that the common law maxim that a person will not be allowed to take advantage of his own wrong has been adopted as public policy in this State; and the right of a person to share in the distribution of recovery in an action for wrongful death will be denied where the death of the decedent is caused by such person's negligence.

Although Bobby is not the plaintiff in the instant case, the record indicates that he would be a substantial beneficiary of the attempted recovery, thereby profiting from his own wrong. We think the benefits that would accrue to him are sufficient to invoke the doctrine above discussed and prevent any recovery in the action.

For the reasons stated, the judgment appealed from is

Affirmed.

Judge PARKER concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

The majority opinion is based upon the premise that public policy prohibits Bobby Pleasants from profiting from his own wrong as a substantial beneficiary of his father's estate. With respect to the son's share in the father's estate, the record reveals only that at the time of the destruction of the automobile, Bobby Pleasant lived in the same home with E. L. Pleasant, Mrs. E. L. Pleasant, and a brother and sister. We are not informed as to whether there are other beneficiaries. I agree with the majority that the wrongdoer should not be allowed to profit from his wrongdoing, and any judgment entered in favor of the insured should specifically exclude the wrongdoer from participation. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807 (1958).

This suit was instituted by the named insured, father of the wrongdoer and owner of the automobile. His death during

the pendency of the action necessitated the substitution of his administrator as plaintiff. This should not necessitate application of any different principles of law, however.

The judgment entered by the trial tribunal was based on the conclusion of the court that the destruction of the automobile was not a "loss" as defined by the policy, because the burning of the automobile "was not caused by accident but was caused intentionally by Bobby Pleasant, son of plaintiff's intestate and primary operator of the aforementioned automobile." The court found as a fact that the word "loss" as used in the policy was specifically defined to include only "direct and accidental loss of or damage to the automobile, its equipment, or other insured property." In my opinion, the language of the policy and the undisputed facts make applicable to this case the principles applied in *Bone v. Insurance Co.*, 10 N.C. App. 393, 179 S.E. 2d 171 (1971), *cert. den.* 278 N.C. 300 (1971).

Additionally, the majority opinion results in imposing upon the father liability for the willful wrongdoing, indeed criminal act, of his son upon a record which discloses no facts upon which that liability could be predicated. In this jurisdiction, the mere relationship of parent and child does not render the parent so liable. *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474 (1963). This is not a case in which the family purpose doctrine has any application. Here, the son, concededly the primary operator of the automobile owned by his father, intentionally burned it. There is no intimation that the father, the insured, procured, commanded, instigated, advised, encouraged, or had any knowledge of the commission of the act by his son. Nor is there any evidence that the automobile was beneficially owned by the son with the father holding legal title for convenience or any other purpose. It is stipulated that the son was convicted in criminal court for his willful burning of the automobile. I do not agree that public policy denies recovery to the father, original plaintiff here, for the loss of his automobile by means accidental to him albeit intentional on the part of the wrongdoer, under a policy which did not exclude loss occasioned by the intentional act of insured or another.

CECIL D. JERNIGAN, JR. v. ATLANTIC COAST LINE RAILROAD COMPANY

No. 716SC474

(Filed 18 August 1971)

1. Trial § 51— motion to set aside verdict — review on appeal

A motion to set aside the verdict as contrary to the greater weight of the evidence is addressed to the sound discretion of the trial judge, whose decision is not reviewable in the absence of a manifest abuse of discretion.

2. Railroads § 7; Trial § 52— crossing accident — motion to set aside award of damages — discretion of court

Trial court properly acted within its discretion in refusing to set aside a $107,500 verdict in favor of a plaintiff who was injured in a collision with defendant's train at a railroad crossing, where the plaintiff offered evidence that he had suffered a forty percent permanent partial disability to his lower left extremity, that arthritis resulted which is expected to increase with the passage of time, and that atrophy has caused a shortening of the left leg; and especially where trial court reduced the verdict to $82,500.

3. Damages §§ 3, 13— future earning capacity — admission of prior earnings

In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings.

4. Damages §§ 3, 13— loss of earning capacity — evidence of loss of business

Evidence that plaintiff's business suffered as a result of his injuries is competent and admissible as an aid in determining damages for loss of time or impairment of earning capacity.

5. Trial § 17— evidence competent for a restricted purpose — admissibility

The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted.

6. Evidence § 45— evidence of average monthly net income

A plaintiff could testify as to his average monthly net income without using tax returns or other documentary evidence.

7. Evidence §§ 29, 33, 44— hearsay evidence — entry in the course of business — letter detailing plaintiff's health

A letter in which plaintiff's fellow employee had recorded his observations of the plaintiff's physical condition at the time plaintiff began employment *held* properly excluded as hearsay evidence in plaintiff's action to recover for injuries sustained in a railroad crossing accident; the fact that the letter was contained in plaintiff's Veterans Administration file does not make the letter admissible as an entry in the regular course of business.

8. Evidence § 29— entry in the regular course of business — admissibility

To be admissible as an entry in the regular course of business, the entry must be made in the regular course of business at or near the time of the transaction involved; furthermore, the entry must be authenticated by a witness who is familiar with it and the system under which it was made.

APPEAL by defendant from *Cowper, Judge,* 29 March 1971 Civil Session of Superior Court held in HALIFAX County.

Plaintiff instituted this action 13 August 1964 seeking recovery for injuries sustained 7 October 1961 in a collision with defendant's train at a railroad crossing in Weldon.

At the first trial plaintiff's action was nonsuited at the conclusion of his evidence. The judgment of nonsuit was reversed by the Supreme Court. 275 N.C. 277, 167 S.E. 2d 269.

At the second trial the jury answered all issues in plaintiff's favor. The trial judge entered judgment on the issues of negligence and contributory negligence in accordance with the verdict but set aside the issue of damages and ordered a new trial as to that issue. This Court affirmed upon review. 9 N.C. App. 186, 175 S.E. 2d 701, *cert. denied,* 277 N.C. 252.

Trial upon the single issue of damages resulted in a jury verdict for plaintiff in the amount of $107,500. Upon order of the trial court, and with the consent of plaintiff, the amount was reduced to $82,500 and judgment was entered accordingly. Defendant appealed.

Allsbrook, Benton, Knott, Allsbrook & Cranford by Richard B. Allsbrook for plaintiff appellee.

Spruill, Trotter & Lane by John R. Jolly, Jr., for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant's first contention is that the trial court erred in denying its motion to set the verdict aside as contrary to the greater weight of the evidence. It is elementary in this State that a motion on this ground is addressed to the sound discretion of the trial judge, and his decision is not reviewable in the absence of a manifest abuse of discretion. *Goldston v. Chambers,* 272 N.C. 53, 157 S.E. 2d 676; *Williams v. Boulerice,*

269 N.C. 499, 153 S.E. 2d 95; *Hoffman v. Brown,* 9 N.C. App. 36, 175 S.E. 2d 388.

[2] Plaintiff presented evidence that he suffered a forty percent permanent partial disability to his lower left extremity as a result of injuries sustained. Arthritis resulted, and plaintiff's physician expected the arthritis to increase with the passage of time and to further limit movement in plaintiff's hips. Atrophy caused a shortening of the left leg and also a lessening of the circumference of the left thigh by three-fourths of an inch. Less serious injuries about the chest and body were also sustained. There was considerable evidence to show continued pain, a curtailment of activities, and a loss of earning capacity.

The question is not whether we are of the opinion the jury's award more than adequately compensated plaintiff for his injuries, but whether we find a manifest abuse of discretion on the part of the trial judge in failing to set the verdict aside. In the light of the evidence of substantial and permanent injuries, a portion of which has been set forth, we do not so find. The reduction in the verdict of the jury by $25,000 gives defendant even less cause to complain.

[3] Secondly, defendant contends that the court erred in permitting plaintiff to testify as to his average monthly net income during the months preceding his injury in 1961. In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings. *Fox v. Army Store,* 216 N.C. 468, 5 S.E. 2d 436.

Plaintiff testified that at the time of the accident he operated his own trucking business. He described in detail the extensive duties he performed in connection with this business. Many of the duties required a type of physical activity which was substantially curtailed by his injuries. As a result, plaintiff's business suffered in details described in his testimony.

[4, 5] In a tort action evidence of a loss of business will not ordinarily support a claim for special damages for lost profits. Nevertheless, such evidence is competent and admissible as an aid in determining damages for loss of time or impairment of earning capacity. *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d

894. No issue of special damage was submitted to the jury and defendant made no request that this evidence be restricted to the issue of loss of time or impairment of earning capacity. "The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted." 7 Strong, N.C. Index 2d, Trial, § 17, p. 283.

[6] Defendant particularly complains that plaintiff used no tax returns or other documentary evidence to show his actual income during 1961. In answering a similar contention made by the plaintiff in *Smith v. Corsat, supra,* Justice Moore stated for the Court: "The fact that defendant did not testify from business records and accounts does not render his testimony too speculative. Plaintiff had full and ample opportunity to cross-examine him with respect to all phases of the business." 260 N.C. at 99, 131 S.E. 2d at 899. This assignment of error is overruled.

[7] Defendant's third assignment of error challenges the exclusion of a letter contained in plaintiff's Veterans Administration file. Defendant subpoenaed the file and offered evidence contained therein which tended to show that plaintiff had made a disability claim in 1952 for a service connected injury. This information included a medical report from the Veterans Administration physician who examined plaintiff. All the evidence tendered from the file was admitted except for a letter from an employee of the State Highway and Public Works Commission. The date of the letter is not shown; however, it purports to be from a fellow employee of plaintiff who describes certain observations which he made with respect to plaintiff's physical condition at the time plaintiff started work for the Commission in 1952 and subsequently.

[7, 8] We hold that the letter was properly excluded. The letter unquestionably constitutes hearsay evidence. The fact it was found among other papers in plaintiff's Veterans Administration file does not make it admissible as an entry in the regular course of business. To be admissible under this theory it must be shown that the entries were made in the regular course of business at or near the time of the transaction involved. Furthermore, the entries must be authenticated by a witness who is familiar with them and the system under which they were made. Stansbury, N. C. Evidence 2d, § 155. The letter fails to

qualify in both of these essentials and amounts to nothing more than "hearsay on hearsay." See *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326, and *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895.

Defendant's final two assignments of error relate to the charge. The charge contains the statement of the rule of damages set forth in *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421. This rule has been approved by our Supreme Court in cases too numerous to mention. A review of the complete charge shows that the trial judge fairly declared and explained the law arising on the evidence given in the case and gave equal stress to the contentions of each party. This was all he was required to do. G.S. 1A-1, Rule 51(a).

No error.

Judges BROCK and VAUGHN concur.

KATHLEEN HALL REECE v. ANTONIOS Y. KARRAZ

No. 7110DC455

(Filed 18 August 1971)

1. **Automobiles § 79— intersection accident — contributory negligence**

Plaintiff's evidence disclosed her contributory negligence as a matter of law where it showed that plaintiff entered an intersection and struck a left-turning automobile that had entered the intersection from the opposite direction, that plaintiff's view was unobstructed as she entered the intersection, and that plaintiff did not look to the left or right before entering the intersection.

2. **Automobiles § 79— intersection accident — contributory negligence**

In defendant's counterclaim against plaintiff, the trial court erred in finding defendant contributorily negligent as a matter of law, that being a jury question, where there was evidence tending to show that defendant turned left at an intersection on the green arrow and was struck by plaintiff's oncoming car before he could safely cross plaintiff's lane of travel.

APPEAL by plaintiff and defendant from *Barnett, District Judge*, 18 January 1971 Session of District Court held in WAKE County.

The plaintiff instituted this action against the defendant to recover for the personal injuries and property damage she sus-

tained as a result of a collision between the 1967 Plymouth she owned and was driving and the 1965 Chevrolet which the defendant owned and was driving. Defendant filed an answer denying the material allegations of the complaint and filed a counterclaim for the personal injuries and property damage he sustained as a result of the collision.

The accident occurred at approximately 10:30 p.m., 6 July 1968, at the intersection of Avent Ferry Road and Western Boulevard. Western Boulevard consisted of two eastbound and two westbound lanes for through traffic with a "left turn" lane for both east and westbound traffic. There were synchronized electrically-operated traffic control devices at each intersection. Traffic traveling straight either east or west was stopped at the time the traffic in the turn lanes was allowed to go.

Plaintiff's evidence, through the witness Richard Dennis McLaughlin (McLaughlin), tended to show that at the time of the collision witness was stopped at the intersection of Western Boulevard and Avent Ferry Road facing in an easterly direction. He was in the middle lane with the left turn lane on his left empty and the lane on his right closest to Avent Ferry Road also empty. His traffic light was red. He testified:

> " . . . I saw Mr. Karraz's vehicle. When I first saw it, it was stopped in the left-turn lane of the westbound traffic. The traffic signals, as represented by the circles which I have indicated over these lanes on the blackboard diagram represent the traffic signals. These were suspended from wires. There was one traffic signal light for each lane. I was generally familiar with this intersection. . . . I can state that the sequence of the traffic signals at this intersection as they were on that night as to when the left-turn signals operated were: Left-turn signals worked together, both eastbound and westbound traffic. They both turn green to yellow to red before the straight-through traffic, both westbound and eastbound, before that turns green.
>
> . . . When I first saw the Karraz vehicle as to what it was doing, it was stopped, in the left-turn lane, westbound. The traffic signal for the left turning traffic eastbound when I observed it was green. I did not see this light go from red to green. I did not observe it turn green. I observed it after I saw Mr. Karraz's vehicle. I did not see

Mr. Karraz's vehicle begin to move. As to when I first noticed the Karraz vehicle begin its left turn, I noticed that he began his left turn after—I noticed he was making a left turn after my light had turned green. I saw Mr. Karraz's vehicle as it was turning and moving across in front of my car. I did not see it as he began his turn but I saw him as he was then completing the turn and proceeding straight across in the median.

At that time the traffic signal for eastbound traffic in my lane had changed to another color from red. It had changed to green. At that time as I observed the Karraz vehicle at or about the median the color of the signal for left turn traffic eastbound was red. . . . "

Mrs. Reece's car then came by McLaughlin on the right and collided with the Karraz vehicle.

On cross-examination McLaughlin testified that when he first noticed the Karraz car it had entered the intersection.

" . . . He entered the intersection and at that point the light for me had turned green. As to whether he was at that point already in the intersection or had entered the intersection I don't want to say that he had entered the intersection. He was in the intersection when my light turned green. I do not want to say that he had entered the intersection because I was not observing him."

McLaughlin was driving a 1968 Triumph which, he testified, is approximately three-quarters or less as tall as a full size automobile.

Mrs. Reece testified that she was traveling in an easterly direction on Western Boulevard when she approached the subject intersection. The light turned green in her direction some 100 feet before she reached the intersection. She testified:

" . . . I was looking straight ahead. I did not see any cars within the intersection as my vehicle approached it. As to when I first saw the Karraz car, when I hit it."

On cross-examination she testified:

"When I approached the intersection of Western Boulevard and Avent Ferry Road, I testified that I was looking straight ahead. I don't remember looking to my left and as to whether I don't remember looking to my left or didn't

look to the right or just straight ahead, well, approaching the intersection, ordinarily you see right and left. I assumed from my normal driving procedure that I was exerting the normal caution to approaching an intersection, but to remember exactly whether I looked to my left or right I don't know. . . . I didn't see then Mr. Karraz's car until a (sic) moment of impact."

Antonios Karraz, the defendant, testified in his own behalf that he was traveling in a westerly direction on Western Boulevard when he came to the subject intersection. Desiring to turn left onto Avent Ferry Road, he pulled into the left turn lane and waited until the light for his lane turned green. He was not certain whether he proceeded into the intersection immediately when the light changed colors but it was green when he entered the intersection. Before he could reach the other side he was struck by the plaintiff.

At the conclusion of all the evidence the judge directed a verdict for the defendant on plaintiff's claim based on the contributory negligence of the plaintiff. He also directed a verdict for plaintiff on defendant's counterclaim based on the contributory negligence of the defendant. From this judgment both plaintiff and defendant appealed.

Walter L. Horton, Jr., for plaintiff appellant.

Smith, Anderson, Dorsett, Blount and Ragsdale, by John L. Jernigan, for defendant appellant.

MORRIS, Judge.

Plaintiff's Appeal

[1] There is nothing in the record to indicate that plaintiff's view was obstructed as she entered this intersection. All of the evidence is to the contrary. The defendant's auto was lighted and had she exercised proper caution we perceive no reason she should not have detected defendant's vehicle before the impact. By her own testimony she admits that she cannot remember looking to the left or right. The applicable rule is stated in *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727 (1967):

"' . . . a motorist facing a green light as he approaches and enters an intersection is under the continuing obliga-

tion to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be likely to endanger others upon the highway. (Citation.) Nevertheless, *in the absence of anything which gives or should give him notice to the contrary,* a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal.' *Cox v. Freight Lines, supra; Hyder v. Battery Company, Inc.,* 242 N.C. 553, 89 S.E. 2d 124; *Troxler v. Motor Lines, supra.*" (Emphasis supplied.)

We are of the opinion that the trial judge did not commit error in directing a verdict against the plaintiff.

Defendant's Appeal

[2] Defendant testified that he turned left on the green arrow. This evidence is uncontradicted. The witness McLaughlin testified that when the light controlling his lane of traffic turned green defendant was in the intersection. He did not say that the light controlling the left turn lane beside him (which was synchronized with the left turn signal before defendant) had turned red prior to the time that defendant began his turn. We have then a situation where the jury could find from the evidence that defendant entered the intersection on a green light and was struck before he could reach the other side in safety.

The applicable rule is stated in Annot., 2 A.L.R. 3d 12 (1965), at page 22:

" . . . where vehicles enter from opposite sides of an intersection, one intending to turn left across the path of the other, and the signals are opposing in some phase in order to permit such left turn, the vehicle proceeding on a favorable signal has the right of way over one going against an unfavorable one, but its driver must yield the right of way to a vehicle which entered previously on a favorable signal, or otherwise entered lawfully, and is caught on the change." See also *Jenkins v. Gaines,* 272 N.C. 81, 157 S.E. 2d 669 (1967).

Viewing the evidence in the light most favorable to the defendant, as we must do on a motion for directed verdict, tak-

ing as true all evidence supporting his claim, resolving contradictions and inconsistencies in his favor, *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971), *cert. den.* 278 N.C. 522 (1971), we think the question of defendant's contributory negligence was for the jury.

On plaintiff's appeal—No error.

On defendant's appeal—New trial.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ANDREW JOSEPH O'HORA

No. 7126SC431

(Filed 18 August 1971)

1. **Searches and Seizures § 4— search of a truck under the warrant — question of ownership — Miranda warnings**

Armed with a search warrant and acting on a tip that the driver of a Dodge panel truck had sold marijuana, police officers were not required to give defendant the *Miranda* warnings prior to asking him if he owned the Dodge panel truck parked in front of his house, where defendant was not placed under arrest until after the officers had searched the truck and found marijuana.

2. **Narcotics § 6— possession of marijuana — confiscation of truck**

A defendant who was convicted of the possession of marijuana was not entitled to have the jury pass upon his claim that the court unlawfully confiscated the truck used to transport the marijuana. G.S. 18-6; G.S. 90-111.2

APPEAL from *McLean, Judge,* at the 1 February 1971 "A" Regular Session of MECKLENBURG Superior Court.

Defendant appeals from the entry of judgment upon his conviction by the jury of possession of 100 grams of marijuana.

Attorney General Morgan by Trial Attorney Cole for the State.

George S. Daly, Jr., for defendant appellant.

MORRIS, Judge.

The undisputed evidence of the State tends to show that an informer (shown by the record to be reliable) gave a police officer a tip that a person named "Andy," with bushy hair, mustache, burn on chest, and blue eyes, driving a blue Dodge panel truck with Maryland license, and living at 5228 Valley Stream Road, had sold the informer $15 worth of marijuana. The officer secured a search warrant on the strength of this information and proceeded to the location some 12 to 15 hours later at 4:00 a.m. with several other officers. The officers knocked at defendant's door, defendant came to the door and one officer asked the defendant whether his name was Andy. Defendant replied in the affirmative. The officer then asked his full name. Defendant told him. The officer then asked defendant if the truck in question, which was parked across the street, was defendant's. Defendant said that it was. The officer then informed defendant that he had a warrant to search defendant and the truck, and the warrant was read to defendant. Defendant was asked to step over to the truck with the officers while the search was made. During the course of the search, which lasted 30 to 45 minutes, defendant wandered around in the yard of the house and around the truck. Defendant was arrested and given his *Miranda* warnings when the officers discovered what later proved to be marijuana. The defendant's truck was impounded at the time of his arrest.

[1] Defendant first contends that his statement regarding ownership of the truck should have been suppressed for failure of the police officer to give him a *Miranda* warning.

Defendant relies on the case of *Orozco v. Texas,* 394 U.S. 324, 22 L. Ed. 2d 311, 89 S.Ct. 1095 (1969), as being controlling in this case and vigorously contends *Orozco* is on "all fours" with the present case. We disagree. In the *Orozco* case, defendant was awakened out of a sound sleep in his own bed at 4:00 a.m. by four police officers who sought him in connection with a murder which had been committed four hours earlier at a Dallas cafe. The officers asked the defendant in that case, without giving him any *Miranda* warnings, his name, whether he had been to the cafe, whether he owned a pistol, and where it was located. The defendant gave incriminating answers to all these questions. The Supreme Court held, six to two, Fortas, J.,

not participating, that the use of the defendant's admissions, obtained in the absence of the *Miranda* warnings, violated the self-incrimination clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. Mr. Justice Black's majority opinion was based in large part on the testimony of one of the police officers that from the moment petitioner gave his name he was not free to go where he pleased but was under arrest. This testimony is alluded to in two places in Mr. Justice Black's opinion. In this case, the officers had a warrant for a person named "Andy," at a certain address, to search a certain truck which was owned by "Andy." In order for the officers to serve the warrant, they asked the person who answered the door at the address in question if he was in fact the person upon whom they wished to serve the warrant, and if the truck they wished to search did in fact belong to him. This Court fails to see the need for *Miranda* warnings under these circumstances. If such were the case, innocent persons would have to be hauled to the lock-up and a lawyer obtained for them before the police could determine if they were indeed the parties sought to be served. The evidence was that defendant wandered around in the yard and around the truck, obviously free to leave if he wished. Defendant's first assignment of error is overruled.

By defendant's eighth assignment of error he contends that the court unlawfully seized the truck. The laws of this State provide that vehicles used in the concealment, transportation, etc., of narcotic drugs may be ordered forfeited under the provisions of the statute dealing with vehicles used to transport illegal whiskey. G.S. 90-111.2. G.S. 18-6 provides that such vehicles shall be seized and sold, upon conviction of the person in possession when the violation occurred, and the proceeds given to the public school fund. The statute also provides that *claimant* may prevent his property from being sold if he can prove the vehicle is his own and that it was being used illegally within the meaning of the statute without his knowledge and consent. The statute provides further that claimant shall have the right to have a jury pass upon his claim.

[2] Defendant contends that he has never been afforded his statutory right to have a jury pass upon his claim. We think it abundantly clear that this statute is designed and intended to protect an owner of a vehicle used illegally within the mean-

ing of the statute who is not the person arrested as "in charge thereof" at the time of the arrest for possession or concealment or illegal transportation. We think *State v. Vanhoy,* 230 N.C. 162, 52 S.E. 2d 278 (1949), is controlling. There defendant was charged with and convicted of unlawful transportation of intoxicating liquor. On appeal his conviction was affirmed. The defendant had also excepted to and assigned as error the entry of the order confiscating the automobile used in the unlawful transportation of intoxicating liquor as found by the jury. As to this assignment of error, the Court said:

> "The statute makes it obligatory upon officers, upon discovering any person transporting intoxicating liquor in violation of law, to arrest him and to seize the vehicle being used for such transportation, and authorizes the court, upon the conviction of the offender, to order sale of the vehicle for the benefit of the public school fund, with saving protection for the rights of a claimant of the vehicle who can show that the vehicle was used in the transportation of liquor without his knowledge or consent. G.S. 18-6; 18-48.
>
> Here the defendant admitted ownership of the automobile in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, but denied he had put any liquor in the car or had any knowledge of its presence therein. However, the jury resolved this issue of fact against the defendant and found him guilty of unlawfully transporting intoxicating liquor as charged. It appears therefore that all the essential facts necessary to authorize confiscation of defendant's automobile were before the court, and that the order appealed from was entered thereon in accordance with the statute. *S. v. Hall,* 224 N.C. 314, 30 S.E. 2d 158; *S. v. Maynor,* 226 N.C. 645, 39 S.E. 2d 833. The judgment will be upheld."

This assignment of error is also without merit.

Defendant does not bring forward and argue in his brief the remaining six assignments of error, and they are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In the trial of this case, we find no error.

Affirmed.

Judges BRITT and PARKER concur.

WALTON PETER BURKHIMER v. W. B. LINDSAY FURNITURE COMPANY, A CORPORATION, AND W. E. SHAW, INDIVIDUALLY

No. 7125DC422

(Filed 18 August 1971)

1. **Sales §§ 14, 17— breach of warranty — malfunctioning refrigerator — plaintiff's knowledge of malfunction — plaintiff's continued use of refrigerator**

   In plaintiff's action against a retailer to recover for breach of warranty of a new refrigerator and for the spoilage of food caused by the malfunctioning of the refrigerator, the trial court improperly submitted the case to the jury where the plaintiff admitted on cross-examination that, notwithstanding his knowledge that the refrigerator was malfunctioning and that food and milk were continually spoiling, he persisted in using the refrigerator.

2. **Appeal and Error § 47— technical error — judgment in conformity with rights of the parties**

   Where the judgment is in conformity with the ultimate rights of the parties, or the appellant, as a matter of law, is not entitled to the relief sought, mere technical error will not justify disturbing the judgment of the trial tribunal.

APPEAL by plaintiff from *Sigmon, District Judge,* 8 February 1971 Session, District Court, CALDWELL County.

Plaintiff instituted this action on 30 April 1970. He alleges that on 22 July 1967, the corporate defendant, acting through its agent, W. E. Shaw, sold to plaintiff a refrigerator which was delivered and installed in plaintiff's home. At the time of the sale, the defendant and its employees represented to the plaintiff that "said refrigerator was in new condition, would preserve food placed in it, would not require defrosting and would properly make ice cubes." The complaint further alleges that "between the date of purchase, July 22, 1967, and July 3, 1969, the refrigerator did not operate properly thereby causing considerable amounts of food to be spoiled and rendered unfit for human consumption, which condition still persists." Plain-

tiff alleged that he complained to defendant many times during that period that the refrigerator was not operating properly and causing considerable waste of food, that defendant several times had its employees work on it until spring of 1969 when defendant refused to do anything further, that the refrigerator "has been virtually worthless to the plaintiff" and "remains worthless to the plaintiff and costs the plaintiff considerable sums of money in food lost and time wasted trying to get it to operate properly." Plaintiff sought to recover the sum of $469.49, the cost of the refrigerator, and $1000 for food spoiled.

Defendants' answer denied the material allegations of the complaint and averred that the refrigerator carried a manufacturer's warranty which specified the terms and conditions of parts and repairs. The warranty was alleged to be attached to the answer. It is not a part of the record. The matter was submitted to the jury who answered the issues in favor of defendants. Plaintiff appealed.

L. H. Wall for plaintiff appellant.

Townsend and Todd, by J. R. Todd, Jr., for defendant appellees.

MORRIS, Judge.

[1] Plaintiff testified that he purchased the refrigerator from defendant through Mr. Shaw who "said it would do the job, that it was a no-defrosting model and had an automatic ice maker." The refrigerator did not function properly from the day it was installed. The refrigerator was intalled on Saturday and the installer had trouble with the ice maker and came back on Monday. Several months later "it iced up completely and frost got in the back and iced up completely and we found milk spoiling and other food spoiling." Plaintiff had trouble with it icing up several times and would ask defendant to send someone out to get it to stop icing. Defendant would send someone out and it would function fairly well for a while and then start back icing up in the freezing compartment and not being cold enough in the lower or food compartment. This went on until the spring of 1969. On cross-examination, plaintiff testified he never saw an owner's guidebook or warranty, that he had only one refrigerator in his home, that the refrigerator in question was

still there and had food in it at the time. On redirect examination, plaintiff testified "We lost considerable amounts of milk, ice cream, lettuce, chicken, meat, vegetables and other foods. This loss has been over virtually the whole time we have had the refrigerator. We averaged losing about two gallons of milk per week, a couple of heads of lettuce, about three half-gallons of ice cream, some chicken, about a chicken a week, and other vegetables and stuff it's hard to figure a record on that we'd lose about one item of vegetables or meat a week. We had trouble losing food when it iced up and sometimes in between times. We learned that if we kept the food in the freezer compartment instead of the food compartment and after it iced up we would transfer it to the food compartment to thaw it out."

On recross-examination, plaintiff testified as follows:

"I stated that about two months after we purchased the refrigerator, we had some milk to spoil in it, about two gallons per week. I am telling the jury we put milk in this defective refrigerator every week for the past three years knowing it would spoil.

REDIRECT EXAMINATION By Mr. Wall:

Since Mr. Shaw would not supply us with a new refrigerator, we had to use something and we tried to use it to the best advantage possible.

RECROSS EXAMINATION By Mr. Todd:

My explanation is that the best advantage we could use the refrigerator was to put milk in it every week knowing it would spoil and not be fit for use. After I brought the lawsuit in April, 1970, we continued to put milk and food in the refrigerator knowing it would spoil. We did everything we could to keep it from spoiling."

At the end of plaintiff's evidence defendant moved for dismissal. The motion was denied, renewed at the end of all the evidence, and again denied. Five issues were submitted to the jury: (1) Whether there was an "express warranty" with the refrigerator, (2) If so was it breached, (3) Whether there was an implied warranty, (4) If so was there a breach, (5) Amount of recovery, if any. The jury answered the first issue "yes" and the second issue "no."

[2] Plaintiff brings forward and argues 33 assignments of error based on 49 exceptions. Some of the exceptions are directed to the admission or exclusion of evidence and some to the charge of the court. There is merit in some of the exceptions, particularly those directed to the charge. However, "where the judgment is in conformity with the ultimate rights of the parties, or the appellant, as a matter of law, is not entitled to the relief sought, mere technical error will not justify disturbing the judgment" of the trial tribunal. 1 Strong, N. C. Index 2d, Appeal and Error, § 47, and cases there cited.

[1] In our opinion this case is controlled by *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780 (1960). The facts are strikingly similar. There the Court, through Bobbitt, J. (now C.J.), quoted with approval Sutherland on Damages, Fourth Edition, Vol. 1, p. 317, § 89: " . . . where property is sold with a warranty of fitness for a particular purpose, if it be of such a nature that its defects can be readily, and in fact are, ascertained, yet the purchaser persists in using it, whereby losses and expenses are incurred, they come of his own wrong and he cannot recover damages for them as consequences of the breach of warranty." The trial court should have granted defendants' motion at the close of plaintiff's evidence. Since the matter should not have been submitted to the jury, errors in the charge cannot be held to be prejudicial. Exceptions to the admission or exclusion of evidence did not constitute prejudicial error.

Because of this disposition of the appeal, we do not discuss plaintiff's exception to the trial court's refusal to strike defendants' motion to dismiss and for default judgment. Nor do we discuss defendants' motion, on appeal, to dismiss for failure to state a cause of action upon which relief can be granted. A discussion of the sufficiency of the complaint would be time consuming and is unnecessary.

Affirmed.

Judges BRITT and PARKER concur.

T. C. DOWLESS, T/A T. C. DOWLESS TRANSFER COMPANY
v. C. C. MANGUM, INC.

No. 7110DC245

(Filed 18 August 1971)

Highways and Cartways § 7— highway construction contractor — failure to maintain suitable detour

Plaintiff's evidence was sufficient to require submission of the case to the jury as to whether defendant contractor was negligent in violating G.S. 136-25 by failing to maintain a suitable detour around highway construction work, where it tended to show that defendant's flagman directed the driver of plaintiff's tractor-trailer to proceed, that it was necessary for plaintiff's driver to drive on the shoulder of the road to get around equipment that was blocking the road, and that the shoulder gave way and plaintiff's vehicle rolled down an embankment.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Winborne, District Judge,* 30 November 1970 Session of WAKE County District Court.

At the close of the plaintiff's evidence, the court allowed the defendant's motion for a directed verdict and dismissed the plaintiff's cause of action with prejudice. The plaintiff excepted and appealed to the Court of Appeals.

Holleman & Savage by Carl P. Holleman for plaintiff appellant.

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

MALLARD, Chief Judge.

The parties stipulated as follows:

"1. That the amount plaintiff is entitled to recover, if he is entitled to recover anything, is $3,000.00, and that if issues are submitted to the jury and if the jury reaches the issue of damages, they might be instructed to answer that issue in the amount of $3,000.00.

2. That at the time of and at the place of the accident out of which this action arises, Frank Brown, Jr. was operating plaintiff's tractor-trailer unit as plaintiff's agent, servant, and employee and was so acting in the course and

scope of his employment by the plaintiff and that any negligence on the part of Frank Brown, Jr. is imputed as a matter of law to the plaintiff."

The defendant admitted in its answer that on 15 September 1966 at approximately 2:15 p.m., it was performing roadwork on N. C. Highway 55 under contract with the North Carolina Highway Commission, that its equipment was being operated by its employees, and that the flagman stationed there directing traffic was its employee. It was also admitted that the plaintiff's tractor-trailer unit was being operated on Highway 55 in an easterly direction, and as it approached defendant's flagman, plaintiff's driver "saw the flagman and defendant's equipment lawfully blocking said eastbound lane and heeding the signs given plaintiff's said driver by defendant's flagman to proceed east in the westbound lane, proceeded to do so."

The plaintiff offered as evidence the testimony of Frank Brown, Jr., its driver, who testified:

" * * * As I was coming into Apex, I came down a hill around a curve and at the bottom of the hill there was a flagman, and he had one of these signs, a round sign on a stick that had 'STOP' on one side and 'GO' on the other. He had 'STOP' on it, so I almost came to a complete stop, and he turned it to 'GO', and he had a red flag in his left hand, and he motioned me to go around. So, I went around him there were three pieces of machinery about half way up the next hill. So, I ran on the highway until I was within two or three hundred feet of them, and I had to get off. From where I was sitting it looked like something across the white line, and it looked like a scraper blade. So, I pulled off on the left-hand side, off on the dirt to get around him. There was three men standing on the inside of the white line back of the machinery. I will say two or three men, talking. So I pulled off on the shoulder of the road to go around him, and I was in the lowest gear I could get on my truck. I was going uphill, and all of a sudden, I felt my pulling wheels—that's what you call the wheels in the back of the tractor—I felt one of them, and the truck came to a complete stop, then it started sliding. So, I rode it down. Then, after it stopped, I kicked the windshield out and crawled out, and I don't know how long it was, it was a few minutes, one of the men came running down

and asked me if there was anyone else in the truck. I told him 'No, it was nobody but me.' I crawled back in and switched the truck off and crawled back out and went up the hill and sat down. The tractor and trailer landed upside down. The embankment looked like fresh dirt that had just been moved there. I don't know how high the embankment was, maybe I went down twenty feet, but I wasn't at the bottom of it then. The truck turned one complete time. A flagman at the bottom of the hill directed me around. I had practically stopped because he had his stop sign on. I didn't go around until he took his red flag and directed me around. I was in the right lane and he directed me into the left lane. I stayed in the left lane until I got within two or three hundred feet of the machinery. Then I had to get off on the shoulder of the road. Then I ran off—from where I was sitting it looked like a scraper blade extending across the lane so I got off on the shoulder of the road. I received no direction from any of the men after I saw the scraper blade. When I started around the end of the machine I was going between 10 and 15. I was down to the lowest gear I could get in my truck. I just let my truck ease off on the shoulder of the road. I didn't cut it fast or anything. The shoulder of the road was just like any ordinary shoulder. I was following the directions of the flagman when I was going around the machinery and the men. I didn't have but one direction to go in to get around them because the machinery was sitting on the hard surface on the right. I crossed over the white line to the left to get around. I don't know how wide the surface is on the highway. * * * "

Defendant's flagman directed plaintiff's driver to proceed. In order to do so, it was necessary for plaintiff's driver to drive on the shoulder of the highway. The shoulder gave way and caused plaintiff's vehicle to be damaged as it rolled down the embankment. When defendant's flagman motioned plaintiff's driver to proceed, he had the right to assume, nothing else appearing, that the defendant had complied with the provisions of G.S. 136-25, which requires, among other things, a contractor employed by the Highway Commission "to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route while said highways or roads are being improved or constructed * * * ." We hold that the evidence was sufficient to require submission of the case to the jury as to

whether defendant was employed by the Highway Commission and failed to comply with the statute. *Equipment Co. v. Hertz Corp.* and *Contractors, Inc. v. Hertz, Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962); *Presley v. Allen & Co.*, 234 N.C. 181, 66 S.E. 2d 789 (1951). The evidence does not disclose that plaintiff's driver was contributorily negligent as a matter of law. The trial judge erred in allowing defendant's motion for a directed verdict.

Reversed.

Judge CAMPBELL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

The evidence reveals that the defendant's equipment and men were blocking the south side of the highway 500 to 600 feet beyond the point where defendant's flagman directed plaintiff's driver to proceed on the pavement on the left side of the road. Following the instructions of the flagman, plaintiff's driver drove the truck along the left side of the highway to within 200 to 300 feet of the equipment where he *first* observed the "scraper blade" extending across the white line into the left side of the highway. The driver testified: "When I was about two hundred feet from the equipment I determined I didn't have enough room to get by it without going on the shoulder, so I turned off onto the shoulder."

In my opinion, the evidence does not raise an inference that defendant's flagman directed plaintiff's driver to drive the truck off the pavement upon the shoulder of the road. There is no evidence from which the jury could find that the defendant selected, laid out or maintained the shoulder of the highway as a detour around defendant's equipment and men.

Although the evidence may be sufficient to raise an inference that the defendant failed to obey the mandate of the statute by selecting and laying out a suitable detour around the "scraper blade" blocking a portion of the lane of the highway upon which the plaintiff's driver was directed to proceed, it seems clear to me that this breach was not a proximate cause of the accident.

In my opinion, the evidence of actionable negligence upon the part of the defendant is not sufficient to carry the case to the jury.

I vote to affirm the judgment allowing defendant's motion for a directed verdict.

JAMES H. BYRD v. WELDON POTTS AND ROYAL MANUFACTURING COMPANY

No. 7126SC281

(Filed 18 August 1971)

Automobiles §§ 62, 83— striking pedestrian — negligence — contributory negligence — last clear chance

In this action to recover for injuries sustained by plaintiff pedestrian when he was struck by defendant's automobile while crossing the street at a point not within a marked or unmarked crosswalk, plaintiff's evidence was insufficient to establish negligence by defendant, established plaintiff's contributory negligence as a matter of law, and was insufficient to raise an issue of last clear chance, where it tended to show that plaintiff was wearing a dark coat and dark pants at night, that he looked both ways before starting across the street but saw nothing coming, that he could see down the street four or five blocks in either direction, that once he started across the street he did not increase or decrease his walk and did not look to his right or left, that defendant was traveling 30 mph and saw plaintiff 50 feet away just before striking him, and that defendant threw on his brakes and skidded 50 feet.

APPEAL by plaintiff from *McConnell, Judge,* 10 December 1970 Civil Session of MECKLENBURG Superior Court.

Plaintiff instituted this action on 4 September 1969 seeking to recover for personal injuries sustained when he was struck by an automobile belonging to Royal Manufacturing Company (Royal) and being driven by its employee, Weldon Potts (Potts), while plaintiff was attempting to cross Statesville Avenue in the City of Charlotte. All of the material allegations of the complaint were denied, and defendants set up the plea of contributory negligence. By reply, plaintiff pleaded that even if plaintiff were contributorily negligent, defendant Potts had the last clear chance to avoid striking plaintiff.

At the close of plaintiff's evidence, defendants moved for a directed verdict. The motion was allowed, and plaintiff appeals.

John E. McDonald, Jr., and Robert D. Potter for plaintiff appellant.

Wardlow, Knox, Caudle, and Wade, by J. J. Wade, Jr., for defendant appellee.

MORRIS, Judge.

Since we do not feel that we could improve the clarity of defendants' description of the scene and area of the occurrence of the accident, we adopt that description which accurately portrays plaintiff's exhibit No. 1. The accident occurred on 17 January 1969, at or about 7:45 p.m. at a point, more specifically indicated on plaintiff's exhibit No. 1, on Statesville Avenue in Charlotte, North Carolina, near what could be described as a "Y" intersection formed by Statesville Avenue, as the stem, and an extension of Statesville Avenue forming the left arm of the "Y" and Statesville Road forming the right arm of the "Y". The accident occurred at a point which could be described as the vertex of the "Y". At this point, Statesville Avenue extends in a general north-south direction and the road is hard surfaced and had a painted line down the approximate center of Statesville Avenue. A street called Norris Avenue near where this happened extends in a general east-west direction and converged into Old Statesville Road at its westernmost point and forms at that point what is commonly known as a "T" intersection. At the top of this "T" intersection there is a concrete island and grass area, on which island there is a right-turn only sign directing traffic traveling west on Norris Avenue to the right, or to the north; Old Statesville Road at this point being a one-way street. This concrete island and grass area divides Statesville Road and Old Statesville Road and prohibits travel from Norris Avenue directly into Statesville Avenue (Plaintiff's Exhibit No. 1).

Plaintiff's contention that the accident occurred at an unmarked crosswalk at an intersection is without merit. The evidence is not sufficient to raise the question and plaintiff's exhibit No. 1 clearly negates this position.

On appeal from the granting of a motion for a directed verdict, the sufficiency of plaintiff's evidence is to be determined by the application of the same principles applicable in determining the sufficiency of evidence to withstand the former

motion for nonsuit under G.S. 1-183 (now repealed). All evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971), *cert. den.* 278 N.C. 522 (1971).

Plaintiff's evidence tended to show: The accident occurred about 7:45 p.m. on the night of 17 January 1969. At the time, plaintiff was wearing a dark blue trench coat and dark pants. He left his home about 25 minutes to eight and went across Samuel Street south toward town on Statesville Avenue. He went down by the fence, around to the telephone pole, stopped and looked both ways, started across the street and was hit in the right hand lane coming from town and knocked back over into the lane going to town and was hit by another automobile coming from Statesville or from the north towards Charlotte. That automobile stopped at about the same place where plaintiff was struck by defendant Potts but in the other lane and going towards Charlotte. Plaintiff had crossed Statesville Avenue at that point before and had seen other people crossing there. He did not hear a horn blow, nor brakes squeal, nor did he hear any skidding. There were no cars stopped at Newland Road going south when he started to cross Statesville Avenue. He did not have to wait for any traffic to pass in front of him before he started to cross the street. He doesn't remember seeing any cars going north at the intersection of Newland and Statesville Roads nor that any cars were stopped at the traffic light. He estimates that it took him about six seconds from the time he left the western side of Statesville Avenue to the point at which he was hit. At the point where he crossed Statesville Avenue there was a street light on a telephone pole and it was burning. There is a path on the south side of Norris Avenue but no paved sidewalk. (Norris Avenue intersects Old Statesville Road and Old Statesville Road runs parallel to Statesville Avenue but is separated therefrom by a concrete island and grass area. Plaintiff would have to cross this area and Old Statesville Road to get to the path on the south side of Norris Avenue.) Plaintiff could see four or five blocks south or right from the point on Statesville Avenue where he crossed and about the same distance to his left, or north on Statesville.

He saw nothing coming from either direction and walked straight across Statesville Avenue. Once he left the side of Statesville Avenue to cross it, he did not increase or decrease his walk but kept the same speed and did not stop until he was hit. Once he started, he did not look either way. Defendant Potts was traveling about 30 miles per hour and saw plaintiff just before his automobile struck plaintiff who was then about 50 feet away. Plaintiff was in front of defendant Potts in his lane of traffic and had crossed the center line. When he saw plaintiff he threw on the brakes and skidded about 50 feet.

Testing the evidence by the principles set out herein, we come to the ineluctable conclusion that the evidence is insufficient to establish negligence on the part of defendants, so clearly establishes plaintiff's own negligence as one of the proximate causes of his injury that no other reasonable inference could be drawn, and makes inapplicable the doctrine of last clear chance. Like the trial judge, we are impressed with the honesty of plaintiff in his testimony. Nevertheless, in the trial of the matter, we find

No error.

Judges BRITT and PARKER concur.

Acorn v. Knitting Corp.

ROBERT M. ACORN, A. K. ANDERSON, SAM B. ANDREWS, C. PHILIP AVERY, JR., FRANK H. BAUERSCHMIDT, FRANK S. BODDIE, JR., T. FRANK BOOTH, FORREST W. BROWN, JR., CARL R. BRUNO, GEORGE D. CARAWAY, JOHN K. CLARK, BILLY CLODFELTER, THOMAS S. COYNE, JR., THOMAS J. CRIBBIN, M. T. DANIEL, FRED G. EICHHORN, CHARLES L. EZELL III, WILLIAM C. FERGUSON, EMMETT G. FRIZZELL, CLARENCE C. GUY, OBA T. HANNA, JR., ARTHUR F. M. HARRIS, BYRON P. HARRIS, GEORGE D. HARRIS, SAMUEL R. HENDERSON, STERLING L. HUDSON, JOHNNIE W. INMAN, C. FOSTER JENNINGS, M. ALBERT JOHNSON, JOSEPH S. KIRCHHEIMER, JULIAN C. KNOTT, HARRY L. LAING, M. ROSS LANE, ROBERT E. LEECH, RICHARD H. LLEWELLYN, GEORGE F. McKNIGHT, MILDRED MASHBURN, JOHN L. MATHEWS, BILLY MITTELSTADT, CHRISTOPHER J. MORAN, JAMES D. MOULTON, JAMES H. MULLER, JAMES C. NEILL, PAUL R. OKEN, RAYMOND B. PEARCE, ROBERT C. PEERY, A. MARVIN PERRIN, CLAUDE F. PHILLIPS, WILLIAM G. PORTERFIELD, JOHN R. PUGH, O. KENNETH SPAINHOUR, IRVIN R. SQUIRES, WILLIAM H. STONE, JR., MICHAEL J. SULLIVAN, C. ROBERT SURRATT, GORREL L. TATE, WILLIAM H. TERRY, JESSE W. TURNER, WILLIAM H. WESTPHAL, A PARTNERSHIP DOING BUSINESS AS A. M. PULLEN & COMPANY, CERTIFIED PUBLIC ACCOUNTANTS, PLAINTIFFS v. JONES KNITTING CORPORATION, DEFENDANT

No. 7112SC308

(Filed 18 August 1971)

1. Appeal and Error § 6— interlocutory order — denial of motion to dismiss and to stay

No right of immediate appeal lies from an interlocutory order denying defendant's motion to dismiss because of a prior action pending between the parties in another jurisdiction and denying defendant's motion to stay pending disposition of the other action. Court of Appeals Rule No. 4.

2. Abatement and Revival § 3— prior action between same parties

The pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action in the same court or in another court of this State having jurisdiction, but the prior action must be pending in a court of this State.

3. Abatement and Revival § 3— stay to permit trial in foreign jurisdiction

The trial judge, on motion, may enter an order staying the proceedings in this State to permit trial in a foreign jurisdiction upon finding that it would work a substantial injustice for the action to be tried in a court of this State; if such motion is denied, the movant may seek a review by a writ of *certiorari*. G.S. 1-75.12(a) and (c).

Acorn v. Knitting Corp.

APPEAL from *Bailey, Judge,* 15 February 1971 Civil Session, CUMBERLAND Superior Court.

This action, in which plaintiffs seek to recover amounts allegedly due them by defendant for professional services rendered in Lumberton, was begun in the Superior Court of Cumberland County on 19 February 1970. On motion of defendant, the Clerk ordered the action removed to the United States District Court for the Eastern District of North Carolina. On motion of plaintiffs in the Federal District Court, the action was remanded to the Superior Court of Cumberland County for that there was no diversity of citizenship upon which to base jurisdiction. In the Superior Court defendant filed three motions: One asking for dismissal for failure to join indispensable parties, one asking for dismissal because of a prior action pending in the United States District Court for the Southern District of New York, and one asking for the entry of an order staying proceedings in the Superior Court of Cumberland County pending the disposition of the New York action. All three motions were denied, and defendant appealed. Defendant also filed a petition for *certiorari* raising identical questions.

McLendon, Brim, Brooks, Pierce and Daniels, by Claude C. Pierce; Jordan, Wright, Nichols, Caffrey and Hill, by Welch Jordan; and Anderson, Nimocks and Broadfoot, by Henry L. Anderson, Jr., for plaintiff appellees.

Smith, Moore, Smith, Schell and Hunter, by Martin N. Erwin, for defendant appellant.

MORRIS, Judge.

On appeal defendant states that at oral argument plaintiffs presented an affidavit representing that all partners of A. M. Pullen and Company have been named as plaintiffs in this action and that defendant is unable to refute this affidavit. Therefore, defendant states that it "withdraws its motion to dismiss for failure to join necessary and indispensable parties."

[1] Plaintiffs have filed a written motion in this Court that the appeal be dismissed for that the order entered by Judge Bailey denying defendant's motion to dismiss and motion to stay is an interlocutory order from which no right of immediate appeal lies. Plaintiff's position is well taken.

Rule 4, Rules of Practice in the Court of Appeals of North Carolina, provides: "The Court of Appeals will not entertain an appeal: 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."

"No appeal lies from a refusal to dismiss an action." *Johnson v. Insurance Co.*, 215 N.C. 120, 122, 1 S.E. 2d 381 (1939). As was pointed out by Chief Justice Stacy in that case, if the motion had been allowed and the action dismissed, plaintiff would have a right of immediate appeal, because further proceedings would have been precluded by the order. The Court, citing the statute permitting appeals, then C.S. 638, now G.S. 1-277, noted that "It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error shall not be corrected at once, and before the final hearing, that an appeal lies before final judgment." As plaintiff points out, there does not exist any "substantial right" *not* to have an action tried in the courts of North Carolina. The right of access to the courts for the trial of an action is, of course, a substantial right.

[2, 3] The pendency of a prior action between the same parties for the same cause of action in a state court of competent jurisdiction does work an abatement of a subsequent action in the same court or in another court of this state having jurisdiction, but the prior action must be pending in a court of this state. 1 Strong, N.C. Index 2d, Abatement and Revival § 3, and cases there cited. However, the trial judge, on motion, may enter an order staying the proceedings in this state to permit trial in a foreign jurisdiction if he shall find that it would work a substantial injustice for the action to be tried in a court of this state. G.S. 1-75.12(a). If such a motion is denied, "the movant may seek review by means of a writ of *certiorari* and

failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion." G.S. 1-75.12(c).

Defendant did file petition for writ of *certiorari* but not within the 30-day period provided under Rule 4. The record reveals that defendant failed to show that it would work substantial injustice for this action to be tried in the courts of this state and Judge Bailey so found in his order denying the motion.

For the reasons set out herein, the appeal is dismissed and the petition for writ of *certiorari* is denied.

Judges BRITT and PARKER concur.

MIRIAM KINCAID MAUNEY v. BILL JENNINGS MAUNEY

No. 7127DC321

(Filed 18 August 1971)

Divorce and Alimony § 18— denial of alimony pendente lite — temporary child support and maintenance of home

In the wife's action for permanent alimony, possession of the residence and child custody and support, the trial court did not err in the entry of a temporary order that failed to give the wife alimony *pendente lite* which she sought but which did provide for support of the two infant daughters who resided with the wife, gave them possession of the home, and provided for maintenance of the home.

APPEAL by defendant from *Mull, District Judge,* 15 January 1971 Session of GASTON County, The General Court of Justice, District Court Division.

This action was instituted for alimony *pendente lite,* permanent alimony, child support, exclusive possession of the residence, custody of three minor children and attorney's fees. From an order entered on 15 January 1971, the defendant appealed.

Childers & Fowler by Max L. Childers for plaintiff appellee.

Anne M. Lamm; Basil L. Whitener for defendant appellant.

CAMPBELL, Judge.

The order appealed from was a temporary order entered during and pending the litigation. Both parties were represented

by counsel and presented their respective evidence before the judge. In such a proceeding the judge was authorized (under North Carolina General Statutes 50-13.1, *et seq.)* to make findings of fact, and such findings of fact are binding if supported by competent evidence. The trial judge found "that the defendant is an able-bodied man who is gainfully employed and who is able to pay the amounts and do the things hereinafter set forth." There was competent evidence to support this finding. The trial judge further found that the infant son of the parties was at that time in the custody of his father, the defendant, and that the defendant "is a fit and proper person to have the custody" of the said son; that the two infant daughters of the parties were at that time in the custody of the plaintiff mother and that she "is a fit and proper person to have the custody" of the said daughters; that due to specific acts of the defendant set forth in the order, plaintiff-wife's "condition became intolerable and her life was made burdensome on account of the indignities offered by the defendant"; and that the parties jointly owned a dwelling house and said home was at that time being occupied by the plaintiff and the two minor daughters. All of these findings of fact were supported by competent evidence.

Based upon these findings of fact, the trial judge entered an order which maintained the status quo pending the ultimate disposition of the case. This order did not give the plaintiff alimony *pendente lite* which she sought but did provide for support of the two infant daughters who were living with the plaintiff-wife and provided for the maintenance of the home in which they were living and gave the plaintiff-wife and the two infant daughters the possession of the home. This disposition of the case pending the litigation was supported by the facts found by the trial judge, and no abuse of the authority vested in the trial judge in such a proceeding has been adduced by the defendant appellant. In the absence of prejudicial error we find that the order entered by the trial judge should be and is

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

IN RE: LAST WILL AND TESTAMENT OF SUDIE GAME HOWELL, DECEASED

No. 718SC453

(Filed 18 August 1971)

Appeal and Error § 24— form of exceptions and assignments of error

Purported assignments of error are ineffectual where, under the title "Grouping of Exceptions and Assignments of Error" in the record on appeal, four "groups" appear and numerous exceptions are listed under each "group," the only indication of the alleged error is a reference to a page of the record, exceptions under the same "group" relate to several questions of law, and a "group" containing exceptions to three purported errors in the charge fails to set out what appellants contend the court should have charged.

APPEAL by caveators from *Bailey, Judge,* 2 February 1971 Session, WAYNE County Superior Court.

The propounders of the Last Will and Testament of Sudie Game Howell are a son and two stepsons, to whom she devised all of her real estate "for and during the term of their natural lives and during the term of the life of the survivor of them . . ." The remainder in fee was devised to the other five children of testatrix, four of whom are the caveators. They allege lack of testamentary capacity and undue influence, and further that the will was not properly executed, sealed and published according to law. The jury answered all issues in favor of propounders. Caveators appeal from the entry of judgment thereon.

Sasser, Duke and Brown by John E. Duke, J. Thomas Brown, Jr., and Herbert B. Hulse for caveator-appellants.

Dees, Dees, Smith and Powell by William L. Powell, Jr., for propounder-appellees.

MORRIS, Judge.

In the record on appeal there appears the title "GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR." Under this designation four "Groups" appear. Group I lists 35 exceptions. The only indication as to what the alleged error is is a reference to a page of the record. A cursory examination, however, reveals that the exceptions relate to several questions of law. "While the form of the assignments of error must depend largly upon

the circumstances of each case, they should clearly present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is. Thus, they must specifically show within themselves the questions sought to be presented, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Nevertheless, the assignment of error should indicate the page of the record where the exception is to be found." 1 Strong, N.C. Index 2d, Appeal and Error, § 24, and cases there cited. The other four "Groups" are similarly defective and not in accordance with our Rules of Practice which are mandatory. *Builders, Inc. v. Hollar*, 7 N.C. App. 14, 171 S.E. 2d 60 (1969). *Nye v. Development Co.*, 10 N.C. App. 676, 179 S.E. 2d 795 (1971), contains an excellent discussion of the same defects.

Group IV, in addition to the defects above, also fails to set out what the appellants contend the court should have charged in the three purported errors in the charge listed thereunder.

Because the purported assignments of error are ineffectual to present for review the questions sought to be presented, the appeal must be dismissed. We have, however, examined the record carefully, and we find no error in the trial sufficiently prejudicial to warrant the awarding of a new trial.

Appeal dismissed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. HAROLD LLOYD HARRIS

No. 712SC376

(Filed 18 August 1971)

1. Criminal Law § 138— appeal from district court to superior court — increased sentence

Where defendant appealed to the superior court from conviction and sentence in the district court, the imposition of a greater sentence in the superior court than that imposed in the district court did not violate defendant's rights under the state and federal constitutions.

2. Criminal Law § 166— abandonment of assignment of error

Assignment of error is deemed abandoned where appellant's brief presents no argument or authority in support thereof.

APPEAL by defendant from *Rouse, Judge,* at the 25 January 1971 Session of BEAUFORT County Superior Court.

Defendant was tried and found guilty in Beaufort County District Court upon a warrant charging him with driving under the influence of intoxicating liquor and resisting arrest. In the District Court defendant received a 30-day jail sentence suspended upon the conditions that he pay a fine of $150, and surrender his driver's license for 12 months. From the judgment of the District Court, defendant appealed to the Superior Court. In Superior Court, the solicitor announced that the defendant would be tried only on the charge of driving under the influence. Defendant entered a plea of not guilty, and the jury returned a verdict of guilty. In Superior Court defendant received an active sentence of six months suspended for two years upon the conditions that he pay a fine of $250 and costs of court, and that he surrender his driver's license for 15 months. From the judgment entered, defendant appealed.

Attorney General Morgan by Staff Attorney Giles for the State.

James R. Vosburgh for defendant appellant.

MORRIS, Judge.

[1] Appellant first contends that the imposition of a greater sentence in Superior Court than he received in District Court violated his constitutional rights under the State and Federal Constitutions. For the reasons stated in *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970), and *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970), this contention is without merit.

[2] Defendant's remaining assignment of error is directed to the charge of the court. Although this assignment of error is listed as a "question presented" in the brief, appellant's brief presents no argument nor authority in support of his contention. This assignment of error is, therefore, deemed abandoned. Rule

28, Rules of Practice in the Court of Appeals of North Carolina; *State v. Norman,* 8 N.C. App. 239, 174 S.E. 2d 41 (1970).

No error.

Judges BRITT and PARKER concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1971

EDGAR E. WORRELL v. HENNIS CREDIT UNION

No. 7121DC408

(Filed 25 August 1971)

1. Rules of Civil Procedure § 50— motion for directed verdict — statement of specific grounds

Statutory provision that specific grounds shall be stated in a motion for directed verdict is mandatory. G.S. 1A-1, Rule 50(a).

2. Rules of Civil Procedure § 50— motion for directed verdict — reason advanced in trial court — different reason advanced on appeal

Defendant was not entitled to a directed verdict for the reason stated to the trial court, that plaintiff had failed to show "any damage," and the Court of Appeals will not consider a different reason than that advanced in the trial court.

3. Rules of Civil Procedure § 51; Trial § 10— expression of opinion by trial court

The trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to whether a fact is fully or sufficiently proven. G.S. 1-180; G.S. 1A-1, Rule 51(a).

4. Rules of Civil Procedure § 51; Trial § 10— comments by trial judge — denial of fair trial

The criterion for determining whether the trial judge deprived a litigant of his right to a fair trial by improper comments in the hearing of the jury is the probable effect upon the jury.

5. Rules of Civil Procedure § 51; Trial § 10— expression of opinion — sustaining of court's own objections

The trial judge expressed an opinion in violation of G.S. 1A-1, Rule 51(a), when he sustained his own objections to ten questions

posed by defendant's counsel to a defense witness, sustained his own objection to a question asked by defendant's counsel on cross-examination of plaintiff, and on his own motion struck certain testimony introduced by defendant.

6. Rules of Civil Procedure § 51; Trial § 10— expression of opinion — unequal stress to plaintiff's contentions

Trial court expressed an opinion in violation of G.S. 1A-1, Rule 51(a), by giving unequal stress to the contentions of the plaintiff.

APPEAL by defendant from *Henderson, District Judge,* 16 February 1971 Session of FORSYTH District Court.

Plaintiff brought this action to recover $453.60 which he contends defendant wrongfully charged to and collected from plaintiff.

The undisputed facts are summarized as follows: In February 1967 plaintiff, an employee of Hennis Freight Lines, financed a new automobile with defendant. The installment loan was payable over a period of 30 months and was secured by a chattel mortgage which contained a provision that plaintiff would keep the automobile insured against loss, damage or destruction due to fire, theft, and collision, the insurance policy to contain a loss payable clause in favor of defendant and the policy to be delivered to defendant; should plaintiff fail to procure insurance in accordance with these provisions, defendant was authorized to procure such insurance at plaintiff's expense. The company from whom plaintiff obtained insurance initially, notified plaintiff and defendant early in August 1967 that plaintiff's policy would expire on 24 August 1967.

Plaintiff offered evidence tending to show that immediately thereafter he obtained required insurance from Liberty Mutual Insurance Company and that a certificate of insurance was issued by Liberty Mutual on 17 August 1967 showing coverage from 24 August 1967 until 24 August 1970; that said insurance with Liberty Mutual was effective for three years and plaintiff paid the premiums thereon.

Defendant offered evidence tending to show: On 8 August 1967 it sent plaintiff a letter advising receipt of cancellation notice that plaintiff's insurance would expire on 24 August 1967; that defendant would have to have written proof of coverage prior to 24 August 1967 and if plaintiff failed to provide this coverage, defendant, at plaintiff's expense, would obtain cover-

age for its interest only. Defendant received no policy or other written notice of coverage by 24 August 1967, therefore, it obtained insurance covering its interest and charged the cost thereof, $267.80, to plaintiff's account. In August 1968 defendant renewed for another year the coverage insuring its interest and charged plaintiff the cost thereof in amount of $189.00. Some two weeks after 24 August 1967 defendant received a certification of insurance from Liberty Mutual but could not cancel the single interest insurance policy defendant had taken out because insurance companies writing that type of insurance refuse to provide it for short intervals. Between 24 August 1967 and 24 August 1968, defendant received one or more cancellation notices from Liberty Mutual relating to the policy allegedly purchased by plaintiff.

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

1. Did the plaintiff procure and maintain insurance in accordance with the contract?

ANSWER: Yes.

2. If so, what amount, if any, is the plaintiff entitled to recover from the defendant?

ANSWER: $456.17

From judgment entered on the verdict, defendant appealed.

White, Crumpler and Pfefferkorn by Michael J. Lewis for plaintiff appellee.

Roberts, Frye and Booth by Leslie G. Frye for defendant appellant.

BRITT, Judge.

Defendant assigns as error the denial of its motion for a directed verdict interposed at the conclusion of plaintiff's evidence. Defendant contends that plaintiff's evidence showed that plaintiff was obligated by the chattel mortgage to keep the automobile insured at all times with loss payable clause in favor of defendant, to deliver the policy to defendant, and upon failure to comply with said conditions defendant was authorized to procure insurance at plaintiff's expense; that plaintiff's evi-

dence showed that he did not deliver such policy to defendant, therefore, defendant properly obtained insurance at plaintiff's expense. The record reveals that at the conclusion of plaintiff's evidence, defendant's counsel moved for a directed verdict for the reason that plaintiff had not introduced any evidence of "any damage."

[1, 2] G.S. 1A-1, Rule 50(a) provides that a motion for directed verdict shall state the specific grounds therefor. This provision of the rule is mandatory. *Wheeler v. Denton,* 9 N.C. App. 167, 175 S.E. 2d 769 (1970). We hold that defendant was not entitled to a directed verdict for the reason stated to the trial court; and the reason advanced in this court being different from that advanced in the trial court we refrain from passing upon it.

Defendant contends that the trial court committed error prejudicial to defendant by violating G.S. 1A-1, Rule 51(a), this rule being formerly covered by G.S. 1-180. Specifically, defendant contends that during the trial the judge expressed an opinion on the evidence and that in his charge he gave unequal stress to the contentions of the respective parties. The points are well taken.

The pertinent principle of law was discussed by us in the recent case of *State v. Lemmond* (No. 718SC445, filed 4 August 1971). Although *Lemmond* was a criminal case, we think the same principle applies to a civil action.

[3] It is well settled in this jurisdiction that a trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. *State v. Cox,* 6 N.C. App. 18, 169 S.E. 2d 134 (1969) and cases therein cited.

[4] The prohibition provided by G.S. 1-180 in criminal cases and Rule 51(a) in civil cases does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of an opinion as to what has or has not been shown by the testimony. *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861 (1965). The trial judge must abstain from conduct or language which tends to discredit or prejudice a litigant or his cause with the jury. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951). The criterion for determining whether the trial

judge deprived a litigant of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. *State v. Cox, supra.*

[5] The record in the instant case reveals that the trial judge sustained his own objection to some ten questions posed by defendant's counsel to his witness; that the trial judge sustained his own objection to a question asked by defendant's counsel on cross-examination of plaintiff; and that the trial judge on his own motion struck certain testimony introduced by defendant. The record reveals that the trial judge voiced no objection to any question asked or evidence offered by plaintiff's counsel.

As was said by us in *State v. Lemmond, supra,* we recognize the general rule that a trial court, in the exercise of its right to control and regulate the conduct of the trial, may, of its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence. *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912 (1960). Nevertheless, the exercise of such right must be kept within proper bounds. We think this case is analogous to *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971) where Justice Huskins, speaking for the Supreme Court said: "The content, tenor, and frequency of the remarks, and the persistence on the part of the trial judge portray an antagonistic attitude toward the defense and convey to the jury the impression of judicial leaning prohibited by G.S. 1-180. This requires a new trial."

[6] We also think the trial judge violated Rule 51(a) by giving unequal stress to the contentions of plaintiff. Quoting the record pertinent to this question would serve no useful purpose.

We refrain from discussing the other assignments of error brought forward and argued in defendant's brief as the alleged errors might not recur upon a retrial.

For the reasons stated, we order a

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA vs. LARRY LAMONT BAILEY

No. 7121SC512

(Filed 25 August 1971)

1. **Criminal Law § 161— identification testimony — review on appeal — necessity for objection**

Where defendant made no objection to the identification testimony of the prosecuting witness and made no request for a *voir dire* hearing on the validity of the pretrial identification, the defendant is precluded from raising the question of identification on appeal.

2. **Robbery § 4— common law robbery — setting aside the verdict**

The trial court in a prosecution for common law robbery acted within its discretion in denying defendant's motion to set aside the verdict as being against the greater weight of the evidence.

3. **Criminal Law § 162— exclusion of testimony — review on appeal**

The appellate court cannot rule on the exclusion of testimony where there is nothing in the record to show what the excluded testimony would have been.

4. **Criminal Law § 167— prejudicial error — burden of proof**

The burden is upon the defendant to establish prejudicial error in the trial.

APPEAL by defendant from *Lupton, Judge,* 10 February 1971 Session of Superior Court held in FORSYTH County.

Defendant was tried on a bill of indictment charging him with common law robbery on 17 November 1970, wherein he was charged with taking $85.00 from Raymer M. Sales, Trading as Kay's Cleaners. The defendant entered a plea of not guilty. The jury returned a verdict of guilty as charged, and from a sentence of imprisonment for not less than eight years nor more than ten years, the defendant appealed.

The record discloses that on the afternoon of 17 November 1970, Patricia Vaughn was employed at Kay's Cleaners as a clerk and cashier. On this occasion Patricia Vaughn was alone in the front office and the defendant and a companion entered. The defendant gave her $1.00 and asked if she could change it. Patricia Vaughn told him that she could and opened the cash register, put the $1.00 in and handed the defendant the change. At this point the defendant grabbed her wrists and held them while the companion extracted $85.00 from the cash register. The defendant and his companion then ran. Patricia

Vaughn, as a witness for the State, positively identified the defendant as the person who held her wrists while his companion took the money. Another employee, who was in the back portion of the building, positively identified the companion who was tried under a similar bill of indictment at the same time as the defendant.

The defendant denied any connection with the robbery and offered evidence consisting of a time clock record and testimony of co-workers indicating that he was at work several miles away when the alleged robbery took place.

A clear, factual situation was presented to the jury. The trial judge gave adequate instructions to the jury as to the law and the duty of the jury in determining the facts. No exception was taken to the charge of the trial judge.

Attorney General Robert Morgan and Assistant Attorney General R. S. Weathers for the State.

R. Lewis Ray for the defendant appellant.

CAMPBELL, Judge.

This appeal presents three questions: (1) error in permitting Patricia Vaughn to identify the defendant as the one who grabbed and held her wrists while his companion extracted the money from the cash register; (2) error in denying defendant's motion to set aside the verdict as being against the greater weight of the evidence; and (3) error in sustaining an objection by the State to a question seeking to establish inconsistent prior testimony given by Patricia Vaughn at the preliminary hearing.

[1] The first question raised by the defendant is not properly presented in this record. No objection was made to the identification of the defendant by Patricia Vaughn, and no request was made for a *voir dire* examination to develop the facts as to whether or not a pre-trial identification was properly conducted, and if not, whether such tainted identification carried over to the in-court identification. Counsel for the defendant, in his brief, with frankness and candor, answers this question as follows:

" . . . [T]his defendant is not entitled to have this issue reviewed on appeal in the manner in which this issue is raised. . . . "

The case of *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), is ample authority to deny any error presented in this first question.

[2] With regard to the second question presented, while the evidence on behalf of the State and of the defendant was in sharp conflict, nevertheless, the evidence on behalf of the State was adequate and sufficient to go to the jury. The jury, as the triers of the facts, found the facts in favor of the State and contrary to the version of the defendant. The defendant is bound by the jury verdict, and no abuse of discretion has been shown in the failure of the trial court to set the verdict aside. *State v. Mitchell,* 6 N.C. App. 755, 171 S.E. 2d 74 (1969).

The third question presented by this appeal is not properly supported by the record. The defendant asked a question of the co-defendant as follows:

"Q. Did you hear the testimony of Mrs. Patricia Vaughn at the preliminary hearing on November—that date was December 28, 1970? Do you recall what her testimony was?

OBJECTION. SUSTAINED. EXCEPTION. . . . "

[3, 4] There is nothing in the record to indicate what the answer to this question would have been. In the absence of any answer in the record, it is impossible for an appellate court to ascertain whether the defendant was prejudiced by the action of the trial court in sustaining the objection interposed by the State. The burden is upon the defendant to establish prejudicial error in the trial. This he has failed to do. *Newbern v. Hinton,* 190 N.C. 108, 129 S.E. 181 (1925); *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265 (1955); and *Westmoreland v. R.R.,* 253 N.C. 197, 116 S.E. 2d 350 (1960).

All questions presented by this appeal have been carefully considered, and we find

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

LEROY SHEETS v. MAX SESSIONS, DOING BUSINESS AS JEAN ANN APARTMENTS

No. 7121SC432

(Filed 25 August 1971)

1. **Appeal and Error § 39— docketing of record — dismissal of appeal**

Appeal is dismissed for failure of the appellant to docket the record on appeal within the time allowed by the rules of the Court of Appeals. Rule 5 of the Rules of Practice.

2. **Landlord and Tenant § 8— action against landlord — personal injury to plaintiff — sufficiency of evidence**

Plaintiff's action to recover for personal injuries sustained when he fell from the porch of defendant's apartment building in the nighttime was properly dismissed by the trial court, where plaintiff's own evidence disclosed that he stepped out from a lighted kitchen onto an unfamiliar back porch in the dark without turning on the porch light and without even looking for the switch, which was easily accessible to the plaintiff.

APPEAL by plaintiff from *Armstrong, Judge,* 25 January 1971 Session of Superior Court held in FORSYTH County.

Plaintiff brought this action on 22 January 1970 to recover damages for personal injuries sustained by him on the night of 1 May 1967 when he fell from the porch of an apartment building owned by defendant in Winston-Salem, N. C. Plaintiff had gone to defendant's apartment building at approximately 8:30 p.m. on 1 May 1967 for the purpose of inspecting a vacant apartment with a view to renting it. Defendant's agent loaned plaintiff a key and permitted plaintiff to enter the apartment in the agent's absence. In the course of inspecting the apartment, plaintiff opened the back door from the kitchen and stepped out onto the back porch. He took one step, started to turn around, and in doing so fell from the porch to the ground, sustaining injuries. In his amended complaint, plaintiff alleged that defendant was negligent in failing to provide proper railing on the porch, in maintaining the porch with the right-hand side of the porch within one foot of the door facing exiting onto the porch, and in failing to warn the plaintiff of the dangerous conditions thereby created. Defendant denied that he was negligent and as an affirmative defense pleaded that plaintiff was contributorily negligent in walking onto the porch in the dark without turning on the back porch light.

At the close of plaintiff's evidence, defendant moved 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 allowing the motion and dismissing the action, plaintiff appealed.

Wilson, Morrow & Boyles by John F. Morrow for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter for defendant appellee.

PARKER, Judge.

[1] The judgment appealed from is dated 4 February 1971. The record on appeal was docketed in this Court on 13 May 1971, which was more than 90 days after the date of the judgment appealed from. In this record there is no order extending the time for docketing the record on appeal. For failure of appellant to docket the record on appeal within the time allowed by the rules of this Court, this appeal is dismissed. Rule 5, Rules of Practice in the Court of Appeals. *Williford v. Williford,* 10 N.C. App. 541, 179 S.E. 2d 118; *Umphlett v. Bush,* 7 N.C. App. 72, 171 S.E. 2d 80; *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547.

[2] Nevertheless, we have carefully reviewed the record and find no error in the judgment directing verdict against the plaintiff. Plaintiff's own evidence disclosed that he stepped out from a lighted kitchen onto an unfamiliar back porch in the dark without turning on the porch light and without even looking for the switch, which was conveniently located and readily available to him. One may not thus heedlessly disregard the commonest precautions for his own safety. See Annotation, 163 A.L.R. 587.

Appeal dismissed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. PETE JUNIOR LANGLEY

No. 7121SC500

(Filed 25 August 1971)

APPEAL by defendant from *Lupton, Judge,* 5 April 1971 Criminal Session of Superior Court held in FORSYTH County.

Attorney General Morgan and Staff Attorney Conely for the State.

Barbara Westmoreland for defendant appellant.

MALLARD, Chief Judge.

In this common-law robbery case, we find no prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

CAROLYN DAVIS AUSTIN v. MERT S. AUSTIN

No. 7120DC428

(Filed 15 September 1971)

1. **Divorce and Alimony § 1; Courts § 14— alimony and child custody — action pending in one county — jurisdiction of district judge in another county to hold in-chambers proceeding**

A district court judge who was assigned to hold a juvenile session in one county of the district had no authority, in an alimony and child custody proceeding that was pending in another county of the district, to conduct an in-chambers hearing on the wife's motion seeking child custody and support, alimony *pendente lite*, and counsel fees, since there was no showing that the judge had received written authorization from the chief district judge to hear motions in chambers in all causes pending in the courts of the district. G.S. 7A-192.

2. **Courts § 14— jurisdiction of district court to conduct in-chambers proceeding**

There is no presumption that a district judge (other than the chief district judge) has authority in chambers to hear motions and enter interlocutory orders in all cases pending in the district courts of the district. G.S. 7A-192.

3. **Divorce and Alimony § 18— alimony pendente lite — counsel fees — necessity for findings of fact**

The trial judge must make sufficient findings of fact to support its order for alimony *pendente lite* and counsel fees and its award of child custody and support. G.S. 50-16.3; G.S. 50-16.8(f).

4. **Divorce and Alimony § 18— alimony pendente lite — adultery as plea in bar — necessity for findings of fact**

When adultery is pleaded in bar of a demand for alimony or alimony *pendente lite*, an award of alimony *pendente lite* will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking such an award.

5. **Divorce and Alimony § 18— award of attorney fees — findings of fact**

An award of attorney fees to a dependent spouse must be supported by findings of fact upon which a determination of the requisite reasonableness of the award could be based. G.S. 50-13.6; G.S. 50-16.4.

6. **Divorce and Alimony § 22— custody of minor children — findings of fact**

An award of custody of the minor children must be supported by sufficient findings of facts. G.S. 1A-1, Rule 52(a)(1).

7. **Rules of Civil Procedure § 40— continuances**

Continuances are addressed to the sound discretion of trial judges and may be granted only for good cause shown and as justice may require. G.S. 1A-1, Rule 40(b).

Austin v. Austin

APPEAL by defendant from *Crutchfield, District Judge,* from orders entered in chambers in April 1971.

On 11 March 1971 the plaintiff wife instituted this action in Anson County seeking alimony without divorce, alimony *pendente lite,* custody and support of the two children of the parties, and counsel fees. In the complaint it is alleged, among other things, that plaintiff and defendant are residents of Anson County; that plaintiff is a dependent spouse and defendant is the supporting spouse and is capable of supporting plaintiff; that defendant offered such indignities to her person as to render her condition intolerable and her life burdensome; that the defendant, in effect, maliciously turned her out of doors; that the defendant by cruel and barbarous treatment of the plaintiff endangered her life; that the conduct of the defendant forced her to take the minor children and flee from the home.

On 11 March 1971 plaintiff issued a notice to defendant, signed by plaintiff's attorney, that plaintiff would on 17 March 1971 apply to Judge Crutchfield at chambers in Stanly County " . . . for an allowance for proper subsistence and reasonable counsel fees pending the final determination of said action." This notice was not served.

On 15 March 1971 plaintiff issued another notice to defendant, which was signed by plaintiff's attorney and served on defendant on 16 March 1971, that plaintiff would on 25 March 1971 apply to Judge Crutchfield at chambers in Richmond County " . . . for an allowance for proper subsistence and reasonable counsel fees pending the final determination of said action." The record does not reveal what disposition was made of this notice or what occurred at the hearing in Richmond County on 25 March 1971, if such a hearing were held.

On 16 March 1971 before Chief District Judge Mills, at chambers in Anson County, the parties entered into certain stipulations signed by their respective attorneys as to the 1970 income and 1970 income tax returns of the parties; that the defendant would make payments on "the house" and on "both cars"; and that the defendant would take a nonsuit in certain separate actions he had instituted against the plaintiff and E. A. Hightower, plaintiff's attorney.

On 2 April 1971 plaintiff issued still another notice to defendant, signed by plaintiff's attorney and served on defend-

ant on 3 April 1971, that plaintiff would on 8 April 1971 apply to Judge Crutchfield at chambers in the Union County Courthouse in Monroe, North Carolina, " . . . for an Order awarding her custody of the children, for alimony without divorce, for reasonable subsistence for herself and the minor children and for reasonable counsel fees pending the final determination of said action."

Defendant filed an answer on 7 April 1971, which was served on plaintiff's attorney on the same date, admitting the allegations of marriage and residence and that there were two children born of the union, but denying the other material allegations of the complaint. As a further answer and defense, he filed a cross-action against the plaintiff in which he sought an absolute divorce on the grounds of adultery and requested a jury trial.

On 8 April 1971, the date set for hearing, the defendant filed a "motion for consolidation and jury trial" in which, among other things, he asked the court to decree that "any in Chambers proceeding would be improper and null and void." He also specifically objected to both the time and site of the hearing in chambers to be held at 2:00 p.m. on 8 April 1971 before District Judge Crutchfield at the Union County Courthouse in Monroe, North Carolina, of which the defendant had previously been notified. It was further alleged that the defendant's attorney was scheduled to appear, and did in fact appear, in the trial of criminal matters in the District Court of Anson County in Wadesboro, North Carolina, on the same date, 8 April 1971.

Defendant's motion "for consolidation and jury trial" was denied in its entirety after the court found, among other things, that " . . . the defendant's attorney could have, if he so desired, attended this hearing . . . and was only attempting to delay and defeat the plaintiff's right to hearing . . . . "

The court then proceeded, in the absence of defendant's attorney, to hold a hearing and thereafter entered an order that the plaintiff have custody of the two minor children and that the defendant pay alimony *pendente lite,* child support, and attorney fees, and transfer to the plaintiff his rights in certain specified property.

In the order for child custody, child support, alimony *pendente lite* and attorney fees, the judge found the following

facts: (1) That notice of the hearing had been duly served on the defendant; (2) that the defendant's attorney had contacted the court requesting a continuance until May of 1971; (3) that defendant's attorney had stated that he was engaged in the trial of criminal cases in Anson County on the date of the hearing; (4) that the court had conferred with the attorneys for both the plaintiff and the defendant about setting a mutually agreeable time for the hearing and had suggested alternate dates of April 9th or 10th, but that the defendant's attorney would not agree to a date earlier than May 1971; (5) that the court had been advised that the session of Anson District Court on 8 April 1971 had adjourned in sufficient time for the defendant's attorney to have attended the hearing in Union County on that date; (6) that the hearing had been delayed "for some time" for the defendant's attorney but that he had failed to appear; (7) that the plaintiff was entitled to be heard; and (8) " . . . that after the trial of said case and the presentation of evidence by both plaintiff and defendant and after consideration of all the evidence, the court finds as a fact that both the plaintiff and the defendant are fit and proper persons to have the custody, control and care of the two minor children; namely: Lori Robin Austin, born January 15, 1964 and Kelly Karol Austin, born 25 November 1969. It is now, therefore, ordered adjudged and decreed that it would be to the best interest of said children and their welfare would be promoted that they remain with their mother . . . . "

On 16 April 1971 the defendant filed a motion to set aside the order awarding plaintiff custody and child support, alimony *pendente lite* and counsel fees, on the grounds that the defendant's motion for a continuance was improperly denied, in that defendant's attorney could not be present at the hearing on 8 April 1971. On 16 April 1971 Judge Crutchfield entered an order denying the motion. On 17 April 1971 defendant gave notice of appeal to the Court of Appeals from the order entered after the hearing on 8 April 1971 and from the denial of his motion to set aside the order.

E. A. Hightower for plaintiff appellee.

Taylor & McLendon by Henry T. Drake for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant by assignment of error presents the question: "Did the court err in denying defendant's motion that Union County be declared an improper venue?" Venue, as used in G.S. Chap. 1, Art. 7, means a *place* where the trial of a cause may be held by a court with jurisdiction. *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723 (1953). Jurisdiction is the *power* of a court to hear and decide a legal controversy. McIntosh, N. C. Practice 2d, § 5. There is a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. This distinction is recognized in G.S. 7A-191 and G.S. 7A-192.

It is provided in G.S. 7A-191 that *"(a)ll trials on the merits* shall be conducted in open court and so far as convenient in a regular courtroom. *All other proceedings, hearings, and acts* may be done or conducted by a judge in chambers in the absence of the clerk or other court officials *and at any place within the district;* but no hearing may be held, nor order entered, in any cause outside the district in which it is pending without the consent of all parties affected thereby." (Emphasis added.)

The notice of the hearing on 8 April 1971 was a notification that plaintiff would make application to Judge Crutchfield *in chambers* in Union County for (1) custody of children, (2) reasonable subsistence for the children, (3) alimony without divorce, (4) reasonable subsistence for plaintiff, and (5) reasonable counsel fees pending the final determination of the action.

In G.S. 50-13.5(h) it is provided that "(w)hen a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time. * * * " Similar language relating to alimony *pendente lite* is contained in G.S. 50-16.8(g). The defendant, therefore, is not entitled to a jury trial on the matter of custody and support of minor children or alimony *pendente lite.* G.S. 50-13.5(h) and G.S. 50-16.8(g). However, in order to have authority to act, the district judge, other than the chief district judge, must be properly authorized under the provisions of G.S. 7A-146 and G.S. 7A-192 to hold a session of court at which the matter is properly before him, or under G.S. 7A-192 to hear the matter in chambers.

In this case the parties were admittedly residents of Anson County. In the pleadings there is no allegation that the children were not residents of Anson County; in fact, there is an inference in paragraph 8 of the complaint that the children were living in Anson County with the mother. Therefore, this action for alimony, child support and child custody was properly instituted and pending in Anson County. G.S. 1-82; G.S. 7A-244; G.S. 50-13.5(c) (f); and G.S. 50-16.8. While pending in Anson County, it could not be calendared for hearing on the merits in Union County, nothing else appearing. G.S. 7A-146 and G.S. 7A-193. See also Rule 2 of the General Rules of Practice for the Superior and District Courts. Judge Crutchfield had been assigned by the chief district judge to hold a "juvenile session" in Union County under G.S. 7A-146(1).

A hearing on motions in a cause comes within the purview of "all other proceedings, hearings and acts" referred to in G.S. 7A-191. This statute expressly and specifically provides that hearings may be held and orders entered in chambers by a district judge (with authority to act as provided in G.S. 7A-192) at any place within the district. Anson County, Stanly County, Richmond County, Union County and Moore County are all in the Twentieth Judicial District. G.S. 7A-41. The civil procedure provided in Chapters 1 and 1A of the General Statutes is applicable to the District Court Division of the General Court of Justice, except as otherwise provided in Chapter 7A of the General Statutes. G.S. 7A-193. *Boston v. Freeman,* 6 N.C. App. 736, 171 S.E. 2d 206 (1969).

We hold that the Union County Courthouse in Monroe, North Carolina, was a proper place wherein a district judge, with the power and authority under G.S. 7A-192 to hold hearings and decide motions in chambers, could hear and determine appropriate motions in an action pending in Anson County. *Boston v. Freeman, supra.*

The defendant in his motion for "consolidation and jury trial" objected to an in-chambers hearing and asked the court to decree that "any in chambers proceedings" in Union County be null and void. This objection was overruled in the general denial of the defendant's motion.

In his brief the defendant argues that the district judge was without authority to conduct this hearing outside the county

in which the principal action was pending, and thereby questioned the power and authority of the judge to hear the matter.

Article IV, Section 12, subsection (4) of the Constitution of North Carolina concerns the jurisdiction of district courts and magistrates. It is provided therein that "(t)he General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates." Pursuant to this constitutional provision, the General Assembly prescribed by whom the power of the district court to enter interlocutory orders could be exercised by enacting G.S. 7A-192, which reads as follows:

> *"By whom power of district court to enter interlocutory orders exercised.*—Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside. *The chief district judge and any district judge designated by written order or rule of the chief district judge, may in chambers hear motions and enter interlocutory orders in all causes pending in the district courts of the district,* including causes transferred from the superior court to the district court under the provisions of this chapter. The designation is effective from the time filed in the office of the clerk of superior court of each county of the district until revoked or amended by written order of the chief district judge." (Emphasis added.)

We take judicial notice that F. Fetzer Mills, Edward E. Crutchfield, Walter M. Lampley, and A. A. Webb have been duly elected and have qualified as the four judges of the District Court of the Twentieth Judicial District and that F. Fetzer Mills has been duly designated as the Chief District Judge of the Twentieth Judicial District.

Under the provisions of the first portion of G.S. 7A-192, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of G.S. 7A-146(1) to preside at such session. In the case before us, the record reveals that Judge Crutch-

field was assigned to hold a "juvenile" session of court on 8 April 1971 in Union County. This case pending in Anson County was not calendared for disposition at the juvenile session of district court being held in Union County.

It is further provided by G.S. 7A-192 that in order for a district judge, other than the chief district judge, to be authorized to hear motions and enter interlocutory orders in chambers in all causes pending in the district courts of the district, he must at that time be designated as having the authority to do so by written order or rule of the chief district judge; further, in order for this authority to be effective, it must be filed in the office of the clerk of superior court of each county in the district. Upon being so filed, this authority remains in effect until revoked or amended by the chief district judge. There is nothing in the record before us which reveals that Judge Crutchfield was authorized in writing by Chief District Judge Mills to hear motions in chambers and enter interlocutory orders in all causes pending in the district courts of the district; and, if he was so authorized, the record fails to reveal that such was properly filed in the office of the clerk of superior court of each county of the district and that it had not been revoked or amended by written order of the chief judge.

The district court is, under the provisions of G.S. 7A-244, a court of general jurisdiction *for the trial* of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody.

The statute conferring jurisdiction on the district courts makes a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. G.S. 7A-191 and G.S. 7A-192.

The question arises as to whether we may indulge in the presumption that Judge Crutchfield, while properly assigned to and holding a "juvenile" session of district court in Union County, had the power and authority to act upon the plaintiff's motion in this case pending in Anson County.

The general rule with respect to the necessity of jurisdiction appearing of record is set forth in 21 C.J.S., Courts, § 104, p. 157, as follows:

"It is generally not necessary that the record of a court of general jurisdiction show the existence of jurisdiction; but, in order for this rule to apply, it should appear from the record that the cause of action comes within the class of cases embraced within the general or ordinary jurisdiction of the court, and *the rule does not apply* where a statute confers special authority upon such a court, not to be exercised according to the course of the common law." (Emphasis added.)

In the case of *Beck v. Bottling Co.*, 216 N.C. 579, 5 S.E. 2d 855 (1939), it is said:

" * * * The general rule is that 'a *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter.' *S. v. Adams*, 213 N.C., 243, 195 S.E., 833; *Graham v. Floyd*, 214 N.C., 77, 197 S.E., 873. Yet, where its authority to act is limited, 'everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it.' *Truelove v. Parker*, 191 N.C., 430, 132 S.E., 295."

See also *Eason v. Spence*, 232 N.C. 579, 61 S.E. 2d 717 (1950).

[2] The authority of the district judge (other than the chief district judge) to hear motions and enter interlocutory orders in cases properly pending in the district court is a special authority which is limited by the provisions of Chapter 7A of the General Statutes and particularly by G.S. 7A-192. Therefore, there is no presumption that a district judge (other than the chief district judge) has authority in chambers to hear motions and enter interlocutory orders in all cases pending in the district courts of the district. Since it does not affirmatively appear in the record that Judge Crutchfield was authorized pursuant to G.S. 7A-192 to hear motions and enter interlocutory orders in chambers in cases pending in Anson County while assigned to and holding a session of "juvenile" court in Union County, we hold that the order entered by Judge Crutchfield herein, dated 8 April 1971, should be vacated and set aside.

[3] The defendant also assigns as error the failure of the district court to make sufficient findings of fact to support its order for alimony *pendente lite* and counsel fees or its award of child custody and child support.

G.S. 50-16.8(f), effective since 1967, provides that "(w)hen an application is made for alimony *pendente lite*, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and *the judge shall find the facts from the evidence so presented.*" (Emphasis added.) While the precise factual findings which must be made will vary depending upon the pleadings, evidence and circumstances of each case, the trial judge must make sufficient findings of the controverted material facts at issue to show that the award of alimony *pendente lite* is justified and appropriate. *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971); *Hatcher v. Hatcher,* 7 N.C. App. 562, 173 S.E. 2d 33 (1970); *Blake v. Blake,* 6 N.C. App. 410, 170 S.E. 2d 87 (1969).

In the case at bar, the district judge made insufficient factual findings as to the controverted material facts at issue. G.S. 50-16.3. There was no finding that the plaintiff was entitled to the relief demanded, or that she was the dependent spouse and lacked sufficient means for subsistence during the prosecution of this action and to defray the necessary expenses thereof, or that the defendant was the supporting spouse and had the ability to pay the award granted to the plaintiff.

[4] Furthermore, the defendant herein pleaded the adultery of the plaintiff in bar of her right to recover. No finding of fact was made with respect to this controverted and material issue. Although the requirement of G.S. 50-16.8(f) [that facts be found to support an award of alimony] is a new one imposed by the 1967 Act, it was established law even under former G.S. 50-16 that where the defendant or party from whom alimony was sought interposed the defense of adultery by the spouse seeking the alimony, as a bar to any recovery, the court was required to make a finding on the issue raised; and if found against the spouse seeking alimony, no award except for counsel fees was allowed. It was held that an award of temporary alimony without making any determination as to the validity of the plea of adultery constituted reversible error and required a rehearing of the application. *Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793 (1962); *Williams v. Williams,* 230 N.C. 660, 55 S.E. 2d 195 (1949). The present statute, G.S. 50-16.6(a), is similar in language and import. Accordingly, we hold that when adultery is pleaded in bar of a demand for alimony or alimony *pendente lite,* an award or allowance of alimony *pendente lite*

will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking such an award.

[5] Neither do the facts found support the award of attorney fees. It is uncontroverted that G.S. 50-16.4 and G.S. 50-13.6 permit the entering of a proper order for "reasonable" counsel fees for the benefit of a dependent spouse, but the record in this case contains no findings of fact, such as the nature and scope of the legal services rendered, the skill and time required, *et cetera,* upon which a determination of the requisite reasonableness could be based. Compare, for example, the evidence and findings in *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967). See also *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949).

[6] The defendant also contends that the court's findings of fact were insufficient to support the award of custody of the minor children to the plaintiff. As previously noted the civil procedure contained in Chapters 1 and 1A of the General Statutes is applicable to the district courts, except as otherwise provided in Chapter 7A of the General Statutes. Chapter 7A does not change the effect of G.S. 1A-1, Rule 52(a)(1), and therefore, it is necessary for the district judge who is authorized to hear a case involving the custody and support of minor children to find the facts specially and state separately his conclusions of law before entering an appropriate judgment. Judge Crutchfield found from the evidence that both the plaintiff and defendant were fit and proper persons to have custody but " . . . ordered, adjudged and decreed that it would be to the best interest of said children and their welfare that they remain with their mother . . . for the major portion of the time . . . . " Suffice it to say that although the findings of the trial court in regard to the custody of a child are conclusive when supported by competent evidence, "(w)hen the trial court fails to find facts so that the appellate court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for *detailed findings of fact.*" (Emphasis added.) *In re Moore,* 8 N.C. App. 251, 174 S.E. 2d 135 (1970). See also *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967).

The failure of the district court in this case to make adequate findings of fact is regard to its order for alimony *pendente lite* and counsel fees, as well as its order for custody and support of minor children, also requires that the order for custody, visitation and attorney fees of 8 April 1971 be vacated and the cause remanded to the District Court for Anson County.

[7] We do not deem it necessary to decide or discuss the other questions raised by the defendant, other than to say that it is a well-established rule that continuances are addressed to the sound discretion of trial judges and may be granted only for good cause shown and as justice may require. G.S. 1A-1, Rule 40(b). Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time.

The result is that the "Order for Custody & Visitation & Attorney Fees" entered herein, dated 8 April 1971, awarding alimony *pendente lite,* counsel fees, and custody and support of the children, is vacated, and this cause is remanded to the District Court of Anson County.

Error and remanded.

Judges CAMPBELL and HEDRICK concur.

MORRIS SPEIZMAN COMPANY, INC. v. WILLIAM H. WILLIAMSON, AND OTHERS, TRADING AND DOING BUSINESS AS REYNOLDS & CO., A PARTNERSHIP

No. 7126SC465

(Filed 15 September 1971)

1. **Contracts § 2— binding contract — objective test**

In examining the language and actions of the parties in order to determine if a binding contract resulted, the test to be applied is objective and not subjective.

2. **Contracts § 2— mistake by one party to contract—avoidance of contract**

A party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in good faith.

3. Contracts §§ 2, 21— contract for broker to sell stock — unilateral mistake by seller as to identity of the stock

Where plaintiff's president instructed defendant stock brokers to sell 14,000 shares of the stock of a foreign corporation reported in a newspaper as listed on the American Stock Exchange under the mistaken belief that stock owned by plaintiff was the same as that listed on the Exchange, when in fact the listed stock was American Depository Receipts, or American shares, and the stock owned by plaintiff consisted of the underlying foreign shares, a binding contract resulted once defendants accepted and acted upon the instructions of plaintiff's president, and plaintiff is liable for breach of contract in failing to deliver to defendants the stock its president had instructed defendants to sell, there being no mutual mistake of fact but only a unilateral subjective mistake on the part of plaintiff's president, and there being no evidence that defendants had reason to know of the mistake of plaintiff's president or that they were negligent in failing to question him as to whether the shares he stated his company owned were American Deposit Receipts or the underlying foreign shares.

4. Evidence § 48— expert in buying and selling stocks — qualification of witness

There was ample evidence to support the trial court's finding that defendants' witness was an expert in the field of buying and selling stocks.

5. Evidence § 48; Trial § 10— finding in jury's presence that witness is expert

The trial court did not commit prejudicial error in stating in the presence of the jury its finding that defendants' witness was an expert in the field of buying and selling stocks, where the witness was not a party to the litigation and finding him to be an expert in no way dealt with any question which the jury was called upon to decide.

6. Evidence § 19— evidence as to prior transactions between the parties

In an action for breach of contract to deliver to defendant stock broker the stock that plaintiff had allegedly instructed defendant to sell for plaintiff's account, evidence as to prior transactions between the parties, while not bearing directly upon the issues in the case, was relevant to establish the course of conduct customarily followed in transactions between the parties, which could provide a basis for determining whether customary procedures were followed in the present case, and whether these resulted in a binding contract between the parties.

APPEAL by plaintiff from *Grist, Judge,* 25 January 1971 Schedule B Civil Session of Superior Court held in MECKLENBURG County.

Plaintiff ("Speizman Company") is a corporation of which Morris Speizman is president and chief executive officer. De-

fendants are copartners engaged in business as stock brokers under the name "Reynolds & Co." The partnership is a member of the American Stock Exchange. Speizman Company and Reynolds & Co. each maintain an office and do business in Mecklenburg County, N. C.

On 5 November 1968 Speizman Company was the owner of 18,179 Ordinary B shares of American Israeli Paper Mills, Ltd., an Israeli corporation. Speizman Company had originally acquired 10,000 of these shares in 1959 in a transaction effected on its behalf by its president, Morris Speizman, in which these 10,000 shares were received in exchange for $10,000.00 Israeli Development bonds. The remaining 8,179 shares had been received by Speizman Company at various times thereafter as stock dividends. In November 1968, the Ordinary B shares of American Israeli Paper Mills, Ltd. were not listed on the American Stock Exchange, but were traded on the over-the-counter market. Prior to November 1968, American Israeli Paper Mills, Ltd., in order to make some of its shares more conveniently transferable and more readily traded in the United States, had deposited a large block of its Ordinary B shares with Bankers Trust Company in New York, which in turn had issued American Depository Receipts (sometimes referred to as "American shares" or "ADRs") on a one for eight basis, *i.e.*, each American Depository Receipt represented eight of the Ordinary B shares of American Israeli Paper Mills, Ltd., on deposit with Bankers Trust Company. In November 1968 these American Depository Receipts had been listed and were being traded on the American Stock Exchange under the ticker symbol "AIP." Speizman Company never owned any of these "American shares" or "ADRs."

On 5 November 1968 Morris Speizman phoned LeRoy Gross, a Registered Representative employed in the Charlotte office of Reynolds & Co., with whom Speizman had had previous business dealings, and told Gross he "had an occasion to think about American Israeli Paper Mills stock which the company owned," and that he "had glanced at the stock quotations of the American Stock Exchange listed in the Charlotte Observer and it was selling at seven dollars a share." Speizman asked Gross to check it, whereupon Gross checked the Wall Street Journal and a telequote machine and confirmed that American Israeli Paper Mills stock as listed on the American Stock Exchange was sell-

ing at the price of around seven dollars a share. At the trial of this action Morris Speizman testified with reference to this phone conversation with LeRoy Gross:

> "A minute or so later in that same conversation he (Gross) said: 'That is right. It is selling at seven dollars a share, approximately.' I did tell Mr. Gross that that was fantastic. That this was the first time that any investment I made in Israel had shown a profit. I did at that time tell Mr. Gross that I owned over 18,000 shares of that stock. I did tell Mr. Gross at that time to sell 14,000 shares of that stock for the account of Morris Speizman Company, Inc. I did tell him not to dump it on the market but to merchandise it out in lots of a hundred or several hundred so as not to upset the market. To my knowledge Reynolds and Company executed this order that I gave to Mr. Gross. . . .
>
> "On November 5, 1968, I did not know the difference between American Israeli Paper Mills, American shares or ADRs and American Israeli Paper Mills common or foreign shares. On November 5, 1968, I thought that the shares owned by Morris Speizman, Inc. in American Israeli Paper Mills were those listed on the American Stock Exchange. I assumed they were, yes sir. I did not at any time ask Mr. Gross for any opinion or advice with respect to American Israeli Paper Mills, Ltd."

Following this conversation, Reynolds & Co. placed an order to sell 14,000 shares of American Israeli Paper Mills, Ltd. ADRs as listed on the American Stock Exchange and a sale was made on the American Stock Exchange. On receiving confirmation of this sale, Speizman Company delivered to Reynolds & Co. its certificates for 18,179 shares of American Israeli Paper Mills, Ltd. Ordinary B shares. Upon learning that the stock delivered was not the same as that which had been sold by Reynolds & Co. on the American Stock Exchange, Speizman Company disclaimed any responsibility and denied any liability. As required by regulations of the Securities and Exchange Commission, Reynolds & Co. then purchased 14,000 shares of American Israeli Paper Mills, Ltd. ADRs on the American Stock Exchange in order to fill its commitments to the purchasers on the prior sale. In the meantime, however, the price had risen on the American Stock Exchange and Reynolds & Co. had to pay a

higher price than that received on the prior sale, the net difference (after taking into account brokerage commissions charged by Reynolds & Co. in the amount of $4,099.91, taxes, and other fees involved in the sales and repurchase transactions) being $22,076.88.

Plaintiff, Speizman Company brought this action on 30 December 1968 to recover possession of the stock that it had delivered to Reynolds & Co. Defendants counterclaimed for damages which they alleged they suffered in the amount of $22,076.88. The trial court granted plaintiff's motion for summary judgment on its claim for recovery of the shares of stock. Defendants' counterclaim was submitted to the jury, which answered issues as follows:

"1. Did plaintiff and defendant enter into a contract authorizing the defendant, Reynolds & Company, to sell 14,000 shares of American Israeli Paper Mills, Ltd. American Shares (ADR's) on the American Stock Exchange and for the plaintiff, Morris Speizman Company, Inc. to deliver 14,000 shares of American Israeli Paper Mills, Ltd. American Shares (ADR's) to Reynolds & Company?

"ANSWER: Yes

"2. Did the plaintiff, Morris Speizman Company, Inc., breach the contract?

"ANSWER: Yes

"3. What amount, if any, is the defendant, Reynolds & Company, entitled to receive from the plaintiff, Morris Speizman Company, Inc.?

"ANSWER: $18,976.97"

From judgment on the verdict that defendants recover from the plaintiff $18,976.97, with interest and costs, plaintiff appealed.

Weinstein, Sturges, Odom & Bigger by T. La Fontine Odom for plaintiff appellant.

James & Williams by Henry James, Jr., and Pender R. McElroy for defendant appellees.

PARKER, Judge.

Appellant assigns as error the denial of its motion for a directed verdict on defendants' counterclaim, made at the close of defendants' evidence and renewed at the close of all of the evidence. In support of this assignment of error appellant contends that as a matter of law the evidence established that the parties acted under a mutual mistake of fact, that there was never a "meeting of the minds" and therefore no binding contract as to what stock was owned by plaintiff and what stock plaintiff authorized defendants to sell, and that any loss sustained by defendants was brought about by their own negligence. We do not agree.

[1, 2] In examining the language and actions of the parties in order to determine if a binding contract resulted, the test to be applied is objective and not subjective. 13 Williston on Contracts, 3rd Ed., § 1536. "The rule supported by the authorities is that if, in the expression of the intention of one of the parties to an alleged contract, there is error, and that error is unknown to, and unsuspected by, the other party, that which was so expressed by the one party and agreed to by the other is a valid and binding contract, which the party not in error may enforce. In other words, a party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in perfect good faith." 17 Am. Jur. 2d, Contracts, § 146, p. 492.

[3] When Morris Speizman, acting on behalf of plaintiff as its chief executive officer, phoned LeRoy Gross, defendants' representative, and asked him to check the current market value of American Israeli Paper Mills stock which Mr. Speizman informed Mr. Gross that his company owned, he expressly identified the stock concerning which he inquired as the stock listed in the Charlotte Observer under quotations of the American Stock Exchange and selling at seven dollars per share. When Gross checked and confirmed the price, Speizman testified that: "I did at that time tell Mr. Gross that I owned over 18,000 shares of *that* stock. I did tell Mr. Gross at that time to sell 14,000 shares of *that* stock for the account of Morris Speizman Company, Inc." Thus, objectively there was no mistake as to the identity of the stock which Speizman authorized defend-

ants to sell for the account of plaintiff company. The only mistake was the unilateral subjective mistake on the part of Speizman in believing that the stock which his company owned was the same stock which he had seen listed in the newspaper. Speizman undoubtedly acted in perfect good faith, but the mistake was his nevertheless. Once defendants accepted and acted upon his instructions, a binding contract resulted and plaintiff became estopped to deny liability. "In the final analysis, the objective theory of contracts, as distinguished from the subjective theory, is based on analogy to estoppel." 1 Williston on Contracts, 3rd Ed., § 98, p. 362.

Nor do we find in this record any evidence that defendants had reason to know of Speizman's mistake or that they were negligent in failing to question him as to whether the shares which he stated his company owned were American Israeli Paper Mills, Ltd., American shares, as listed and traded on the American Stock Exchange, or the underlying American Israeli Paper Mills, Ltd., Ordinary B shares. Defendants had not participated in any way when Speizman had originally acquired the shares for his company, and all that they knew concerning the shares was what Speizman told Gross in their brief telephone conversation. Nothing in that conversation would put defendants on notice that Speizman was acting under a mistaken impression in believing that the shares which his company owned were the same as the shares reported in the newspaper as listed on the American Stock Exchange to which he made specific reference. While he expressed surprise and delight that the shares which his company owned had apparently so substantially increased in value, he did not inform Gross as to the amount of the increase, or exactly when the shares had been acquired, or what the original cost of the shares had been. During the telephone conversation, Gross consulted a Standard & Poor's Stock Guide which was on his desk, and this revealed that the American Israeli Paper Mills, American shares, as traded on the American Stock Exchange, had ranged in price during 1967 from a low of 2 to a high of 5½ and during 1968 from a low of 3⅛ to a high of 7⅜. Therefore, there was nothing surprising in the fact that an investor in such shares might have realized a substantial gain. While the same Standard & Poor's Stock Guide showed in a footnote "Amer shrs equals 8 ord par Is £ 1," the existence of this footnote would not, in our opinion, put Gross on notice that his customer, Speizman, was

operating under any mistake as to the nature of the shares which his company owned. From previous dealings between them, Gross knew Speizman to be an experienced and knowledgeable investor in many types of securities, and nothing occurred during the course of the telephone conversation which would reasonably put Gross on notice that his customer may not have been equally knowledgeable in this instance as to the nature of the securities which his company owned.

Appellant also assigns as error the trial court's refusal to submit to the jury plaintiff's tendered issues of mutual mistake and negligence and its failure to give the jury plaintiff's tendered instructions on these issues. In these actions of the trial court we find no error. To justify the submission of an issue it must not only arise on the pleadings, but must be supported by competent evidence. *Gunter v. Winders,* 256 N.C. 263, 123 S.E. 2d 475. As noted above, these issues did not arise on the evidence in this case.

[4] Appellant contends the trial court erred in finding defendants' witness Abernethy to be an expert in the field of buying and selling stocks and in permitting the witness to express an opinion in response to a hypothetical question. "Whether a witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is within the exclusive province of the trial judge." To qualify a witness as an expert, "[i]t is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject. A finding by the trial judge that the witness possesses the requisite skill will not be reviewed on appeal unless there is no evidence to support it." Stansbury, N. C. Evidence, 2d Ed., § 133, p. 316. Here, there was evidence that the witness had been engaged in the securities business in various capacities for many years, for more than twenty-five years as an official of a broker dealer firm. There was ample evidence to support the court's finding that he was an expert in this field.

[5] Appellant contends the trial court erred, nevertheless, in stating its finding that the witness was an expert in the presence of the jury, citing *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861. In that case the defendant, a surgeon in a malpractice suit, was offered as an expert witness. The trial court, in the presence of the jury, found him to be a medical expert.

On appeal, the Supreme Court held that the ruling should have been made in the absence of the jury, "for it was an expression of opinion by the court with reference to the professional qualifications of the defendant" and "might well have affected the jury in reaching its decision that the child was not injured by the negligence of the defendant." Accordingly, the Supreme Court held that the trial court's comments made in the presence of the jury finding defendant to be a medical expert constituted prejudicial error, since "they dealt with the very questions which the jury was called upon to decide." In the present case the witness involved was not a party to the litigation and finding him to be an expert in no way dealt with any question which the jury was called upon to decide. Under the circumstances of this case we find no prejudicial error when the trial court stated its ruling in the presence of the jury.

[6] We have considered appellant's remaining assignments of error and find them without merit. Evidence as to prior transactions between Speizman and Gross, while not bearing directly upon the issues in the case, was relevant to establish the course of conduct customarily followed in transactions between the two men. This in turn could provide a basis for determining whether customary procedures were followed in the present case and whether these resulted in a binding contract between the parties. To be relevant, "it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Bank v. Stack,* 179 N.C. 514, 103 S.E. 6.

The court's charge to the jury adequately declared and explained the law arising on the evidence given in the case and, considered as a whole and contextually, was free from prejudicial error. In the trial and judgment appealed from we find

No error.

Judges BRITT and MORRIS concur.

B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF RUTH ANN FRANCE v. COLON LOUIE WHITLEY AND PUGH OIL COMPANY, INC.

No. 7119SC540

(Filed 15 September 1971)

1. **Evidence § 11— dead man's statute — personal transaction — collision between two vehicles**

A collision between a tractor-trailer operated by defendant and the automobile operated by plaintiff's intestate was not a "personal transaction" within the meaning of the dead man's statute, G.S. 8-51, and that statute did not prohibit defendant from testifying as to how the collision occurred.

2. **Evidence § 11— dead man's statute — collision between two vehicles — testimony by one defendant in support of second defendant's counterclaim**

In this action to recover damages resulting from a collision between an automobile operated by plaintiff's intestate and a tractor-trailer driven by one defendant and owned by the second defendant, the dead man's statute did not prohibit defendant driver from testifying as to the collision in support of defendant owner's counterclaim for damages to its tractor-trailer.

3. **Trial § 17— testimony incompetent against one party — restricted admission**

Testimony competent as to one party should not be excluded by virtue of G.S. 8-51 because it is not competent against another party in the suit, but its admission should be limited by proper instructions.

4. **Automobiles § 53— driving on wrong side of road**

Defendants' counterclaims should have been submitted to the jury where their evidence tended to show that the automobile driven by plaintiff's intestate crossed the center line into defendants' lane and struck defendants' oncoming tractor-trailer.

APPEAL by defendants from *Gambill, Judge,* 5 April 1971 Session of RANDOLPH Superior Court.

The original plaintiff, Ruth Ann France (decedent), instituted this action to recover for personal injuries and property damage allegedly sustained by her in a collision between an automobile owned and operated by her and a tractor-trailer owned by defendant Pugh Oil Company, Inc. (defendant Pugh), and operated by its agent and employee defendant Whitley. After the pleadings were filed, decedent committed suicide and the administrator of her estate was substituted as plaintiff and adopted the pleadings. By counterclaims in their answer, de-

fendant Whitley sought recovery for personal injuries and defendant Pugh sought recovery for property damage.

Plaintiff's evidence tended to show: The collision occurred 4.8 miles south of Greensboro on U.S. Highway No. 220. Decedent was driving her car in a northerly direction on the two-lane highway and defendant Whitley was traveling in a southerly direction. After the collision the vehicles came to rest on a curve which bears to the left if traveling in a southerly direction, the tractor-trailer on its right hand side of the road. Except for the two drivers there were no eye witnesses to the collision. There was a deep indention in the pavement some 75 to 100 feet from the rear of the tractor-trailer. There was a mist-type rain, and the pavement was wet. Decedent's automobile was upright, down an embankment and the tractor-trailer was lying on its side. Decedent's automobile was damaged in the front and the tractor-trailer was damaged in the left front and top.

At the close of plaintiff's evidence, defendants moved for a directed verdict on the ground that plaintiff had failed to show any evidence of negligence on the part of either defendant which could have been the proximate cause of any injuries or damages sustained by decedent. The court did not rule on the motion at that time.

As a material part of their evidence, defendants attempted to show by testimony of defendant Whitley their version as to how the collision occurred, but the court on plaintiff's objection excluded the testimony as being violative of G.S. 8-51. The testimony was given for the record in the absence of the jury and tended to show: The collision occurred on the curve above mentioned. Although defendant Whitley turned his wheels to his right and "took the shoulder" in an effort to prevent the collision, decedent crossed the center line into defendant's lane and struck the tractor. Defendant Whitley did not leave his right hand side of the highway at any time and received no warning that decedent's vehicle would not remain in its lane. The vehicles made contact after decedent crossed the center line of the highway at which time the right front wheel of the tractor was on the west shoulder of the highway.

Defendants introduced evidence of defendant Whitley's employment, experience, and injuries together with the route

he had followed prior to the collision; evidence as to damage to the tractor-trailer was also admitted. At the close of defendants' evidence, plaintiff moved for a directed verdict on the counterclaims on the grounds that defendants failed to show actionable negligence on the part of decedent. The court thereupon allowed defendants' motion for a directed verdict on plaintiff's claim and plaintiff's motion for directed verdict on defendants' counterclaims. From judgment dismissing their actions, defendants appealed.

Smith & Casper by Archie L. Smith for plaintiff appellee.

Moser and Moser by Thad T. Moser and Perry C. Henson and Daniel W. Donahue for defendants appellants.

BRITT, Judge.

[1] In their first assignment of error defendants contend the court erred in excluding the testimony of defendant Whitley concerning the collision on the ground that said testimony violated G.S. 8-51, commonly referred to as the dead man's statute. The portion of the statute pertinent to this case provides that "(u)pon the trial of an action * * * a party or a person interested in the event * * * shall not be examined as a witness in his own behalf or interest * * * against the * * administrator * * of a deceased person * * * concerning a personal transaction or communication between the witness and the deceased person * * * . " Was the collision between the tractor operated by defendant Whitley and the automobile operated by decedent a "personal transaction" within the meaning of G.S. 8-51? We hold that it was not.

We are aware that our Supreme Court has held that two occupants of the same automobile are engaged in a "personal transaction" thereby rendering incompetent the testimony of one against the personal representative of the other's estate. *Tharpe v. Newman,* 257 N.C. 71, 125 S.E. 2d 315 (1962); *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655 (1941); *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832 (1934). We are also aware of the 1967 amendment to G.S. 8-51 which provides: "Nothing in this section shall preclude testimony as to the identity of the deceased operator of a motor vehicle in any case brought against the deceased's estate arising out of the operation of a motor vehicle in which the deceased is alleged to have been the opera-

tor or one of the operators involved." But the case at bar presents an entirely different proposition as the Supreme Court indicated in *Carswell v. Greene,* 253 N.C. 266, 116 S.E. 2d 801 (1960) when Justice Higgins speaking for the court said: "The decisions of this Court have gone a long way in excluding evidence of a surviving passenger in his action against the estate of the deceased driver based on driver negligence. Our cases, however, have never gone so far as to exclude the evidence of a survivor as to what he saw with respect to the operation of a separate vehicle with which he had a collision."

We think this case is analogous to *Hardison v. Gregory,* 242 N.C. 324, 88 S.E. 2d 96 (1955). *Hardison* was an action for alienation of affections and criminal conversation by a husband against the administrators of the alleged tort-feasor. Plaintiff testified that when he unexpectedly returned to his home one night he found the deceased standing in the living room of the unlighted house, and that on two other occasions he saw his wife and the deceased alone at farm cabins; the court held the evidence competent as testimony of independent facts. In the opinion, written by Parker, Justice (later Chief Justice), we find:

> Apparently we have no case directly on all fours, but we have a number of cases that sustain the proposition that G.S. 8-51 does not prohibit an interested party from testifying as to the acts and conduct of the deceased, where the interested party is merely an observer—in other words as to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased. (Numerous citations.)
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> * * *
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> Our cases hold that an interested party is not prohibited by G.S. 8-51 from testifying concerning his independent acts. (Citations.)
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> * * *
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> It is to be noted that plaintiff gave no testimony as to any words spoken on the three occasions. Applying the principles of law stated above to the facts, we conclude that the plaintiff was competent to testify as to what he saw the deceased Bonnie M. Gregory do and his conduct

on the three occasions set forth, because he was testifying as to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased.

In *Hardison,* the court has distinguished between acts done *with* a deceased person and acts done *in observing* such a person thereby putting the emphasis on the "personal relationship" of the parties. Any acts done in observation of a deceased person apparently are considered "independent acts" and not within the statutory exclusion.

In the instant case the acts of two independent drivers, total strangers to each other up to the point of impact, cannot be said to be acts done *with* a deceased person but are acts done *in observation of* a deceased person, thus, testimony as to these acts are not excluded by G.S. 8-51. Defendant Whitley would not be prevented from describing the conduct and movements of the deceased's car by the phrase "concerning a personal transaction" when the movements were quite independent and apart from, and in no way connected with, or prompted or influenced by reason of, the conduct of the party testifying. 58 Am. Jur., Witnesses, § 250. This view has been adopted by a number of other jurisdictions in the following cases: *Harper v. Johnson,* 345 S.W. 2d 277 (Tex. 1961); *Knoepfle v. Suko,* 108 N.W. 2d 456 (N.D. 1961); *Gibson v. McDonald,* 265 Ala. 426, 91 So. 2d 679 (1956); *Turbot v. Repp,* 247 Iowa 69, 72 N.W. 2d 565 (1955); *Shaneybrook v. Blizzard,* 209 Md. 304, 121 A. 2d 218 (1956); *Christofiel v. Johnson,* 40 Tenn. App. 197, 290 S.W. 2d 215 (1956); *Rankin v. Morgan,* 193 Ark. 751, 102 S.W. 2d 552 (1937). Considering the fact that the only relationship between defendant Whitley and decedent was the impact of their vehicles, in light of the distinctions projected in *Hardison v. Gregory, supra,* and other authorities cited, we conclude that such a collision is not a personal transaction within the meaning of the term, and G.S. 8-51 is not applicable to the testimony of the surviving driver in a two vehicle collision.

[2] There is an additional reason why the excluded testimony was competent as to defendant Pugh's counterclaim. Assuming that the testimony was inadmissible as to defendant Whitley because of the "personal transaction" portion of the statute, this would not have made it incompetent as to defendant Pugh. We would then be confronted with another portion of the

statute requiring an answer to this question: Was defendant Whitley, employed by defendant Pugh as a truck driver, "interested in the event"—the collision— to the extent that he was disqualified to testify with respect to the collision as a witness for defendant Pugh? We hold that he was not.

To be disqualified as a "person interested in the event" the witness must have a direct legal or pecuniary interest in the outcome of the litigation. *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801 (1938); *Price v. Askins,* 212 N.C. 583, 194 S.E. 284 (1937); *Burton v. Styers,* 210 N.C. 230, 186 S.E. 248 (1936). As to defendant Pugh, defendant Whitley did not have such an interest. Assuming a collision between two motor vehicles is a "transaction" within the meaning of the statute, it has been held that one who has acted as an agent for a third person in a transaction with a person since deceased, is ordinarily competent to testify to conversations or transactions of the decedent. 97 C.J.S., Witnesses, § 180.

Analogous to this case is *Smith v. Perdue,* 258 N.C. 686, 129 S.E. 2d 293 (1963) in which a husband and his wife filed separate suits for personal services rendered decedents. The suits were tried together and in an opinion by Sharp, Justice, we find:

> Over objection, each plaintiff testified for the other. This was permissible procedure and defendant's assignments of error to the evidence thus elicited are not sustained. We have consistently held that in actions of this kind the relationship of husband and wife does not render the testimony of one for the other incompetent under G.S. 8-51. *Burton v. Styers,* 210 N.C. 230, 186 S.E. 248; *Bank v. Atkinson,* 245 N.C. 563, 96 S.E. 2d 837.

[3] The "courts are not disposed to extend the disqualification of a witness under the statute to those not included in its express terms." *Sanderson v. Paul,* 235 N.C. 56, 59, 69 S.E. 2d 156, 158 (1952). When there is more than one defendant, testimony which is competent as to one party should not be excluded by virtue of G.S. 8-51 because it is not competent against another party in the suit; the testimony should be limited by proper instructions. *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 847 (1959).

[4] Defendants' remaining assignment of error relates to the granting of plaintiff's motion for a directed verdict as to defendants' counterclaims on the ground that defendants failed to show sufficient evidence of actionable negligence on the part of decedent. In allowing the motion, the court did not consider the excluded testimony hereinbefore referred to. Having held that the excluded evidence was admissible, we hold that it, together with other evidence presented, was sufficient to make out a case on defendants' counterclaims.

For the reasons stated, the portions of the judgment allowing plaintiff's motion for directed verdicts and dismissing the counterclaims are

Reversed.

Judges MORRIS and PARKER concur.

JIMMY SIDES, EMPLOYEE, PLAINTIFF v. G. B. WEAVER & SONS ELEC. CO., INC., EMPLOYER AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7119IC487

(Filed 15 September 1971)

1. **Master and Servant § 77— workmen's compensation — additional compensation for change of condition — Form 28(b) — duty of carrier**

Industrial Commission Form 28(b) serves as explicit notice to the recipient of compensation benefits that if further benefits are claimed the Commission must be notified in writing within one year from the date of receipt of the recipient's last compensation check. The failure of the compensation carrier to furnish the recipient a copy of Form 28(b) with his last compensation check will estop the carrier from pleading the one year period as a bar to the recipient's claim for additional compensation on the ground of change of condition. G.S. 97-47; G.S. 97-80.

2. **Master and Servant § 77— workmen's compensation — finding that injured employee never received Form 28(b) from compensation carrier — sufficiency of evidence**

A finding by the Industrial Commission that the recipient of compensation benefits never received a copy of Form 28(b) with his final compensation payment is supported by the evidence adduced at the hearing on the recipient's claim, where (1) the recipient testified that he never received a copy of the form; (2) the employer's book-

keeper was unable to say with certainty that she mailed a copy of the form along with the recipient's final compensation check; and (3) the compensation carrier contended that a second copy of Form 28(b) was mailed to the recipient but it could offer no evidence to support the contention.

3. Master and Servant § 73— workmen's compensation — industrial blindness

A conclusion by the Industrial Commission that there was a causal relation between an employee's accident and his loss of vision in the right eye and that the employee was industrially blind in the right eye, *held* supported by the findings of fact and the evidence, which included the opinion testimony of the employee's doctor that the employee's loss of vision was probably caused by his accident, and which also included a finding that the extent of the employee's vision in the right eye was the ability to count fingers at three feet. G.S. 97-31(19).

APPEAL by defendants from order of North Carolina Industrial Commission filed 9 March 1971.

On 23 May 1967 plaintiff sustained an injury to his right eye in an accident arising out of and in the course of his employment. His physician was of the opinion he had sustained no permanent partial disability and certified him as able to return to work on 14 June 1967. Defendants accepted liability and in a check, dated 21 June 1967, paid plaintiff temporary total disability benefits in the sum of $28.80. Industrial Commission Form 21 (agreement for compensation for disability), dated 21 June 1967, was executed by the parties and thereafter filed with and approved by the Industrial Commission. No further compensation has been paid.

On 6 March 1969 plaintiff notified the Commission that he was claiming additional compensation because of a change in condition. A hearing was held 13 August 1969 before Deputy Commissioner Dandelake. Mr. Dandelake concluded that no request for a hearing was made within twelve months after the last payment of compensation as required by G.S. 97-47 and issued an order denying the claim. Upon review the Full Commission set aside the order, finding it incomplete because it contained no findings of fact as to whether Industrial Commission Form 28(b) had been furnished to plaintiff or received by him.

A second hearing was held before Deputy Commissioner Leake. In an order filed 7 October 1970, Mr. Leake held that

defendants had failed to furnish plaintiff with Form 28(b), as required by the rules of the Commission, and were therefore estopped from pleading the limitations of G.S. 97-47 in bar of plaintiff's claim. Mr. Leake further found that plaintiff has lost 85% of his vision in his right eye as a result of the injury he sustained 23 May 1967, and that this loss of vision can probably be reduced by a penetrating corneal transplant. Plaintiff was ordered to submit to a corneal transplant at the expense of defendants. The matters of permanent loss of vision and temporary total disability were left open.

Defendants appealed to the Full Commission which made a minor modification in one of the findings contained in the order and adopted the order as modified as its own. (The modification is not pertinent here.) Defendants appealed to this Court.

Johnson, Davis & Horton by Clarence E. Horton, Jr., for plaintiff appellee.

Williams, Willeford & Boger by John Hugh Williams for defendant appellants.

GRAHAM, Judge.

This appeal raises two questions: (1) Is the Commission's finding that no Form 28(b) was ever delivered to or mailed to plaintiff as required by the Commission's rule XI(5) supported by the evidence? (2) Did the Commission fail to determine in its order whether there is a causal relation between the compensable injury of 23 May 1967 and plaintiff's present condition?

[1] Under G.S. 97-47, a claim for additional compensation is barred, if the request for compensation is not made within twelve months from the date of the last payment, unless the carrier is estopped to plead the lapse of time. *Watkins v. Motor Lines,* 279 N.C. 132, 181 S.E. 2d 588. Under the Commission's rule XI(5), promulgated pursuant to statutory authority contained in G.S. 97-80, defendants must execute Form 28(b) and furnish a copy to a claimant with his last compensation check. A failure to do so will estop defendants from pleading the lapse of time in bar of a claim asserted for additional compensation on the grounds of a change in condition. *White v. Boat Corporation,* 261 N.C. 495, 135 S.E. 2d 216. The importance of Form 28(b) with respect to starting the running of the statutory period under G.S. 97-47 is that this form serves as explicit

notice to a claimant that if further benefits are claimed the Commission must be notified in writing within one year from the date of receipt of claimant's last compensation check.

[2] Defendants do not dispute the fact that a failure to furnish plaintiff with a copy of Form 28(b) would estop them from pleading the limitation period of G.S. 97-47 as a bar to plaintiff's claim for additional compensation, but as indicated above, they do challenge the Commission's finding that a copy of Form 28(b) was not in fact furnished plaintiff or mailed to him.

The evidence discloses that a copy of Form 28(b), dated 21 June 1967, was mailed by the carrier to the defendant employer, along with plaintiff's only compensation check, a copy of Form 21, and a form letter of transmittal. The employer's bookkeeper wrote plaintiff on 27 June 1967:

> "We have a check for you in the amount of $28.80 from National Mutual Insurance Company. There are also papers for you to fill out.
>
> Please come by the office and pick up the check and complete the papers as soon as it's convenient. The insurance company would like to have these papers as soon as possible in order to file with the Industrial Commission."

Plaintiff thereafter went by the employer's office where he signed Form 21 and received from the bookkeeper his compensation check. He denied receiving a copy of Form 28(b) and the bookkeeper was unable to say definitely that she furnished one to him. She did state that she recalled that plaintiff came in, signed the Form 21, and "I gave him the check, and shortly thereafter he left." In reply to a specific question as to whether she remembered delivering a green form like the form referred to as 28(b), the bookkeeper stated: "I really—I couldn't swear I did. I'm not familiar with insurance forms. If they had been stapled, I'm sure I did. I'm not that familiar with the forms." She further testified: "I would not swear I did. If it was attached to the letter, I assume I did—I don't know whether it was or not. As to being sure if the form was given if attached, all of the forms were not given to him. I suppose he has a copy of what I witnessed. I don't know if I gave him one of which I witnessed. If there was that many of them I don't remember if I gave him a copy of Form 28(b)."

An inference arises from the bookkeeper's testimony that she was unfamiliar with Workmen's Compensation claims and the requirement that certain copies of forms be furnished a claimant. (Actually, she was first employed by defendant employer in June of 1967—the same month she delivered defendant his check and obtained his signature to Form 21.) Her letter to plaintiff indicated he was to pick up only his check—the only mention of other items concerned papers which were to be filled out and returned to the carrier.

The bookkeeper's uncertainty as to whether she delivered the required Form 28(b) to plaintiff and her obvious unfamiliarity with the insurance forms and her duties in connection therewith, when coupled with plaintiff's insistence that he never at any time received a copy of Form 28(b), supports the Commission's finding that no copy of Form 28(b) was furnished to plaintiff. Findings of fact by the Industrial Commission are binding on appeal where supported by any competent evidence. *Jackson v. Highway Commission,* 272 N.C. 697, 158 S.E. 2d 865.

Defendants insist that a second Form 28(b) was prepared on 6 October 1967, and that a copy thereof was mailed directly to plaintiff at his home address by the carrier sometime in October of 1967. It is noted that this would not be in compliance with the Commission's rule XI(5) which requires defendants to send a copy of the form to a claimant *with his last payment of compensation.* Moreover, the Commission rejected this contention by finding that no Form 28(b) was ever furnished to plaintiff *or mailed to him.* The evidence supports this finding. Plaintiff and his mother testified that no mail of any kind was ever delivered to their address from the defendant carrier. Also, the carrier's claim supervisor, who brought up the matter of the second Form 28(b), was unable to say definitely that a copy was mailed to plaintiff. He stated, "I don't know of my own knowledge that the second Form 28(b) in October was mailed." The supervisor further stated that his testimony was based purely on what the file showed. There was no testimony that there was any indication in the file that a copy of Form 28(b), dated 6 October 1967, was mailed to plaintiff. Both 28(b) forms contained in the carrier's file were offered into evidence. The one dated 21 June 1967 indicates a copy was prepared for plaintiff. ("C. C. Jimmy Sides" appears thereon.) No similar notation appears on the form dated 6 October 1967.

We turn now to the second question raised by this appeal.

[3] The Commission's findings relate the history of plaintiff's eye condition, beginning with the injury on 23 May 1967 which resulted in a diagnosis of herpes ulcer cornea, secondary to the injury. This condition cleared and when plaintiff was examined by his physician on 3 July 1967 the vision in his right eye had improved. No permanent disability was noted at that time, but it was noted that some scarring remained in the central cornea, indicating the dendritic figure had penetrated below the epithelium and had left the scar. Plaintiff was next seen by his physician on 23 April 1969. An examination on this occasion revealed that plaintiff's vision in the right eye was limited to hand motions at five feet and that he was unable to obtain visual fields. It is the physician's opinion that the herpes must have reoccurred; that it is not unusual for a person in plaintiff's condition to suffer with further episodes of the herpes disease, but is rather characteristic of the situation; and that, assuming the history given by plaintiff to be correct, the present condition was probably brought on by the initial injury. The Commission specifically found that the plaintiff is able to count fingers at three feet with the right eye and this is the extent of his vision. Further, that the plaintiff's loss of vision is more than 85 percentum and amounts to industrial blindness within the meaning of the Workmen's Compensation Act. (G.S. 97-31(19) provides that where there is 85 percentum, or more, loss of vision in any eye, it shall be deemed "industrial blindness" and compensated as for a total loss of vision of such eye.) These findings, which are supported by the evidence, support the Commission's conclusion that "[t]he plaintiff's loss of vision in the right eye is a result of the stipulated injury by accident to the right eye on May 23, 1967" and that "[t]he plaintiff at this time is industrially blind in the right eye."

It is our opinion that the findings and conclusions made by the Commission constitute a sufficient determination of all the crucial questions before it.

Affirmed.

Judges BROCK and VAUGHN concur.

HARVEY FRANKLIN ODELL v. FLONEY LIPSCOMB, JR., AND JONES MOTOR COMPANY, INC.

No. 7118SC545

(Filed 15 September 1971)

1. **Rules of Civil Procedure § 50— directed verdict entered by trial judge on his own motion**

The trial judge on his own motion may enter a directed verdict within ten days after the jury is discharged for failing to reach a verdict. G.S. 1A-1, Rule 50(b)(1).

2. **Rules of Civil Procedure § 50— motion for directed verdict — question presented**

The motion for a directed verdict presents a question of law for the court, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. G.S. 1A-1, Rule 50(a).

3. **Rules of Civil Procedure § 50— motion for directed verdict — failure of jury to reach verdict**

In ruling upon the motion for a directed verdict, the court should give no consideration to the fact that the jury may have failed to reach a verdict, but should consider only the evidence in the case.

4. **Rules of Civil Procedure § 50— directed verdict — consideration of evidence**

In ruling on defendant's motion for directed verdict, the evidence is considered in the light most favorable to the plaintiff, with all conflicts resolved in plaintiff's favor.

5. **Automobiles § 58— accident involving turning automobile — directed verdict — conflict in the evidence**

The trial court in an automobile accident case erred in entering a directed verdict in the defendant's favor, where plaintiff's and defendant's evidence conflicted as to whether plaintiff's vehicle was in the outside or inside lane of travel before plaintiff began a left turn in front of defendant's following vehicle, and where there was some evidence that defendant was exceeding the posted speed limit.

6. **Automobiles § 80— accident involving turning automobile — contributory negligence**

Plaintiff's testimony on cross-examination that he did not see the defendant's following vehicle before he attempted a left turn does not establish plaintiff's contributory negligence as a matter of law in failing to see that the turn could be made in safety, since the plaintiff also testified that, as he was going into the turn, he looked into his mirror and saw the defendant.

7. **Rules of Civil Procedure § 50— directed verdict — discrepancies in the evidence**

In ruling on a motion for a directed verdict, the court must resolve any discrepancies in the evidence in favor of the party against whom the motion is made.

Odell v. Lipscomb

APPEAL by plaintiff from *McConnell, Judge,* 22 March 1971 Civil Session of Superior Court held in GUILFORD County.

Civil action for damages arising from a collision between two tractor-trailers. The collision occurred on the afternoon of 25 November 1968 on U.S. Highway 29 at its intersection with Rural Paved Road 1144 in Guilford County, N. C. At that point U.S. Highway 29 is a four-lane paved highway with two lanes for northbound traffic and two lanes for southbound traffic, the northbound lanes being separated from the southbound lanes by a 30-foot wide grass median. R.P.R. 1144 is a paved road which intersects Highway 29 at a right angle and crosses over the median on a paved crossover. Both vehicles were traveling northward on Highway 29. Plaintiff was driver of the front vehicle. The individual defendant, Lipscomb, was owner and driver of the following vehicle, and was an employee of the corporate defendant, to which he leased his vehicle. The collision occurred as plaintiff was turning left from Highway 29 into the crossover of R.P.R. 1144.

Plaintiff contended the defendant driver was negligent in operating at a speed greater than reasonable and prudent under the circumstances, in failing to maintain a proper lookout and to keep his vehicle under proper control, in following too closely, and in other respects. Defendants denied negligence on the part of defendant driver and alleged that plaintiff was contributorily negligent in that he cut from the outside northbound lane across the inside northbound lane in front of defendant's tractor-trailer unit which was in the process of passing, that he turned his vehicle to the left from a direct line without first seeing that the movement could be made in safety in violation of G.S. 20-154, and in other respects. The individual defendant also filed a counterclaim against plaintiff to recover for damages to his vehicle.

At the close of plaintiff's evidence and at the close of all of the evidence, defendants moved for a directed verdict in their favor as to plaintiff's action against them on the grounds that there was insufficient evidence of actionable negligence on the part of defendants and on the grounds that the evidence established plaintiff's contributory negligence as a matter of law. At the close of all evidence plaintiff also moved for a directed verdict as to the counterclaim on the grounds that there was insufficient evidence as to actionable negligence on the part of

plaintiff and that the evidence established that defendant driver was contributorily negligent as a matter of law. All motions were overruled and the case was submitted to the jury on issues as to: (1) Actionable negligence of defendant driver; (2) contributory negligence of plaintiff; (3) damages for plaintiff; (4) actionable negligence of plaintiff as alleged in the counterclaim; and (5) damages for defendant driver. The jury failed to return a verdict and was discharged. Within ten days thereafter the court, on its own motion, entered an order reciting that "having further considered the motions of the parties, the evidence, the law involved in the case, and the failure of the jury to reach a verdict, and being of the opinion that the motions of the defendants and the plaintiff should have been granted and being of the opinion that the same should be granted at this time; Now, therefore, it is ordered that the defendants' motion for directed verdict against the plaintiff's action, and the plaintiff's motion for a directed verdict against the defendant Lipscomb's counterclaim, both of which motions were made at the conclusion of the evidence, be and the same are hereby granted." The court accordingly ordered plaintiff's action and defendant Lipscomb's counterclaim dismissed.

Plaintiff excepted to and appealed from so much of the order as allowed defendants' motion and dismissed plaintiff's action. Defendant Lipscomb did not appeal.

Jordan, Wright, Nichols, Caffrey & Hill, by Karl N. Hill, Jr., and Younce, Wall & Suggs, by Adam Younce and Wade C. Euliss for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter; and Richmond G. Bernhardt, Jr., for defendant appellees.

PARKER, Judge.

[1] The court discharged the jury when it failed to reach a verdict. Within ten days thereafter the trial judge on his own motion directed a verdict. This procedure was authorized by Rule 50(b)(1) of the Rules of Civil Procedure, which contains the following:

> "Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for

directed verdict made at the close of all the evidence that was denied or for any reason was not granted."

While the action of the trial judge in directing a verdict was procedurally permissible, the question remains whether it was proper in this case.

[2-4] The motion for a directed verdict under Rule 50(a) presents a question of law for the court, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396. In deciding this question, the court should give no consideration to the fact that the jury may have failed to reach a verdict, but should consider only the evidence in the case. In so doing, the court should consider all of the evidence in the light most favorable to the plaintiff, and may grant the motion only if the evidence when so considered is insufficient, as a matter of law, to justify a verdict for the plaintiff. *Kelly v. Harvester Co., supra.*

[5] In the present case there was a direct conflict in the evidence as to the location of plaintiff's vehicle on Highway 29 immediately before it started its turn. Defendants' evidence would show that plaintiff was driving in a northerly direction on Highway 29 in the outside, or right-hand, lane of travel for northbound traffic, and that he turned suddenly to his left and across the inside northbound lane directly in front of defendants' tractor-trailer. On the contrary, plaintiff's evidence would show that he was driving in the inside, or left-hand, northbound lane; that in apt time he turned on his left-hand turn signal and slowed to make a left turn into the crossover; and that as he was turning into the crossover, defendants' following vehicle struck him. While the physical evidence would tend to support defendants' version of what occurred, when all conflicts are resolved in plaintiff's favor and when the evidence is considered in the light most favorable to the plaintiff, as we are required to do when passing upon a ruling on a defendant's motion for a directed verdict, we are of the opinion that the evidence in this case was sufficient to entitle the plaintiff to have the jury pass on it.

There was some evidence that defendant driver was exceeding the posted speed limit. Furthermore, while the circumstances of each particular case govern the relative duties which

vehicle drivers owe one another when they are traveling along a highway in the same direction, "[o]rdinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout." *Clark v. Scheld,* 253 N.C. 732, 737, 117 S.E. 2d 838, 842. In our opinion the evidence in the present case was sufficient to support a jury verdict finding actionable negligence on the part of the defendant driver.

[6] We do not agree with defendants' contention that the directed verdict in their favor in plaintiff's action against them was required on the grounds that plaintiff's own evidence established his contributory negligence as a matter of law. In support of their contention, defendants point to plaintiff's testimony, given on cross-examination, that: "I did not actually see Mr. Lipscomb's truck before the accident occurred," and "[b]efore I started making a turn to the left the last time I recall looking in the mirror was somewhere around coming through the bridge, coming through the Deep River Bridge, and that was 3 to 4 or 500 feet roughly, I would say." (The investigating highway patrolman had previously testified that the intersection where the collision occurred was approximately 350 feet from the north end of the bridge.) Defendants contend this testimony of the plaintiff established that he was negligent in turning his vehicle from a direct line of traffic without first seeing that the movement could be made in safety in violation of G.S. 20-154, citing *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426, and *Lowe v. Futrell,* 271 N.C. 550, 157 S.E. 2d 92. However, plaintiff also testified: "I was looking into my mirror as I was going into my left turn and that is when I spotted Mr. Lipscomb. I had looked into the mirror before I came to the bridge, at the time when I was coming through the bridge, and, of course, I was looking in it when I went into the turn. I was looking in it when I was going into my turn. My tractor was 3 to 4 feet off of Highway 29 and into the crossover, that was when I spotted Mr. Lipscomb."

[7] In ruling on a motion for directed verdict the court must resolve any discrepancies in the evidence in favor of the party against whom the motion is made and must give that party the benefit of every legitimate inference which may be reasonably drawn from the evidence. When this is done in the pres-

ent case, while the evidence would support a finding that plaintiff was negligent in turning his vehicle without first seeing that the movement could be made in safety, in our opinion it does not compel that conclusion as a matter of law. The decisions cited by defendants are factually distinguishable. Plaintiff's case was for the jury, and the judgment appealed from, insofar as it directs a verdict in defendants' favor, is

Reversed.

Judges BRITT and MORRIS concur.

LOUIE DEAN STEPHENS; JOHN F. STEPHENS, JR., AND WIFE, ANNE J. STEPHENS; SARA ANN STEPHENS (SINGLE); BESSIE STEPHENS WAGSTAFF (WIDOW); MABEL S. LONG (WIDOW); WILLIAM P. STEPHENS AND WIFE, HILDA S. STEPHENS; NORMAN B. STEPHENS AND WIFE, EVELYN STEPHENS; JAMES A. STEPHENS AND WIFE, SARAH P. STEPHENS; BERKLEY M. STEPHENS AND WIFE, CECIL B. STEPHENS; AND HARRIETT S. JOHNSTON AND HUSBAND, R. M. JOHNSTON, AND ALL OTHER HEIRS KNOWN OR UNKNOWN OF VIDA TIMBERLAKE v. NORTH CAROLINA NATIONAL BANK, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JOHN ANDERSON TIMBERLAKE, DECEASED, AND JAMES M. LONG, VAN BARKER AND JOHN POOLE, TRUSTEES OF SEMORA (UNITED) METHODIST CHURCH; AND KENNETH GARRETT, C. C. ANDREWS, A. F. HICKS, SR., NATHAN HICKS, HAROLD T. BROOKS, AND J. C. WOODY, TRUSTEES OF HELENA METHODIST CHURCH

No. 7118SC561

(Filed 15 September 1971)

1. **Wills § 28— interpretation of will — intent of testator**

The intent of the testator remains the guiding star in the interpretation of a will.

2. **Wills § 32— devise by implication**

A bequest or devise may be made by implication, but the implication cannot rest on conjecture.

3. **Wills § 31— testator's mistaken belief concerning homeplace — devise by implication**

An article in testator's will which mistakenly asserted that the homeplace would go to his wife as the surviving tenant by the entirety, when in fact the record title to the homeplace was in the testator alone, was merely a declaration of the testator's belief that he and his wife owned the homeplace as tenants by the entirety and, in the absence

of any dispositive language in the will with respect to the homeplace, did not constitute a devise by implication to the wife; consequently, the homeplace passed to the testator's trustee under the residuary clause.

APPEAL by plaintiffs from *Olive, Emergency Judge,* 7 June 1971 Civil Session, Superior Court, GUILFORD County.

This action was brought pursuant to the provisions of G.S. 1-253 through G.S. 1-267 seeking a judgment declaring the rights of the parties in certain funds resulting from the sale of real property situate in Greensboro. The dispute is between the heirs of Vida Timberlake and the trustee under the trust created by the will of John Anderson Timberlake, husband of Vida Timberlake, who predeceased her. Resolution of the dispute requires interpretation of the will of John Anderson Timberlake.

The parties waived a jury trial and agreed that the court might find the facts and render its judgment thereon. The parties stipulated to the facts which were included in the Order on Final Pre-Trial Conference, and the stipulation of facts and exhibits referred to in the stipulation were attached to the judgment and incorporated therein by reference.

From the stipulated facts, it appears that certain real property on Friendly Avenue in the City of Greensboro was conveyed to John Anderson Timberlake in 1944 and that fee simple title to the property remained vested in him until his death on 22 May 1967. Until his death, he and his wife occupied as their home the property on Friendly Avenue. John Timberlake died testate and left surviving him his wife, Vida Timberlake. Both his parents predeceased him, and he left no issue surviving. After his death, Vida Timberlake continued to occupy the property as her home, paying the costs of maintenance thereof. She died testate on 20 December 1968, leaving all of her property "To my beloved husband, Anderson Timberlake, or should he predecease me, then to my heirs-at-law and next of kin according to the laws of the State of North Carolina then in force." Pursuant to the provisions of her will, her heirs-at-law, plaintiffs herein, took possession of the homeplace and negotiated a contract for the sale of the property. A title examination by the purchaser revealed that record title to the property was vested solely in John Anderson Timberlake, and the prop-

erty was not owned by the Timberlakes as tenants by the entirety as had been assumed by both testators and the executors of both estates and the trustee under the will of John Anderson Timberlake. The executor and trustee under the will of John Anderson Timberlake and the heirs of Vida Timberlake entered into an agreement that the sale should be consummated and the proceeds held in trust pursuant to the agreement until a determination by the court could be had as to the rightful owners of the real property. Defendants contend that the property is a part of the residuary trust created by Article Fourth of the will of John Anderson Timberlake. Plaintiffs contend that the language of section 6 of Article Fourth: "Upon my death my wife, Vida Timberlake, will be the owner of my homeplace, which is now held as an estate by the entirety . . . " , is sufficient to constitute a devise of the property to Vida Timberlake by implication, or in the alternative, that John Anderson Timberlake died intestate as to this property.

By its answers to the issues, the court held that John Anderson Timberlake did not devise the property to his wife and that title thereto passes to the North Carolina National Bank as trustee under the provisions of Article Fourth of the will of John Anderson Timberlake. Plaintiffs appealed.

Alspaugh, Rivenbark & Lively, by James B. Rivenbark, for plaintiff appellants.

York, Boyd & Flynn, by A. W. Flynn, Jr., for defendant appellees.

MORRIS, Judge.

[1] The intent of the testator remains the guiding star in the interpretation of a will. Justice Rodman, in *In re Will of Wilson,* 260 N.C. 482, 484, 133 S.E. 2d 189, 190 (1963), reiterated this basic rule:

> "As said by Sharp, J., in *Trust Co. v. Bryant,* 258 N.C. 482, 128 S.E. 2d 758: 'The basic rule of construction, and the refrain of every opinion which seeks to comprehend a testamentary plan is that "[t]he intent of the testator is the polar star that must guide the courts in the interpretation of a will " ' Moore, J., said in *Poindexter v. Trust Co.,* 258 N.C. 371, 128 S.E. 2d 167: 'The intent of the testatrix

is her will and must be carried out unless some rule of law forbids it.' "

[2] It is also a general rule of construction that a bequest or devise may be made by implication. 57 Am. Jur., Wills § 1192 (1948). This implication of a devise or bequest cannot, however, rest on conjecture. "[T]o raise such implication it must be necessary to do so in order to carry out a manifest and plain intent of the testator which would fail unless the implication is allowed." 57 Am. Jur., Wills § 1192, at 782 (1948); 4 Bowe-Parker: Page on Wills, § 3018 (3d ed. 1961).

> " '[T]he doctrine of devise or bequest by implication is well established in our law.' *Finch v. Honeycutt,* 246 N.C. 91, 98, 97 S.E. 2d 478, 484. The law, however, does not favor either, and dispositive words will be interpolated 'only when it cogently appears to be the intention of the will. (Cites omitted.) Probability must be so strong that a contrary intention "cannot reasonably be supposed to exist in a testator's mind," *and cannot be indulged merely to avoid intestacy.*' (Emphasis added.) *Burney v. Holloway,* 225 N.C. 633, 637, 36 S.E. 2d 5, 8; 57 Am. Jur., Wills § 1153 (1948)." *Ravenel v. Shipman,* 271 N.C. 193, 196, 155 S.E. 2d 484, 486 (1967).

[3] The will of John Anderson Timberlake first provided for the payment of debts. The next article directed the executors to pay estate and inheritance taxes from the principal of his estate except that his sister and brother should pay the taxes on the property received by them. By Article Three, testator devises to his sister and brother, or the survivor of them, certain real estate previously owned by his father and certain real estate previously owned by his mother, stating: "I am leaving my interest in the above described property to my sister and brother because it is my desire that said property remain in the Timberlake family and because *I am hereinafter leaving all the rest and residue of my property in trust for the benefit, use and support of my beloved wife, Vida Timberlake.*" (Emphasis supplied.) Article Fourth provides: "I hereby give, devise and bequeath all the residue and remainder of my property and worldly possessions of whatsoever nature and wheresoever situated, both real and personal of which I shall be seized or possessed, or to which I shall in any way be entitled at my

death, to North Carolina National Bank of Greensboro, North Carolina, in trust . . . " Article Fourth, by its separate sections, proceeds to set out the duties and powers and authorities of the trustee and provides for the ultimate disposition of the trust estate. In section 6 of Article Fourth, we find the following language: "Upon my death my wife, Vida Timberlake, will be the owner of my homeplace, which is now held as an estate by the entirety, and she will have an income from the insurance upon my life, and such amounts as may be payable under Social Security." The trustee was directed to use the income from the trust and the principal, if necessary, to supplement his wife's income from these sources to the extent necessary to provide for her support and care and the maintenance of the homeplace. Section 7 of Article Fourth reiterated these directions and added, "and if practical, I would like for her present home to be maintained and to keep Miss Lilly Gates and Miss Lessie Dell Holman to look after my wife, since she loves them both and they have done such a splendid job looking after her for so many years." The fifth and last item of the will appointed executors.

Plaintiffs and defendants agree that this case is controlled by *Efird v. Efird,* 234 N.C. 607, 68 S.E. 2d 279 (1951). Plaintiffs contend that *Efird* requires the application of the devise by implication rule to the will of John Anderson Timberlake. Defendants, on the other hand, contend that testator's language in section 6 of Article Fourth is merely a declaration of testator showing that he believed that at his death his wife would own the homeplace by operation of law. Such a declaration, nothing else appearing, is not a gift or devise by implication. 4 Bowe-Parker: Page on Wills, § 30.18 (3rd ed. 1961), and cases there cited; *Efird v. Efird, supra.* We agree with defendants.

In *Efird* testator stated in Item III "Upon my death, if my wife, Maude Gray Efird, be living, she will automatically own our homeplace located at 224 Hermitage Road, Charlotte, North Carolina, and any other real estate that she and I may own as tenants by the entirety." Testator in the same item specifically gave to her any automobiles owned by him and his interest in the furniture and other tangible personal property contained in the residence. By Item IV he provided that after the personalty bequeathed to her by Item III had been given to her and she had received the realty owned by them as tenants by the entirety

and after payment of debts but before payment of taxes his wife should have ⅓ interest in all of his estate. In Item V he directed the payment of death taxes, properly chargeable against his estate "after all my debts shall have been paid, *and after the above properties shall have been given to my wife.*" (Emphasis added.) The Supreme Court noted that the "above properties" necessarily include the homeplace and said:

> "We are not inadvertent to the rule, which the appellants contend is controlling here, to the effect that where 'a testator erroneously recites that he has made some disposition of property belonging to him by an instrument other than the will, it is held that such recital is merely an incorrect description of an instrument extrinsic to the will and may not operate as a gift by implication.' 57 Am. Jur., Wills, section 1193, page 784. We think this rule would be applicable in the instant case if the plaintiff had to rely exclusively on the provisions of Items III and IV of the will. In these items, the testator does not refer to the real estate held by the entireties as a gift or devise, but merely as passing to his wife, but in Item V of the will he said: 'after the above properties shall have been given to my wife,' the various taxes, properly chargeable against the estate should be paid, and the remainder of his estate divided among his four children named therein.
>
> A careful consideration of the entire will leads us to the conclusion that in using the language contained in Item V of the will, the testator intended to give whatever interest he might have in the properties referred to in Items III and IV of his will, to his wife, and that such intention should be made effective."

We find no such intention in the Timberlake will. On the contrary, it appears abundantly clear that the intention of John Anderson Timberlake was to give *all* of his estate, except the lands given to his sister and brother, to a trustee for the sole purpose of caring for his wife and maintaining the homeplace, keeping employed the people who had looked after his invalid wife for some time. It is obvious that he was mistaken as to the true ownership of the homeplace and that he was under the impression that it would go to his wife by operation of law, and therefore, could not be by him included in his residuary estate to go to his trustee. It seems equally obvious that had he

realized the title to the property was vested in him, it would have been included in his residuary estate. He did expressly provide that his trustee should, if practical, maintain his wife's present home and also provided for the expenditure of funds for the "maintenance of the homeplace." Nowhere in the will is there the use of a dispositive word with respect to the homeplace. Throughout the will, the testator expresses his mistaken belief that the homeplace was owned by him and his wife as tenants by the entirety. A careful consideration of the entire will leads us to the conclusion that by using the language contained in Article Fourth of the will, testator did not intend to give whatever interest in the homeplace he had to his wife but that the language used was merely declaratory of his belief that the property was owned by them as tenants by the entirety and would, necessarily, pass to her by operation of law.

For the reasons stated herein, we hold that the court correctly found that testator did not devise the property in question to his wife and did not die intestate with respect thereto but that the property passed to the trustee to be administered under the provisions of Article Fourth of the will.

Affirmed.

Judges BRITT and PARKER concur.

GLADYS W. DUKE v. EDWARD S. MEISKY AND WELLS FARGO ARMORED SERVICE CORPORATION

No. 7118SC575

(Filed 15 September 1971)

1. **Appeal and Error § 24— assignment presenting different questions of law**

The grouping under a single assignment of error of a number of exceptions which raise distinct and different questions of law relating to the admission or exclusion of evidence does not conform with Court of Appeals Rule 19(c).

2. **Evidence § 50— medical opinion testimony**

The trial court did not err in permitting an expert in general surgery to testify, in response to a hypothetical question, that in his opinion there was a probability that the blows which plaintiff received in the accident in question "could cause a growth to enlarge and spread."

3. Rules of Civil Procedure §§ 41, 50— motion for directed verdict — motion to dismiss

In a jury trial, the appropriate motion by which a defendant tests the sufficiency of plaintiff's evidence to permit a recovery is the motion for a directed verdict under G.S. 1A-1, Rule 50(a); the motion for dismissal under G.S. 1A-1, Rule 41(b) performs a similar function in a nonjury trial.

4. Rules of Civil Procedure § 7— statement of rule number in motions

All motions must state the rule number or numbers under which the movant is proceeding. Rule 6, General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure.

5. Automobiles § 40— pedestrian's right-of-way

Where a pedestrian and a turning motorist are both proceeding at an intersection under favorable signal lights, the right of the pedestrian to proceed is superior to that of the turning motorist.

6. Automobiles § 62— striking pedestrian at intersection — sufficiency of evidence of negligence

In this action for injuries received when plaintiff pedestrian was struck by defendants' left-turning vehicle at an intersection while both plaintiff and defendant driver were proceeding under favorable signal lights, defendants' motion for directed verdict was properly denied where there was ample evidence from which the jury could find that plaintiff was within a marked crosswalk when struck, and that defendant driver failed to keep a proper lookout and to yield the right-of-way, and the evidence does not disclose that plaintiff was contributorily negligent as a matter of law.

APPEAL by defendants from *Kivett, Judge,* 12 April 1971 Civil Session of Superior Court held in GUILFORD County, Greensboro Division.

Civil action to recover damages for personal injuries sustained when plaintiff, a pedestrian, was struck by an armored truck owned by the corporate defendant and operated by its employee, the individual defendant, while acting in the course and scope of his employment. The accident occurred shortly after 9:00 a.m. on 24 September 1968 at the intersection of East Market and Davie Streets in the City of Greensboro. At that point East Market Street runs east-west, and Davie Street north-south. Vehicular traffic at the intersection was controlled by electric signal lights. A marked crosswalk for pedestrians extended across Davie Street from the northwest to the northeast corner of the intersection. There was an electric "WALK" and "DON'T WALK" signal at the northeast corner facing pedestrians walk-

ing eastward in the crosswalk. All signal lights were functioning properly.

Defendants' truck, proceeding eastward on East Market Street, entered the intersection facing a favorable green light and turned left across the crosswalk in order to proceed north on Davie Street. In so doing it struck plaintiff, who was walking eastward across Davie Street while facing a favorable "WALK" sign. Plaintiff alleged that she was walking within the marked crosswalk and was struck when she had reached a point approximately midway between the northwest and northeast corners of the intersection. She alleged that defendant driver was negligent in failing to maintain a proper lookout, in failing to yield the right-of-way to plaintiff in violation of G.S. 20-155(c) and of Section 12-31 of the Greensboro Code of Ordinances, in failing to exercise due care to avoid striking the plaintiff and to give warning by sounding the horn in violation of G.S. 20-174(e), and in other respects. Defendants denied negligence on the part of defendant driver, denied that plaintiff was walking within the marked crosswalk, alleged that plaintiff was struck at a point approximately ten feet north of the north line of the marked crosswalk, and pleaded that plaintiff was contributorily negligent in jaywalking directly into the path of defendants' truck, in failing to keep a proper lookout, and in failing to yield the right-of-way in violation of G.S. 20-174(a) and (c).

At the close of plaintiff's evidence, defendants moved to dismiss on the grounds that plaintiff had failed to establish negligence on the part of defendants and that plaintiff's own testimony established her contributory negligence as a matter of law. The motion was overruled. Defendants did not offer any evidence, renewed their motion to dismiss, and asked for a directed verdict in their favor. Defendants' motion was overruled, and the case was submitted to the jury which answered issues of negligence and contributory negligence in plaintiff's favor and awarded plaintiff damages in the amount of $53,000.00. From judgment on the verdict, defendants appealed.

Jordan, Wright, Nichols, Caffrey & Hill by Luke Wright; and Smith & Patterson by Norman B. Smith for plaintiff appellee.

Sapp & Sapp by Armistead W. Sapp, Jr., for defendant appellants.

PARKER, Judge.

[1] In the record on appeal appellants have grouped three exceptions under the heading "Assignment of Error No. 1," twenty-six exceptions under the heading "Assignment of Error No. 2," and nine exceptions under the heading "Assignment of Error No. 3." While all of these relate to rulings admitting or excluding evidence, in the case of each grouping several distinct and different questions of law are presented. This method of grouping exceptions does not conform with the Rules of Practice in this Court. Rule 19(c) provides that all exceptions relied on shall be grouped and separately numbered. In interpreting its cognate rule, our Supreme Court has held that "[t]his grouping of the exceptions assigned as error (sometimes for brevity also called 'assignments of error') should bring together all of the exceptions which present a single question of law." *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912. "An assignment of error must present a single question of law for consideration by the court." *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. The purpose of this requirement is to bring into focus the several distinct questions of law which the appellant wishes the appellate court to consider. That purpose is defeated when, as here, appellant jumbles together in the same assignment of error a number of exceptions which undertake to raise quite distinct and different questions of law. It is not enough that all exceptions grouped under a single assignment may present questions in the field of the law of evidence; that field is far too broad to serve as an adequate focusing device for present purposes, as anyone who has glanced at Wigmore can attest.

[2] While appellants' failure to comply with the Rules has made our task more difficult, we have nevertheless carefully considered all of the separate questions raised by the exceptions which appellants have lumped together under each of the headings "Assignment of Error No. 1," "Assignment of Error No. 2," and "Assignment of Error No. 3," and find no prejudicial error. Plaintiff testified that for several years prior to the accident she had had a small lump on her chest and that a few weeks "or maybe a month" after being struck "it started paining me terrifically because it was bruised black," and that "it stayed like that until sometime in December and it started growing like wildfire." Plaintiff's physician, Dr. Lyday, testified from an

examination which he made of the plaintiff within two weeks prior to the trial that in such examination he found on plaintiff's breast a "large, bulging tumor mass," "the size at least of a pear," which he diagnosed as cancerous. In response to a hypothetical question, Dr. Lyday testified that in his opinion there was a probability that the blows which plaintiff received in the accident "could cause a growth to enlarge and spread." We find no error in admitting this testimony. Defendants' counsel had stipulated the doctor was an expert physician specializing in the field of general surgery. The hypothetical question called for the doctor's opinion as to whether the growth on plaintiff's body "could or might to a reasonable degree of medical probability have been activated by the blows and bruises" received by plaintiff in the accident. The hypothetical question was in a form which has been approved by our Supreme Court, Stansbury, N. C. Evidence 2d, § 137, and there was evidence from which the jury could find the facts to be as stated in the question. On cross-examination by defendants' counsel, the doctor testified that during the two months he had attended plaintiff while she was in the hospital immediately following the accident, he had not himself observed any bruises on her body in the area of the lump on her chest. This would not, however, preclude the jury from finding that such bruises in fact existed, since plaintiff had so testified. There was, therefore, sufficient evidence to support the jury's finding the facts to be as stated in the hypothetical question. In overruling defendants' objection to the hypothetical question and their motion to strike the doctor's answer, we find no error. We have also carefully considered and find no prejudicial error in the other rulings on evidence as to which appellants complain and which are the subject of the numerous exceptions grouped in their first three assignments of error.

[3, 4] In Assignment of Error No. 4 appellants contend that "[t]he Court erred in not granting defendants' motions for involuntary dismissal of this action at the close of plaintiff's evidence and at the close of all the evidence." Where, as here, a case is tried before a jury, the appropriate motion by which a defendant tests the sufficiency of plaintiff's evidence to permit a recovery is the motion for a directed verdict under Rule 50(a) of the Rules of Civil Procedure. The motion for involuntary dismissal, made under Rule 41(b), performs

a similar function in an action tried by the court without a jury. Effective 1 July 1970 our Supreme Court adopted, pursuant to G.S. 7A-34, "General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure." Rule 6 of these Rules contains the following:

> "All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding."

It does not appear from the record before us that defendants complied with Rule 6. It does appear that, at least when their motion was first made at the close of plaintiff's evidence, they misnamed their motion as a motion to dismiss rather than as a motion for a directed verdict. In phrasing their Assignment of Error No. 4, appellants have continued the misnomer. While such imprecision is not to be encouraged, it would appear that the trial judge considered defendants' motions as having been correctly made under Rule 50(a), and we shall do likewise.

[5, 6] There was no error in overruling defendants' motions. Contrary to appellants' contentions, there was ample evidence from which the jury could find that plaintiff was within the marked crosswalk when defendants' truck first hit her. She testified that she walked on the sidewalk on Market Street to the corner, that the sign said "WALK," and that she walked "straight on down." After the accident her body was found lying two or three feet in front of defendants' truck at a point north of the crosswalk, but the rear of the truck was still partially in the crosswalk and one of plaintiff's shoes was found exactly on the northernmost crosswalk line underneath the rear of the truck. The investigating officer testified that defendant driver stated he didn't see the plaintiff and didn't know whether she was in the crosswalk or not. While both the plaintiff and the truck were proceeding under favorable signal lights, this Court has held that under similar circumstances the right of the pedestrian to proceed is superior to that of the turning motorist. *Wagoner v. Butcher,* 6 N.C. App. 221, 170 S.E. 2d 151; *Pompey v. Hyder,* 9 N.C. App. 30, 175 S.E. 2d 319; See: Annotation, 2 A.L.R. 3d 155, at page 182. Viewing all the evidence in the light most favorable to the plaintiff, there was ample evidence from which the jury could find that defendant driver was negligent in failing to keep a proper lookout and in failing to yield the right-of-way.

The issue of contributory negligence was properly submitted to the jury. Certainly nothing in the evidence would compel the conclusion that plaintiff was contributorily negligent as a matter of law.

We have carefully examined all of appellants' remaining exceptions and in the trial and judgment appealed from find

No error.

Judges BRITT and MORRIS concur.

SOUTHWIRE COMPANY v. LONG MANUFACTURING COMPANY AND TOMMY RAY EUBANKS

— AND —

CHARLES RAY POPE v. LONG MANUFACTURING COMPANY AND TOMMY RAY EUBANKS

No. 7118SC599

(Filed 15 September 1971)

1. **Pleadings § 32; Rules of Civil Procedure § 15— amendment of answer**

The trial court did not err in allowing defendants to amend their answer to elaborate further on their defense of contributory negligence which had been pleaded in the original answer. G.S. 1A-1, Rule 15(a).

2. **Trial § 10— court's questioning of plaintiffs' witnesses — expression of opinion**

In this action arising out of a collision between two tractor-trailers, the trial judge went beyond the clarification stage in his questioning of plaintiffs' witnesses and committed prejudicial error entitling plaintiffs to a new trial.

APPEAL by plaintiffs from *Armstrong, Judge,* 17 May 1971 Session of Superior Court held in Greensboro Division, GUILFORD County.

The two cases were consolidated for trial without objection. Plaintiffs seek to recover damages proximately caused by the actionable negligence of the defendants when a tractor-trailer unit owned by Long Manufacturing Company (Long) and operated by its employee, Tommy Ray Eubanks (Eubanks), collided with a tractor-trailer unit owned by Southwire Company (Southwire) and operated by its employee, Charles Ray Pope

(Pope). It was stipulated by the parties that Eubanks and Pope were the agents of their respective employers and were acting in the course and scope of their employment. Southwire seeks $6,764.60 for damages to its tractor and other alleged expenses, and Pope seeks $25,000.00 for personal injuries.

Both plaintiffs alleged in their complaints filed 1 February 1968 that Eubanks was negligent, in that (1) he violated the first two sections of the reckless driving statute, G.S. 20-140; (2) he drove faster than was reasonable and prudent and failed to reduce his speed as he approached an area of special hazard, in violation of G.S. 20-141(a) and (c); (3) he turned from a direct line without first seeing that such movement could be made in safety and without giving a signal of his intention to do so, in violation of G.S. 20-154; and (4) he failed to keep a proper lookout and maintain control of his vehicle.

The defendants filed an answer on 29 March 1968 in which they denied the material allegations of the complaint and alleged that the collision was caused solely by the negligence of Pope, in that (1) he violated the first two sections of the reckless driving statute, G.S. 20-140; (2) he drove faster than was reasonable and prudent, in violation of G.S. 20-141(a); (3) he followed the vehicle operated by Eubanks more closely than was reasonable and prudent, in violation of G.S. 20-152(a); and (4) he operated a motor truck and followed the vehicle operated by Eubanks within three hundred feet while traveling upon a highway outside a business or residence district, in violation of G.S. 20-152(b).

On 8 September 1970 Judge McConnell, upon motion of the plaintiffs, entered an order, the pertinent parts of which are as follows:

> " * * * (F)or good cause shown, and pursuant to Rule 15(a) of the Rules of Civil Procedure, it is,
>
> Ordered, that the answer heretofore filed by the defendant be and is hereby amended by adding a paragraph thereto, at the end of paragraph III of the Further Answer and Defense, in words and figures as follows:
>
> IV. 'If the defendants, or either of them, were in any manner negligent in respect of the collision specified by the plaintiff, which is expressly denied, the negligence of the

plaintiff as set forth in paragraph III above, constituted contributory negligence on its part, and such contributory negligence is pleaded as a bar to any recovery by the plaintiff herein.' "

At the close of the plaintiffs' evidence, the court allowed defendants' motion for a directed verdict. Plaintiffs appealed.

Sapp & Sapp by W. Samuel Shaffer II for plaintiff appellants.

J. B. Winecoff and Harry Rockwell for defendant appellees.

MALLARD, Chief Judge.

[1] The first question presented by appellants is whether "the court committed error in granting the order allowing the defendants to amend their answer." In the original pleadings filed in this case, the defendants had alleged "that the negligence and recklessness of Charles R. Pope are specifically pleaded in bar of any recovery herein by the plaintiff." G.S. 1A-1, Rule 15(a), permits, among other things, a party to amend his pleading by leave of the court and provides that "leave shall be freely given when justice so requires." This rule also provides that a party shall plead in response to an amended pleading within thirty days unless the court orders otherwise. The amendment allowed was a further elaboration of what had already been pleaded. The plaintiffs apparently were aware of the amendment on the date it was allowed, 8 September 1970, because their exception to the order was "noted" as of that date. The case was not tried until the 17 May 1971 Session. Plaintiffs had ample time to respond, if they desired, to the amended pleading. It was not error to allow the motion to amend.

[2] The plaintiffs contend that "the court committed error in its continuous interrogation of plaintiffs' witnesses." Plaintiffs argue in their brief that the judge, in questioning their witnesses, went far beyond the clarification stage and usurped the right of the attorney to systematically question his witnesses in an orderly manner.

The plaintiffs took several exceptions to the questioning of plaintiffs' witnesses by the trial judge throughout the presentation of their evidence. The following, which occurred

during the direct examination of the individual plaintiff, is illustrative of the interrogation assigned as error:

"A. As I came into the junction of I-85 and I-40, I proceeded around into this intersection here.

Q. Mr. Pope, could you please speak up. The jury can't hear you.

A. I proceeded into this intersection of I-40 and I-85.

Q. In what lane?

A. Lane 4. As I came around there, this red tractor and trailer came around me.

COURT: Who came around you?

WITNESS: A red tractor and trailer. I believe it was driven by Eubanks.

COURT: Eubanks came around you where?

WITNESS: In the curve at the junction of I-85 and I-40.

COURT: Came around you in what lane?

WITNESS: He was in lane 3. We proceeded into this junction of I-40 and I-85 and along this—between the junction and the bridge here, there came an opening.

COURT: Which bridge?

WITNESS: I believe it is 220 overpass.

COURT: The first one there?

WITNESS: Yes, sir.

COURT: What happened then?

WITNESS: I changed over into lane 3.

COURT: That is the lane that you say Eubanks was in, was it?

WITNESS: Yes sir, he was in lane 3.

COURT: Ahead of you or behind you?

WITNESS: Pardon?

COURT: Ahead of you or behind you?

WITNESS: Ahead of me. As we came under the junction of 220—

COURT: Wait a minute—go ahead, I thought you had already gotten by that.

WITNESS: No sir, I had just gotten to it. As we came under the junction of 220, Eubanks changed into lane 4. As we proceeded through U. S. 220 to the Elm Street cut-off, Eubanks continued down in lane 4 and myself in lane 3.

COURT: You were in 4 and Eubanks was in 3?

WITNESS: No sir, I was in 3 and Eubanks was in 4.

COURT: Eubanks was in 4?

WITNESS: Yes. As we came to this Elm Street bridge, you could see on either side of the Interstate Highway there that they had those barricades set up there. Traffic began to pile up, what you might say—

COURT: You could see the barricades where?

WITNESS: On the right and left side of the road.

COURT: All right, go ahead.

WITNESS: They also had two flagmen there, one on each side of the road. As we went under this bridge here, all at once Eubanks made a direct left turn into lane 3.

COURT: As he went under the Elm Street bridge?

WITNESS: Yes.

COURT: All right.

WITNESS: And he stopped abruptly. I didn't and that's the last thing I remember.

COURT: So you ran into him then, is that what you say?

WITNESS: I couldn't stop. There wasn't any way I could stop.

COURT: That isn't what I asked you, you had the collision?

WITNESS: Yes, sir.

COURT: Were you knocked unconscious or something?

WITNESS: I don't remember.

COURT: So that's all you remember, when you say he turned in front of you?

WITNESS: He made a left swerve into lane 3, and I tried to avoid hitting him and the rear of his truck.

MR. SHAFFER:

Q. Do you remember approximately what speed you were traveling at the time?

A. It was below the speed limit. I don't remember the exact speed.

COURT: If you know, what speed were you going?

WITNESS: Approximately 30 miles an hour.

MR. SHAFFER: I'm talking about the vicinity of the Elm Street bridge overpass.

COURT: You say you were going approximately 30 miles an hour—when?

MR. SHAFFER:

Q. At what time were you going approximately 30 miles an hour, for what period?

A. I would say between the 220 cutoff and Elm Street, because they had signs out there, 'men working ahead.'

COURT: You are mumbling. I can't hear you. You are not talking loud enough.

WITNESS: They had signs on the right side of the road, I believe, 'men working' and the way the traffic was to go and all.

COURT: I just asked you what speed you were going, if you knew, and when it was you are talking about that you were going 30 miles an hour?

WITNESS: Between 220 and—

COURT: Between the two bridges?

WITNESS: Yes sir.

COURT: Did you continue that speed until the collision, or what?

WITNESS: The traffic was still moving until he made that sudden turn into my lane and stopped all at once.

COURT: Were all the lanes blocked except 3?

WITNESS: No, sir, there was one lane open.

COURT: That would be 3, wouldn't it?

WITNESS: Yes, sir.

COURT: And when did you first see the lanes—at what point were you on the highway?

WITNESS: Approximately Elm Street bridge, just before you go under.

COURT: You say they were blocked there?

WITNESS: Yes, sir.

COURT: Before you went under, you say just as you went under?

WITNESS: Just as you went under the bridge, you could tell they were blocked on both sides.

MR. SHAFFER:

Q. I hand you plaintiffs' Exhibit 5 and plaintiffs' Exhibit 6. They have already been introduced into evidence, and I ask you to identify the truck that you were driving.

A. This is the truck I was driving.

Q. This is plaintiffs' Exhibit 6?

A. Yes.

COURT: You have already got those in. What is it that you want to ask him about it?

MR. SHAFFER: I wanted to ask him which way he was turning.

MR. SHAFFER:

Q. Just describe the location of your truck in regard to the lanes of traffic.

A. I don't understand what you mean by that.

Q. Just describe where your truck is in regard to—

COURT: The jury can see that from the picture.

MR. SHAFFER: I will hand them to the jury then."

We hold that the able and experienced trial judge, in his questioning of the witnesses, went beyond the clarification stage and committed prejudicial error entitling plaintiffs to a new trial.

New trial.

Judges CAMPBELL and HEDRICK concur.

JILL ANN MILLER, BY HER GUARDIAN AD LITEM FRANK J. YEAGER v. ROBERT SNIPES AND WIFE, ANN SNIPES

No. 7121SC517

(Filed 15 September 1971)

1. **Animals § 2— injury inflicted by domestic animal — liability of owner — elements of proof**

To recover for injuries inflicted by a domestic animal, a plaintiff must allege and prove: (1) that the animal was dangerous, vicious, mischievous, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits.

2. **Animals § 2— injury inflicted by pony — six-year-old plaintiff — summary judgment**

In an action to recover for personal injuries sustained by a six-year-old plaintiff who was kicked in the face by defendants' pony, the trial court erred in entering summary judgment for the defendants, where the plaintiff presented affidavits tending to show that the pony was not well trained or broken; that it was frisky and unpredictable; that it had bitten people; that on several occasions it had broken through its pasture fence in order to get to mares; that the pony had thrown several riders; and that although the defendants knew or should have known of the pony's misbehavior they permitted the plaintiff, who was unfamiliar with ponies, to follow at the heels of the pony.

3. **Rules of Civil Procedure § 56— summary judgment — scrutiny of movant's supporting papers**

In ruling on a motion for summary judgment, the papers supporting the movant's position are to be closely scrutinized, while the opposing papers are to be indulgently treated.

4. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

The party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact.

5. **Animals § 2— injury inflicted by domestic animal — gravamen of the action for damages**

The gravamen of an action to recover for injuries inflicted by a domestic animal is not negligence but is the wrongful keeping of an animal with knowledge of its viciousness; the standard of a reasonable person must be applied in this action.

6. **Rules of Civil Procedure § 56— summary judgment — cautious observance of its requirements**

Summary judgment is a drastic remedy, and there must be a cautious observance of its requirements in order that no person might be deprived of a trial on a genuine disputed factual issue.

APPEAL by plaintiff from *Lupton, Judge,* 3 May 1971 Session of Superior Court held in FORSYTH County.

This civil action is to recover for personal injuries sustained by minor plaintiff, a six-year old child, when she was kicked in the face by defendant's pony. The incident occurred 26 October 1968 while the minor plaintiff and others were following the pony as it was being led by one of the defendants to defendants' yard where the children were to ride.

Summary judgment was entered for defendants and plaintiff appealed.

Nelson and Clayton by George E. Clayton, Jr., for plaintiff appellant.

Deal, Hutchins & Minor by William Kearns Davis for defendant appellees.

GRAHAM, Judge.

[1] To recover for injuries inflicted by a domestic animal, a plaintiff must allege and prove: (1) That the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits. *Swain v. Tillett,* 269 N.C. 46, 152 S.E. 2d 297; *Sellers v. Morris,* 233 N.C. 560, 64 S.E. 2d 662; *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1.

In support of their motion for summary judgment defendants offered evidence tending to show that before the incident complained of they considered the pony gentle in nature. He appeared nervous only when children would make loud noises around him. Defendants had never known the pony to kick, buck, rear up when being ridden, or throw anyone. The only complaint received from neighborhood children who rode the pony from time to time was with respect to "nuzzling," which Mr. Snipes described as "[m]ore or less of a pinch, I would say; never breaking the skin or bruising that I know of." On three occasions before the pony was gelded he broke through the fence and went to a mare in an adjoining pasture. After he was gelded, more than a year before the incident complained of, the pony did not break through the fence. There were occasions when the pony was difficult to harness and when it would not respond to commands. The pony had been ridden by defendants' eleven-year old son, and occasionally by their seven-year old son without incident. Defendants had thought it better to bring the pony from its pasture to the yard before permitting the children to ride, because the minor plaintiff and her mother had never "worked around a pony or had a pony."

[2] Plaintiff presented affidavits tending to show that the pony was not well trained or broken; that it was frisky and unpredictable; that it had been known to bite others; that on several occasions it had broken through its pasture fence in order to get to mares; and that on several occasions, the pony had thrown its rider.

[3, 4] The affidavits offered by plaintiff leave much to be desired with respect to clarity and specificity. However, in ruling on a motion for summary judgment, the papers supporting the movant's position are to be closely scrutinized, while the opposing papers are to be indulgently treated. *Underwater Storage, Inc. v. United States Rubber Co.*, 371 F. 2d 950 (D.C. Cir. 1966); 6 Moore's Federal Practice, § 56.15(3). Also, the party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact and any doubt as to whether such an issue exists must be resolved in the favor of the party opposing the motion. *National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F. 2d 647 (5th Cir. 1962). "A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right

is reviewable. . . . " *Doehler Metal Furniture Co., Inc. v. United States,* 149 F. 2d 130 (2d Cir. 1945).

[2] In light of plaintiff's showing that she is prepared to offer evidence that the pony had bitten people, thrown riders, broken through its pasture fence several times; and that it was unpredictable and not well trained, we are unable to conclude beyond doubt that no question exists as to whether the animal was in fact dangerous or mischievous as those terms are used in the law governing the ownership or keeping of domestic animals. Nor do we think that it has been sufficiently shown that no question exists as to whether defendants had knowledge of the animal's propensities. It is true that defendants deny any knowledge that the pony engaged in the acts described in plaintiff's affidavits. Also, there is no evidence to show that defendants were ever told of these acts or that they were present when any of the acts occurred. However, it is not mandatory that a plaintiff present evidence that the owner or keeper of a domestic animal had actual knowledge of the animal's vicious propensities. It is sufficient if it is shown that the owner *should have known* of such propensities. *Swain v. Tillett, supra.*

In applying a doctrine with respect to domestic animals similar to the doctrine prevailing in North Carolina, the West Virginia Supreme Court stated:

> "While the doctrine . . . is that notice or knowledge of the vicious propensities of an animal is an essential prerequisite in order to charge the owner, yet the true doctrine is that knowledge need not necessarily be actual, in the ordinary acceptation of the term. Either constructive or imputed notice is sufficient. If in the exercise of reasonable diligence and common prudence the owner ought to have known an animal owned or kept by him was dangerously inclined and likely would, if unrestrained, inflict injury upon the person or property of another, he is chargeable as if he had actual, direct, and positive notice of acts of viciousness committed by it." *Butts v. Houston,* 76 W.Va. 604, 86 S.E. 473.

If the plaintiff here can show at the trial that the pony repeatedly engaged in acts tending to indicate that if unrestrained it would likely inflict injuries on others, the jury might infer that defendants had reason to know that the pony

possessed these dangerous propensities. Defendants had owned and kept the pony for more than two years. They, and their family, had obviously had more contact with the pony than anyone else. Who would have been in a better position than defendants to know of their animal's general nature and propensities? See *Humes v. Salerno,* 351 S.W. 2d 749 (Mo. 1961).

[5] It should be noted that summary judgment is not usually feasible in negligence cases where the standard of the prudent man must be applied. *Robinson v. McMahan,* 11 N.C. App. 275, 181 S.E. 2d 147. The gravamen of an action of this sort is not negligence but the wrongful keeping of an animal with knowledge of its viciousness. *Swain v. Tillett, supra.* Nevertheless, the application of standards relating to viciousness and scienter are just as subjective and as difficult to determine as a matter of law as is the standard of the prudent man. Moreover, although this type of action may not technically be classed as a negligence action, the standard of a reasonable person must still be applied. This is illustrated by the following statement which we find in the case of *Sink v. Moore,* 267 N.C. 344, 350, 148 S.E. 2d 265, 270:

> "The test of the liability of the owner of the dog is, therefore, not the motive of the dog but whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result. That is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog. The size, nature and habits of the dog, known to the owner, are all circumstances to be taken into account in determining whether the owner was negligent."

This same test is applicable with respect to defendants' liability here. The evidence presented at the summary judgment stage tends to show that the male defendant permitted the six-year old minor plaintiff, whom he knew to be unfamiliar with ponies, to follow at the heels of a pony which plaintiff is prepared to show was not well trained or broken and was unpredictable. If defendants should have known from the pony's past conduct that it was likely, if not restrained, to engage in an act from which a reasonable person, in their position, could foresee that an injury would be likely to result, it was their

duty to restrain the pony in a manner sufficient to preclude such an occurrence.

Defendants call attention to the case of *Patterson v. Reid, supra.* In that case defendants presented evidence in support of their motion for summary judgment which clearly showed that they were neither the owners nor the keepers of the horse involved at the time it allegedly injured plaintiff. Plaintiff was unable to present any affidavits or other evidence tending to show the contrary. This Court held that since it had been shown that no genuine issue of fact existed with respect to this essential element of plaintiff's case, defendants' motion for summary judgment should have been allowed. The opinion continued, however, with the following language, which is relied upon by defendants here:

> " . . . furthermore, even if a liberal construction of plaintiff's affidavits show that she can produce some competent evidence from which a jury might permissibly find that the horse here involved was a vicious animal, they completely fail to disclose that she has any competent evidence to show that defendants either knew or had any reasonable cause to know of any such vicious propensities."

The observation quoted above was unnecessary for a decision in the case and may therefore be considered dicta. Furthermore, it was undisputed that defendants' only contact with the horse involved there was that of permitting it to be pastured in their pasture and occasionally furnishing a saddle for riders. Such casual contact with an animal could hardly be compared to that of defendants here who had owned, kept and worked with the pony for a period of more than two years before the incident complained of and consequently could be found to have had constructive knowledge of its propensities.

[6] Summary judgment is a drastic remedy and there must be a cautious observance of its requirements in order that no person might be deprived of a trial on a genuine disputed factual issue. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823. Whether the motion was properly allowed here is a close question. However, we are of the opinion that when the evidence is taken in the light most favorable to the plaintiff, it cannot be said that the essential questions raised by the pleadings have

been laid to rest and are now beyond dispute. We therefore hold that summary judgment was improperly entered.

Reversed.

Judges BROCK and VAUGHN concur.

FRED DALE v. GEORGE F. LATTIMORE, JR.

No. 7110SC19

(Filed 15 September 1971)

1. **Rules of Civil Procedure § 12— failure to state claim for relief — motion to dismiss made on appeal**

Where there has been a trial, a party cannot on appeal interpose the defense that the complaint fails to state a claim upon which relief can be granted. G.S. 1A-1, Rules 12(b)(6) and 12(h).

2. **Rules of Civil Procedure § 12— lack of jurisdiction of subject matter — failure to state claim for relief**

Lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative; however, failure of the complaint to state a claim for relief does not constitute a lack of jurisdiction of the subject matter. G.S. 1A-1, Rule 12(h)(3).

3. **Appeal and Error § 45— abandonment of exceptions**

Exceptions not brought forward and argued in the brief are deemed abandoned.

APPEAL by defendant from *Bailey, Judge,* 1 June 1970 Civil Session, Superior Court of WAKE County.

Plaintiff instituted this action to recover from defendant $1,221.23 allegedly owed him for commissions earned as a real estate salesman for defendant and money expended and advanced by plaintiff for the use and benefit of defendant, and for $12,500 representing commissions allegedly due him as his portion of the commission on the sale of a piece of property for $500,000 which plaintiff alleges he sold for defendant after he left defendant's employ and under an agreement with defendant that he would receive 2½ percent of the sales price as commission. Defendant answered denying that he was indebted to plaintiff in any amount but admitting "that the sale of said

property was consummated and deed was executed and the purchaser paid the sum of Five Hundred Thousand ($500,000.00) Dollars on the 6th day of September, 1968, for said property." By counterclaim defendant alleged an indebtedness to him by plaintiff of some $2,300 on a note, a check, and for rent. The jury answered the issue with respect to the 2½ percent commission in favor of plaintiff. The issue as to the commissions earned as a salesman and of money expended and advanced was answered against plaintiff and in favor of defendant. The issue on the counterclaim of defendant was answered against defendant.

On appeal it is conceded by both parties that only the question of the 2½ percent commission on the $500,000 sale is before the court.

Ellis Nassif for plaintiff appellee.

Carl E. Gaddy, Jr., for defendant appellant.

MORRIS, Judge.

Defendant first contends that the complaint fails to state a cause of action and moves this Court *ore tenus* that the cause be dismissed. It appears from the record that the complaint was filed 12 March 1969, and that a demurrer was filed 30 April 1969. Order was entered overruling the demurrer on 10 July 1969. The record does not reveal an objection and exception to the entry of that order, nor does the record reveal that a motion to dismiss under Rule 12(b) (6) (failure to state a claim upon which relief can be granted) was made by defendant at trial.

We have before us, then, the question of whether a motion to dismiss an action for failure of the complaint to state a claim upon which relief can be granted can be interposed on appeal.

It is true that under the former procedure, defendant, by answering the complaint, did not waive the right to demur for failure of the complaint to state a cause of action, or for its statement of a defective cause of action. Demurrer *ore tenus* on this ground could be interposed at any time before final judgment, even in the Supreme Court on appeal. Under the former procedure, the appellate court could take cognizance of

the complaint's deficiency *ex mero motu.* 6 Strong, N. C. Index 2d, Pleadings, § 26.

G.S. 1A-1, Rule 7(c) abolished demurrers, and with them the concept of "a defective statement of a good cause of action." G.S. 1A-1, Rule 12(b)(6) permits a motion to dismiss upon the ground that the complaint states a defective claim or cause of action but not upon the ground that the complaint contains a defective statement of a good cause of action, relief for that defect being available under other sections of Rule 12. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970).

G.S. 1A-1, Rule 12(b), provides that certain defenses may, at the option of the pleader, be made by motion. Among the seven listed is: "(6) Failure to state a claim upon which relief can be granted." The rule further provides: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h)."

The pertinent provision of section (g) is that if a party does make a motion under this rule but fails to include a defense or objection available to him and permitted to be raised by motion by this rule, he cannot thereafter make a motion based on the defense or objection omitted, "except a motion as provided in section (h)(2) hereof on any of the grounds there stated."

Section (h)(2) provides: "A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits."

Unquestionably, a motion to dismiss for failure to state a claim upon which relief may be granted, under Rule 12(b)(6), can be made as late as trial upon the merits. However, we are of the opinion that, as a general rule, the motion comes too late on appeal. The verbiage of G.S. 1A-1, Rule 12(h) and Rule 12(h) of the Federal Rules is identical except the Federal Rule refers to "a party indispensible under Rule 19" and G.S. 1A-1, Rule 12(h) refers to "a necessary party." The Rules of Civil Procedure in the federal courts are substantially identical, and the application thereof over the years by the federal courts may

often serve as a guide in our interpretations. In Black, *Sivalls & Bryson v. Shondell,* 174 F. 2d 587 (8th Cir. 1949), the action was brought in a Missouri state court but removed to federal district court because the requisite amount was involved, and there was diversity of citizenship. Plaintiffs sued for damages for breach of express and implied warranty in the sale of five oil storage tanks manufactured by defendant and sold to plaintiffs. The jury returned a verdict for plaintiffs and defendant appealed. Defendant had not moved for dismissal for failure of the complaint to state a claim upon which relief could be granted nor had it moved for directed verdict at the close of the evidence. After the verdict was returned and judgment entered, it moved for judgment notwithstanding the verdict or in the alternative for a new trial. On appeal one of defendant's contentions was that the complaint did not state a claim upon which relief could be granted. As to that, the Court said:

> "Under Rule 12, Rules of Civil Procedure, 28 U.S.C.A., a defendant waives all defenses and objections which he does not present either by motion or in his answer except that the defense of failure to state a claim upon which relief may be granted may also be made by a later pleading if one is permitted or by motion for judgment on the pleadings or at the trial on the merits. The record shows no such defense presented by defendant in a motion or answer and it must be deemed to have waived the defense that the petition did not state a claim upon which relief may be granted. The motion which defendant made for judgment notwithstanding the verdict was on the grounds that 'the plaintiff's petition and the evidence discloses that there was no privity of contract between the plaintiff and the defendant' and that 'it is uncontroverted in the evidence that the five tanks delivered by defendant complied with the terms specified in the [written] order' given by Midwest to defendant. It was made after the trial and not on the trial and did not preserve the defense of failure of the petition to state a claim. The defendant is therefore in the position of having waived that defense and may not urge it here."

See also 2A Moore's Federal Practice § 12.23, at 2446 (2d ed. 1968), Waiver of Defenses.

[1] We hold that where there has been a trial, a party cannot

on appeal interpose the defense that the complaint fails to state a claim upon which relief can be granted. See *Archer v. U.S.*, 217 F. 2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955); *Southard v. Southard*, 305 F. 2d 730 (2d Cir. 1962).

[2] We are aware, of course, that Rule 12(h) (3) provides that "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." This rule is identical to Federal Rule 12(h)(3). Unquestionably lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative. See 2A Moore's Federal Practice § 12.23, at 2460 (2d ed. 1968), where it is said: "Such lack of jurisdiction can never be waived by the parties or such jurisdiction conferred on a court by consent of the parties, except where a valid statute, such as the Bankruptcy Act, may allow jurisdiction to be so conferred." However, the failure of the complaint to state a claim upon which relief can be granted does not constitute a lack of jurisdiction of the subject matter. Jurisdiction of the court over the subject matter is not defeated by the possibility that the allegations of the complaint may fail to state a cause of action upon which plaintiff can recover.

> "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. (Citations omitted.)" *Bell v. Hood*, 327 U.S. 678, 682, 90 L. Ed. 939, 943 (1946). See also *Utilities Commission v. Truck Lines*, 243 N.C. 442, 91 S.E. 2d 212 (1956).

[3] Appellant grouped 95 exceptions in his record on appeal. He brings forward and argues only 10 of them. The others are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

We have carefully studied and considered all of defendant's assignments of error. It is true that the record reveals technical procedural error. However, in view of the entire record, we do not deem the procedural errors sufficiently prejudicial to warrant a new trial, nor do we feel that a new trial would produce a different result.

Affirmed.

Judges BROCK and HEDRICK concur.

LOUISE E. LITTLE v. JOHN B. LITTLE, JR.

No. 7119DC568

(Filed 15 September 1971)

Divorce and Alimony § 18; Rules of Civil Procedure § 12; Venue § 7— motion for temporary alimony — prior motion for change of venue as matter of right.

The district court in which an action for alimony without divorce had been brought was without authority to hear and determine plaintiff's motion for temporary alimony and counsel fees pending disposition of defendant's motion made in apt time to remove the action as a matter of right to a county in another judicial district. G.S. 1A-1, Rule 12(b)(3); G.S. 1-82.

APPEAL by defendant from an order by *Walker, Chief Judge,* 18 June 1971 Session, District Court of CABARRUS County.

An action was begun in the Cabarrus District Court by the plaintiff Louise Little against her husband John Little, Jr., under Chapter 50 of the General Statutes for temporary and permanent alimony without divorce and for counsel fees. The complaint alleged that both plaintiff and defendant were residents of Stanly County, North Carolina. Details of other allegations made by plaintiff and of counter allegations by the defendant by affidavit are not necessary to the decision and are omitted from the opinion. On 1 April 1971, before the time for answering expired and before answering, defendant filed a motion pursuant to Rule 12(b)(3) of G.S. 1A-1 for transfer of venue to Stanly County as a matter of right under G.S. 1-82 and 1-83. On 2 April 1971, defendant filed an answer denying

the allegations of plaintiff's complaint relating to his misconduct. On 21 May 1971, plaintiff served notice on defendant that at the 9 June 1971 Session of District Court in Cabarrus County, she would move for an allowance of alimony *pendente lite* and for a hearing upon defendant's motion for change of venue. On 28 May 1971 defendant filed a motion for stay of proceedings, alleging the Cabarrus District Court was without authority to hear plaintiff's motion for temporary alimony and counsel fees pending disposition of defendant's motion for change of venue. At the 9 June 1971 Session of District Court in Cabarrus County, a hearing was held and defendant's motion for a stay of the proceedings was denied. The trial court heard evidence in the form of affidavits on plaintiff's motion for temporary alimony and entered an order granting plaintiff temporary alimony of $300 per month and $400 for counsel fees. The court at the same time entered an order removing the cause from the District Court of Cabarrus County to the District Court of Stanly County for trial.

The defendant excepted and appealed the order denying defendant's motion for stay of the proceedings and the order granting the plaintiff temporary alimony and counsel fees.

Williams, Willeford and Boger, by John Hugh Williams, for plaintiff appellee.

Patterson and Doby, by Henry C. Doby, Jr., for defendant appellant.

MORRIS, Judge.

The defendant assigns as error the court's hearing and determining plaintiff's motion for alimony *pendente lite* in Cabarrus County before considering and passing upon defendant's prior motion for change of venue to the Stanly County District Court as a matter of right.

At the outset, we note that we are here dealing with the priority of a motion for change of venue to a county outside the district over a motion for alimony *pendente lite* in the county in which suit was brought. Cabarrus County is in the nineteenth judicial district and Stanly County is in the twentieth judicial district. We do not have before us the question of the authority of a district judge or chief district judge to hear matters within the district. This opinion is, therefore, limited

in its application to the specific question raised by this appeal—where it appears that the proper venue is a county outside the district where the action is brought, and proper motion for change of venue as a matter of right is made in apt time, is the court then restricted to entering an order solely as to venue and without authority to hear a motion for alimony *pendente lite* and counsel fees?

Plaintiff concedes that the general rule is that, in the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal. *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94 (1961). The record is devoid of any action on the part of defendant which could be said to be a waiver or consent. On the contrary, defendant objected to the hearing of the motion for alimony *pendente lite* by way of special appearance and a written motion to stay proceedings pending a hearing on the venue motion. Defendant excepted to the order entered denying the motion to stay. Plaintiff does not contend that defendant either waived the right to have venue changed or consented to venue in Cabarrus County. She contends that the Cabarrus Court had authority to hear the motion for alimony *pendente lite* notwithstanding the motion for removal because of the statutory authority granted the court and additionally because alimony *pendente lite* is not a substantive right affecting trial.

A careful consideration of pertinent statutes leads us to the conclusion that plaintiff's argument with respect to statutory authority is without merit.

Alimony *pendente lite* may be ordered by the court to be paid pending final judgment of divorce in an action for alimony without divorce under the provisions of G.S. 50-16.1(2). Though venue in such cases is not specifically set out in sections 16.1 through 16.10 of Chapter 50, section 16.8(a) does provide: "The procedure in actions for alimony and actions for alimony *pendente lite* shall be as in other civil actions except as provided in this section." Subsection (g) provides: "When a district court having jurisdiction of the matter shall have been established, application for alimony *pendente lite* shall be made to such dis-

trict court, and may be heard without a jury by a judge of said court at any time." Plaintiff contends that the phrase "at any time" gives the court authority to hear the motion for alimony *pendente lite* notwithstanding the pending venue motion. We do not agree.

The plaintiff alleged in her complaint that both plaintiff and defendant were residents of Stanly County, North Carolina, at the time the action was commenced and that neither of them resided in Cabarrus County. Thus plaintiff's complaint did not comply with the provisions of G.S. 1-82 which requires that venue in civil actions not specifically provided for in G.S. 1-76 through G.S. 1-81 must be in the county where either plaintiff or defendant resides at the commencement of the suit.

With the establishment of the new unified judicial system in 1965, G.S. 7A-193 provided that civil procedure provided in Chapters 1 and 1A of the General Statutes applies to the district court division of the General Court of Justice unless otherwise provided in Chapter 7A. Alimony *pendente lite* and alimony without divorce are not "otherwise provided" for in Chapter 7A of the General Statutes. Thus we conclude that improper venue is subject to attack under G.S. 1A-1, Rule 12(b)(3). In the case at bar a motion asserting improper venue was made in writing and in apt time. " . . . [T]he question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon." *Capital Corp. v. Enterprises, Inc.*, 10 N.C. App. 519, 521, 179 S.E. 2d 190, 192 (1971); *Casstevens v. Membership Corp., supra.*

The plaintiff appellee argues that alimony *pendente lite* is not a matter of substantive right, but rather is ancillary and does not affect the ultimate rights of the parties. To the contrary, this Court has held that an order requiring payment of alimony *pendente lite* and counsel fees affects a substantial right from which an appeal lies as a matter of right. *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E. 2d 915 (1970). The right of a wife to subsistence pending trial and to attorney fees was derived from the common law. *Hudson v. Hudson*, 5 N.C. App. 185, 167 S.E. 2d 836 (1969). "The remedy of subsistence and counsel fees *pendente lite* is intended to enable the wife to maintain herself according to her station in life and employ counsel to meet her husband at trial upon substantially equal terms. (Cita-

tions omitted.)" *Brady v. Brady,* 273 N.C. 299, 304, 160 S.E. 2d 13, 16-17 (1968). The Court in *Brady* goes on to say that the amount of subsistence and counsel fees *pendente lite* allowed is within the discretion of the court, but that this discretion is limited by the factual conditions. "Generally speaking (and excluding statutory grounds for denial), allowance of support to an indigent wife while prosecuting a meritorious suit against her husband under G.S. 50-16, for alimony without divorce . . . is so strongly entrenched in practice as to be considered an established legal right. . . . " *Brady v. Brady, supra,* quoting from *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745 (1946).

When defendant appellant in apt time made a proper motion for change of venue under G.S. 1A-1, Rule 12(b)(3), it became a matter of right and the District Court of Cabarrus County was without authority to proceed further in the cause until the motion to remove had been determined. Since the court lacked authority to make any ruling on the merits while the motion to change venue was pending, it was error to enter an order granting alimony *pendente lite* and counsel fees. It is unnecessary, therefore, to consider the defendant's other exceptions as to the sufficiency of the evidence to support an order of the court awarding alimony *pendente lite* and counsel fees.

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. DONNIE WESTMORELAND

No. 7121SC558

(Filed 15 September 1971)

1. **Robbery § 4— common law robbery — sufficiency of evidence**

Issue of defendant's guilt of the common law robbery of a money box from a store was properly submitted to the jury under the facts of this case.

2. **Criminal Law §§ 66, 87— identification of defendant — use of leading questions**

A solicitor in a robbery case who had difficulty in getting the State's witness to understand his questions concerning the identity of the defendant as the person who had entered his store did not commit prejudicial error in asking leading questions of the witness and in

pointing out the defendant in the courtroom, especially since the solicitor had not yet established that a crime had been committed.

3. **Robbery § 5— common law robbery — instruction on larceny of property less than $200 in value**

Evidence that when defendant and his companions were apprehended for robbery they had less than $200 on their persons did not warrant an instruction on the offense of larceny of property less than $200 in value, where all the evidence showed that the money taken in the robbery amounted to $600 or $700.

APPEAL by defendant from *Kivett, Judge,* 1 March 1971 Session of FORSYTH Superior Court.

Defendant was tried for common law robbery under an indictment proper in form. He was convicted by the jury and appeals from judgment entered upon the verdict. He was represented by court-appointed counsel at his preliminary hearing in the District Court and different counsel was appointed to defend him at trial in the Superior Court. Upon his request, counsel was appointed to prosecute his appeal. His present counsel did not appear in either of his trials. The State is, of course, also furnishing at no expense to defendant, the transcript of the trial and paying the costs of printing the record and brief on appeal.

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

Green, Teeter & Parrish, by D. Blake Yokley, for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the failure of the court to allow his motion for judgment of nonsuit. The evidence tends to show: The defendant, his wife, and one other drove up to the front of Graves Grocery, drove past the front and parked in the garage in the driveway. There were three people in the car. They asked for oil. The store employee, prosecuting witness, put the oil in the car after one of the occupants had gotten out and helped him raise the hood. The defendant got out of the car, but the employee did not know where he went. Defendant's wife got out of the car and went in the store. After the witness finished putting the oil in the car, he started in the store and found the door locked. He could not say whether anyone locked the door because it did "lock

itself" sometimes. Defendant's wife came to the door. Witness did not remember whether she opened the door or whether he unlocked it with the use of his key since it all occurred at the same time, but he went in the store. Defendant's wife asked for a beer, which he got and put in a bag. Whereupon, she opened the beer. Witness told her she could not drink beer on the premises and would have to go out. She responded that she would drink it where she pleased and got up on top of the ice cream counter and sat there drinking the beer. Witness opened the door for her and told her to get out and told her they didn't want her in there and didn't allow drinking beer on the premises, "and the next thing I knew, she had the money box going out with it. It was the store's money box, I couldn't say positively how much was in it, but around six or seven hundred dollars. It was sitting on the ice cream box. She started out with the money box and I grabbed her. She dropped the box. Then Donnie come to the door and reached in the door and got it and run with it. Well, I reached for the gun and whenever I got ahold of it, why, she run behind the counter and grabbed it and throwed her arms around me and beat me to keep me from turning around with the gun. She beat me with her fists, but she didn't have anything in her hand that I could see. She hit me in the stomach and made me sick and I just give it up. Donnie Westmoreland had the money box the last time I saw it. After they went out the door, I didn't see them anymore. I was kind of sick and I done give it up. They left in the car. I had seen them something like a week or two before. They had stopped there a time or two and bought gas. I did not get the money box or any of the money back."

The evidence is sufficient for submission to the jury under proper instructions from the court. Defendant's first assignment of error is overruled.

[2] Defendant next argues that prejudicial error was committed when the court allowed "an in-court identification of the defendant." The record reveals that the store employee was the first witness for the State. The solicitor had a most difficult time getting the witness to understand the questions and give an answer which was responsive to the question asked. The solicitor was attempting through the witness to develop the events on the night of the robbery. He asked witness if any person came to the store about 7:30 on 20 November. The witness replied "Not except the ones that's involved."

"Q. The ones involved?

A. Yes.

Q. You're talking about these two people?

MR. YOKLEY: OBJECTION to leading.

COURT: OBJECTION SUSTAINED. Do not lead the witness. Go ahead."

The solicitor for two pages of evidence tried valiantly to get the witness to testify as to who was in the store on 20 November at about 7:30 p.m. with little or no success. He finally succeeded in getting the testimony that Mrs. Westmoreland and two other people came to the store in a car. The following transpired:

"Q. Is one of the other three people in the court today?

A. I think so.

MR. YOKLEY: OBJECTION, your Honor.

COURT: OBJECTION SUSTAINED as to what he thinks. You will disregard what he thinks, members of the jury. Go ahead.

Q. Mr. Horton, was this lady back here in the green, was she in your place of business?

A. She come in along about that same time.

Q. And was this woman in your place of business?

MR. YOKLEY: OBJECTION, your Honor.

COURT: OBJECTION OVERRULED.

EXCEPTION NO. 3.

A. Yes, she was in.

Q. How about this man, was he in your place of business?

MR. YOKLEY: OBJECTION.

COURT: OVERRULED.

EXCEPTION NO. 4.

A. Yes, he come in right at the end, right on the end. She just barely come to the door—

MR. YOKLEY: OBJECTION, your Honor. Objection to the answer and motion to strike.

COURT: To pointing out the defendant?

MR. YOKLEY: Yes, sir. I would like for the record to show the Solicitor pointed him out.

COURT: OBJECTION OVERRULED. Let the record show that the Solicitor pointed to him and asked him if he was in the station or grocery store at the time.

EXCEPTION NO. 5."

At this point in the proceedings the solicitor had not even established that a crime had been committed. He was attempting to elicit evidence as to who was in the store at 7:30 on 20 November. It is true that 20 November is the date given in the indictment. No time is indicated. It is also obvious that it was necessary for the solicitor to ask leading questions of this particular witness. Whether counsel is to be permitted to ask leading questions is within the discretion of the trial tribunal. *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657 (1941). The defendant did not request a *voir dire* and the court did not, on its own noting, conduct one. Nor was a *voir dire* examination necessary. The witness had not attempted to identify defendant or anyone else as a person who had committed a crime or even one charged with the commission of a crime. The principles enunciated in *U. S. v. Wade,* 338 U.S. 218, 87 S.Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178 (1967); *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L. Ed. 2d 1199 (1967), relied upon by defendant are not applicable, because the facts here do not present a case which falls within the rationale of those cases. This assignment of error is also overruled.

[3] Defendant, by his third assignment of error, contends that the trial tribunal committed prejudicial error by failing to submit to the jury the lesser included offense of larceny of property of a value of less than $200. "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. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481,

488 (1969), quoting *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). There was evidence that when defendant and his companions were later apprehended, they had less than $200 in money on them, but the only evidence of the amount of money taken was between six and seven hundred dollars. This assignment of error is without merit.

Defendant's remaining assignments of error are to the charge of the court. The portions of the charge to which defendant excepts could not have mislead the jury nor confused them and therein we find no prejudicial error.

Affirmed.

Judges BRITT and PARKER concur.

AGGIE MAE SANDERS v. ANCHOR COMPANY, INC.

No. 7119SC560

(Filed 15 September 1971)

1. **Negligence §§ 5.1, 53— liability of storekeeper for customer's safety**

A storekeeper is not an insurer of his customers' safety while they are on his premises, but he does owe them the duty to exercise ordinary care to keep in a reasonably safe condition those portions of his premises which he may expect they will use during business hours, and to give warning of hidden peril or unsafe conditions insofar as these are known or can be ascertained by reasonable inspection.

2. **Negligence §§ 5.1, 6— injury to store customer — res ipsa loquitur**

A department store customer who was injured when a swinging glass door struck her on the nose may not rely upon the mere happening of the occurrence to carry her case to the jury.

3. **Negligence §§ 5.1, 53— liability of store to customer who was struck by swinging door — insufficiency of evidence to show negligence**

In an action to recover damages for personal injuries sustained when the plaintiff was struck on the nose by a swinging glass door at the entrance to the defendant's store, the trial court properly directed a verdict in the defendant's favor and dismissed the plaintiff's action for failure to show the store's negligence, where plaintiff offered no evidence to show that the door was improperly constructed or maintained, or that it had any mechanical defect.

4. **Appeal and Error § 49— exclusion of testimony — review on appeal**

The exclusion of testimony cannot be held prejudicial on appeal when the record fails to show what the answer of the witness would have been.

Sanders v. Anchor Co.

APPEAL by plaintiff from *Gambill, Judge,* 5 April 1971 Session of Superior Court held in RANDOLPH County.

Civil action to recover damages for personal injuries sustained when plaintiff was struck on the nose by a swinging glass door at the entrance to defendant's store. In the front of the store there were two sets of doors, each set consisting of two swinging glass doors paired together in one door frame. Both sets of doors opened on Sunset Avenue, one being on the eastern and one being on the western side of the store front, the two sets being separated from each other by a glass display window. All four swinging doors were alike. Each door was made of tinted glass and was approximately ¾ of an inch thick, three feet wide, and seven to eight feet high. On the inside and outside of each door there was a handle, larger than a broomstick and approximately 12 to 16 inches in length. Each door could swing both ways, swinging for a total of 180 degrees. When a door was pushed beyond 90 degrees, it would catch and stay open.

On 22 May 1963 plaintiff entered defendant's store to purchase a birthday present for her son. Plaintiff testified:

> "I went in Anchor's door, the one towards the First National Bank. That is the eastward most door. I went in the door around noon. The door was open. There was nobody maintaining the entrance to the door. As I went in, the door was open. It was swinging doors, glass, you know, a door on each side and they came together. . . . They had one of them pulled back and it was open when I went in. The other half was closed and one half was open and pushed back. I did not purchase a birthday present for my son. I didn't find what I wanted. . . .
>
> "After I decided to go look some other place, I started out the door, and, by the time I got to the door, it came in my face, and the blood just started streaming. . . . I did not touch the door in any way.
>
> * * * * *
>
> "I went back and checked the door after it broke my nose. I took the door and pushed it back to see if it would stay open, and just a little pull brought it together. I don't know what caused it to come loose. . . . "

On cross-examination, plaintiff testified:

"I had been in that store often and I had gone through that same door many times. When I started out, I was looking straight ahead. When I started through the door going out, it was open. I was not carrying anything but my pocketbook. I had my pocketbook in one of my hands or my arms. There was nothing to prevent me from putting my hands up. I was looking straight ahead. There was nothing to prevent me from reaching out and stopping this door which I say was swinging to except it came to so fast I didn't see it. As to whether I actually saw the door, I saw the door when it hit me, when it swung against me. I hadn't even gotten out the door. I don't know whether I saw it then or not. When it hit me I was still in the inside and the blood was pouring. . . .

"I did not see the door until the moment it hit me. If I had, it wouldn't have hit me. You know I'd have caught it if I saw it a coming.

"My nose was the only part of my body that came in contact with the door. As to there being plenty of light, it was a sunny day and there was plenty of light inside the store. I do not know whether anybody had gone through the door just before I did or not. I don't know one way or the other whether anybody had just gone through the door or not. I didn't see anybody."

Defendant's store manager, called by the plaintiff as an adverse witness, testified that he did not know whether the door was open on 22 May 1963, that at that time the air conditioning was functioning and it was not a policy during this time to prop the doors open. He also testified:

"When you pushed it (the door) beyond 90 degrees and the door caught, it had no latch where you could hook it. There was no mechanical device at all to secure that door after it passed this 90 degrees. When I wanted to close the door, I had to exert quite a little bit of pressure and pull it to me."

At the close of plaintiff's evidence the court allowed defendant's motion for a directed verdict and entered judgment dismissing plaintiff's action.

Ottway Burton for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter for defendant appellee.

PARKER, Judge.

[1] A storekeeper is not an insurer of his customers' safety while they are on his premises. He does owe them the duty to exercise ordinary care to keep in a reasonably safe condition those portions of his premises which he may expect they will use during business hours, and to give warning of hidden peril or unsafe conditions insofar as these are known or can be ascertained by reasonable inspection. *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1. Therefore, before plaintiff can recover in this case she must, by evidence, establish actionable negligence on the part of defendant. This, she has failed to do.

[2, 3] While plaintiff alleged that the door complained of was defective, she offered no evidence to support that allegation. No inference of negligence on the part of defendant arises from the mere happening of the occurrence disclosed by plaintiff's evidence; thus, plaintiff may not rely upon the doctrine of *res ipsa loquitur* to carry her case to the jury. *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Connor v. Thalhimers Greensboro, Inc.*, 1 N.C. App. 29, 159 S.E. 2d 273. Plaintiff offered no evidence to show that the door was improperly constructed, or that it had any mechanical defect, or that it was improperly maintained. Neither is there any evidence that the entrance doors at defendant's store were not the customary type used in similar stores.

While plaintiff attempted to introduce evidence which she contends would tend to show that similar accidents had occurred previously, her proffered evidence was incompetent for that purpose and was properly excluded. Plaintiff's witness, Mrs. Ruth Dixon, could testify that her finger had been injured when it became caught in an entrance door to defendant's store, but she was unable to remember which door it was, whether she received her injury in 1962 or 1963, or how it happened. Similarly, while plaintiff's witness, Mrs. Bullins, who had worked on the second floor in defendant's store, could testify that "on several occasions people got hurt with little mashed fingers," she could not remember any dates, did not

know which door caused the injuries or the manner in which they occurred, and everything she did know concerning such injuries was what someone else had told her. Plaintiff's assignments of error directed to the exclusion of the testimony of Mrs. Dixon and Mrs. Bullins are without merit.

[4] Plaintiff contends there was error when the trial judge sustained defendant's objection to the following question which plaintiff's counsel asked defendant's store manager, who was being examined as an adverse witness:

> Question: "To your knowledge, how many people were injured in the doors that Mrs. Sanders was injured in, prior to May 22, 1963?"

While the question may have been proper, what the witness would have answered does not appear in the record, and the exclusion of testimony cannot be held prejudicial on appeal when the record fails to show what the answer of the witness would have been. 1 Strong, N.C. Index 2d, Appeal and Error, § 49, p. 200.

We have carefully examined all of appellant's remaining assignments of error, and find them without merit. The judgment appealed from directing verdict for the defendant is

Affirmed.

Judges BRITT and MORRIS concur.

LESTER E. HUDSON, EMPLOYEE v. J. P. STEVENS AND COMPANY, EMPLOYER; AND LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7118IC605

(Filed 15 September 1971)

1. **Master and Servant § 93— workmen's compensation — refusal to allow expert testimony**

The hearing commissioner did not err in refusing to allow an expert medical witness to testify as to whether cellulitis in plaintiff's right foot could have been caused by acid burns where, in response to a question by the commissioner, the witness stated he had no opinion regarding this matter.

2. **Master and Servant § 94— workmen's compensation — failure to make sufficient findings**

In this proceeding to recover workmen's compensation for loss of plaintiff's right foot after plaintiff suffered acid burns on his

left foot, the Industrial Commission failed to find facts determinative of the questions at issue where the Commission's findings with respect to injury to plaintiff's right foot merely recited testimony of various witnesses and described portions of medical records, and the Commission failed to find whether plaintiff's right foot was injured in the accident or whether plaintiff had a preexisting physical condition which was aggravated by the injury to his left foot so as to cause cellulitis in his right foot and the subsequent loss thereof.

APPEAL by plaintiff from a decision of the North Carolina Industrial Commission (Commission) filed 10 May 1971.

This is a proceeding under the North Carolina Workmen's Compensation Act wherein plaintiff seeks to recover compensation for the alleged loss of his right foot as a result of an injury sustained on 3 March 1969.

The record reveals this matter came on for hearing before Deputy Commissioner W. M. Barbee at High Point, North Carolina, on 23 November 1970 pursuant to a letter from plaintiff's counsel dated 20 April 1970 claiming a "change of condition." On 4 December 1970, the Deputy Commissioner filed an opinion and award in pertinent part as follows:

"FINDINGS OF FACT

"1. The plaintiff, at the time of the alleged accident which supposedly occurred on March 3, 1969, was a 42 year old male employee of the defendant employer and had been for two weeks prior thereto.

"2. On March 3, 1969, the plaintiff was performing his regular duties as a service lane employee which included servicing trucks and trailers such as greasing, changing oil and batteries, and servicing the Bacto alarm system on the trailers which is operated by batteries.

"3. The plaintiff alleges that while changing a battery in a truck, when he had the battery in his hands acid ran through a 'crack' in the battery onto his clothes and 'run down into my shoes and blistered the bottom of my feet.' On a different occasion the plaintiff, according to a transcript of a conversation recording between him and a representative of the insurance carrier which the plaintiff's counsel stipulated into the record as Plaintiff's Exhibit #1, 'one of the other boys was working on the system

there and he turned one battery over and I walked through it and I didn't realize at the time what it was. When I got home and pulled my shoes off, down in the bottom of my shoes and part of the inside of my shoe was eat up and everything and my sock had several holes in it.' Quoting verbatim from the transcript and I quote: 'Q. Okay, and could you tell me what part of your body was injured there? A. The bottom of my foot has 3rd and 1st degree acid burns. Q. Now, is this both feet or just one? A. Left foot.'

"4. Plaintiff's counsel subpoenaed Drs. Tommie L. Canipe, Hugh T. Wallace, Robert Ruscoe, IV, and Fred M. Wood to appear at the hearing on November 23, 1970 to testify. Counsel for both sides stipulated into the record that all four doctors were experts in their fields and were qualified to give expert medical evidence. Dr. Canipe saw the plaintiff the first time on March 24, 1969 and treated him until May 1, 1969 for acid burns only to his left foot at which time he informed the plaintiff he had reached sufficient recovery to return to work at his normal duties. The plaintiff's left foot had completely healed and was doing well when the doctor next saw him on March 17, 1970 for an infected callus on the sole of his right foot. Dr. Canipe's records show no history of an injury to the right foot but does show the plaintiff to be a diabetic.

"5. Dr. Hugh Wallace saw the plaintiff in the emergency room at the hospital on March 8, 1969 and treated him for acid burns on his left foot. His records show that the plaintiff stepped in acid. Dr. Wallace treated the plaintiff for this injury until March 23, 1969, and the next time he saw the plaintiff was on April 18, 1969, as a private patient for soreness of the right foot. Dr. Ruscoe's records show that the plaintiff gave him a history of injury to his left foot only. Dr. Fred Wood saw the plaintiff the first time on March 17, 1970, and this was for his right foot only. His records show the plaintiff had greatly insufficient circulation and he put the plaintiff in the hospital on March 31, 1970, and on April 22, 1970, Dr. Wood found it necessary to amputate the plaintiff's right foot due to gangrene and other problems.

"6. The defendant employer admitted liability from the acid burn injury to the plaintiff's left foot on March 3, 1969

and paid the plaintiff temporary total disability compensation for 8 and 6/7 weeks, plus $75.50 medical expenses.

"The foregoing findings of fact and conclusions of law engender the following additional

"CONCLUSIONS OF LAW

"The plaintiff did not sustain an injury by accident to his right foot arising out of and in the course of his employment with the defendant employer on March 3, 1969. G.S. 97-2(6)."

From the decision of the Deputy Commissioner denying plaintiff's claim for compensation, the plaintiff appealed to the Full Commission. On appeal, the Full Commission amended the hearing commissioner's "Findings of Fact" by striking paragraphs 3 and 4 thereof. The Full Commission then adopted as its own the "Findings of Fact," as amended, and the "Conclusions of Law" of the hearing commissioner and affirmed his decision.

The plaintiff appealed to the Court of Appeals.

Harold I. Spainhour for plaintiff appellant.

Lovelace, Hardin & Bain by Edward R. Hardin for defendant appellee.

HEDRICK, Judge.

[1] Plaintiff contends by appropriate assignment of error that the hearing commissioner committed prejudicial error by not allowing an expert witness, Dr. Wallace, to testify as to whether the cellulitis on plaintiff's right foot could or might have been caused by acid burns. In response to a question from the Commissioner, the physician stated unequivocally that he had no opinion regarding this matter. This assignment of error is without merit.

[2] Plaintiff contends by his first assignment of error that the Commission failed to make findings of fact which were determinative of all the questions at issue in this proceeding. In *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968), Chief Judge Mallard quoted with approval

from the opinion of Justice Ervin, in *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706, as follows:

> " 'If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth, and merely determine whether or not they justify the legal conclusions and decision of the commission. (Citations omitted.) But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings. (Citations omitted.)
>
> It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.' "

The Commission failed to find facts determinative of the questions at issue between the parties. It will be noted the Commission's "Findings of Fact," with respect to any injury to plaintiff's right foot, merely recite some of the testimony of the various witnesses, and describe portions of the records of the physicians. There is evidence in the record from which the Commission could have found whether plaintiff's right foot was or was not injured on 3 March 1969, or whether plaintiff had a preexisting physical condition (diabetes and congenitally

deformed feet) which was or was not so aggravated by the injury to his left foot on 3 March 1969 as to cause the cellulitis in his right foot and the subsequent loss thereof.

Because the Commission failed to make detailed findings of fact determinative of the questions at issue, it is impossible for this Court to ascertain whether the Commission rightly recognized and effectively enforced the rights of the parties upon the matters in controversy.

For the reasons given, the case is remanded and the Industrial Commission is directed to make findings of fact determinative of all questions at issue and proceed as the law requires.

Error and remanded.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. CHARLES HAMPTON, JR.

No. 713SC579

(Filed 15 September 1971)

1. **Criminal Law § 42; Robbery § 3— admission of exhibits — adhesive tape taken from robbery victims' wrists**

   Adhesive tape taken from the wrists and ankles of armed robbery victims was admissible in evidence to corroborate the victims' testimony describing the manner in which the defendant tied them up during the robbery.

2. **Criminal Law § 42; Robbery § 3— admission of exhibits — money order forms which were subject of armed robbery**

   Western Union money order forms that were the subject of armed robbery were admissible to corroborate the testimony by a Western Union employee that there was an armed robbery of the company's premises.

APPEAL by defendant from *Parker (Joseph W.), Judge,* 25 May 1970 Session of Superior Court held in CRAVEN County.

For cause considered sufficient this Court, on 22 April 1971, allowed defendant's petition for writ of *certiorari* to perfect his appeal, and the appeal was argued during the Fall Session 1971.

Defendant was charged in a bill of indictment with the felony of robbery with firearms. Upon his plea of not guilty he was tried by jury.

The State's evidence tended to show the following: On 25 February 1970 defendant entered the Western Union Telegraph Company office in the city of New Bern. He stated that he would like to send a money order, and, after spending five to eight minutes in partially filling out the order form, left the premises stating that he would like to get more information. In about thirty minutes defendant returned in the company of one Lawrence Stepney. Both defendant and Stepney had pistols which they pointed at Mrs. Powell, the manager, and Mr. Harrelson, a technician for the telegraph company. Defendant announced it was a stick up and ordered Mr. Harrelson to lie down on the floor. Defendant and Stepney used adhesive tape to bind the hands and feet of Mrs. Powell and Mr. Harrelson. Defendant then shot Mr. Harrelson in the leg while he was lying on the floor.

Defendant took all the money, money orders, and checks amounting to $484.00 from the cash drawer. He also took five unused books of express money orders that could be written in denominations of $100.00 each, twenty blanks to the book. He took a quantity of Western Union checks, $235.00 of Mrs. Powell's personal money, her wallet containing an additional $3.00, Mr. Harrelson's wallet containing $75.00, and his watch. All of these items were placed in a brown paper bag by defendant and then he and Stepney left.

Defendant testified that he lived in Chicago and was in Washington, D. C., on the date of the alleged offense; that he was not in New Bern; that he was arrested in Washington, D. C.; and that none of the stolen property was found on his person. Defendant called as a witness one Hoyle L. Starks, Jr., who testified that he lived in Chicago; that defendant borrowed Stark's uncle's car and that he rode with defendant and Stepney to New Bern, North Carolina; that they were in New Bern for a short time on the day of the robbery; that defendant had a brown paper bag; that they went from New Bern to Washington, D. C., where they were arrested at a motel; that defendant gave him $50.00 just before they reached Washington, D. C.; and that the officers in Washington took a paper bag from a phone booth that defendant had gone into.

From a judgment entered on a verdict of guilty of robbery with firearms defendant gave notice of appeal.

Attorney General Morgan, by Trial Attorney Cole, for the State.

Cecil D. May for defendant.

BROCK, Judge.

From notations in the Record on Appeal it appears that defendant was also charged with a felonious assault. However, the Record on Appeal contains no bill of indictment, plea, or judgment in an assault case. Nevertheless, defense counsel states in his brief that defendant was convicted of a felonious assault for which he was given a suspended sentence. Presumably, if there was an assault charge, it was for the shooting of Mr. Harrelson during the robbery and was joined with the robbery charge for trial. If this is correct, the Record on Appeal in the robbery case would be the same as in the assault case.

Defendant's sole assignment of error is to the action of the trial judge in admitting into evidence the State's exhibits 1 through 14.

At the close of the State's evidence the Solicitor for the State announced that he would like to introduce into evidence certain exhibits as follows:

1, 2, and 3 which he announced were for the purpose of identification.

4 which he announced was a telegraphic money order form.

5 which he announced was identified as Mrs. Powell's wallet.

6 which he announced was identified as Mr. Harrelson's wallet.

7 which he announced was a photograph of defendant.

8 which he announced that he did not desire to introduce.

9 which he announced that he did not desire to introduce.

10 which he announced was adhesive tape taken from wrists and ankles of Mrs. Powell and Mr. Harrelson.

11 which he announced that he did not desire to introduce.

12 which he announced was the bullet taken from the flooring where Mr. Harrelson was lying when shot.

13 which he announced was the quantity of telegraph money order forms identified by Mrs. Powell.

14 which he announced was the quantity of Western Union money order forms identified by Mrs. Powell.

Defendant's objection appears in the Record on Appeal as follows: "Mr. May objects to the introduction of the money order forms and of the masking tape." Assuming that the reference to the masking tape means the adhesive tape, clearly the foregoing objection is addressed only to exhibits 10, 13, and 14.

[1] The adhesive tape was competent to corroborate and illustrate the testimony of the witnesses concerning the manner in which they were tied up by defendant. Defendant's objection was properly overruled.

[2] Defendant complains that the State offered no evidence that exhibits 13 and 14 were taken from the defendant at any time. It is true that the State showed only that the exhibits were turned over to a detective of the City of New Bern by some officer in Washington, D. C. There was no evidence to disclose how the Washington, D. C., officer came into possession of them. Even so, the exhibits were competent as tending to corroborate Mrs. Powell's testimony that the robbery did occur.

Upon this record as a whole it is our opinion that defendant had a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

CHARLIE EDWARD TALBERT v. WILLIAM ELLIS HONEYCUTT

No. 7119SC564

(Filed 15 September 1971)

Automobiles §§ 23, 90— defective brakes — conflicting instructions

In this action resulting from a rear-end collision wherein defendant contended that his brakes suddenly failed without warning, the trial court committed prejudicial error in instructing the jury that it should answer negatively the issue of defendant's negligence if it found that defendant acted with diligence in seeing that his brakes met statutory requirements *and* that he failed to find a latent defect not reasonably discoverable upon proper inspection which caused him to lose control.

APPEAL by plaintiffs from *Collier, Judge,* at the 1 February 1971 Session, CABARRUS Superior Court.

In this action plaintiff seeks to recover for personal injuries allegedly caused when the rear of the automobile he was driving was violently run into by a vehicle owned and operated by defendant. In his complaint plaintiff alleged that defendant was operating his vehicle at a speed which was greater than was reasonable and prudent under existing conditions, that he failed to decrease his speed so as to avoid colliding with plaintiff, that he operated his vehicle on the highway without adequate brakes, that he failed to maintain a proper lookout, and failed to keep his vehicle under proper control.

The evidence showed that the collision occurred while plaintiff was stopped at a street intersection in obedience to a traffic signal. Defendant offered evidence tending to show that without any warning, the brakes on his vehicle failed and that the collision was an unavoidable accident.

Issues of negligence and amount of damage were submitted to the jury who answered the negligence issue in the negative. From judgment denying plaintiff any recovery, he appealed.

Williams, Willeford & Boger by John Hugh Williams for plaintiff appellant.

Hartsell, Hartsell & Mills by K. Michael Koontz for defendant appellee.

BRITT, Judge.

The parties stipulated that due to failure of the court reporter to timely prepare a transcript of the trial proceedings, they were able with the assistance of notes of counsel and other memoranda to make up an acceptable record on appeal. This action on the part of counsel is commendable.

As to the trial court's charge to the jury, except for the instructions hereinafter set forth, the parties stipulated that the court rendered proper instructions. The record reveals that immediately after the jury returned its verdict, at the request of plaintiff's counsel, the court reporter transcribed the instructions hereinafter set forth and plaintiff moved for a new trial because of them. The motion was denied. The challenged instructions, to which plaintiff's sole assignment of error relates, are as follows:

> "Now, if you find in this case from the evidence and by its greater weight, that on this occasion of July 20, 1968, on Church Street, North, in Concord, the defendant, William Ellis Honeycutt, had failed to use due care and diligence to see that his brakes met the standards prescribed by our statute, which I read to you, and find by its greater weight that there was no latent defect in the defendant's vehicle which was discoverable to Mr. Honeycutt upon proper inspection, then it would be your duty to answer this first issue in favor of the plaintiff, that is, Yes.
>
> "If, however, you fail to find from the evidence and by its greater weight that the defendant, Mr. Honeycutt, failed to act with diligence to see that his brakes met the requirements and you find that he failed to find that a latent defect, not known to Mr. Honeycutt and not reasonably discovered by him upon proper inspection, caused him not to control his motor vehicle, then your verdict must be "No." If you are unable to determine from the evidence where the truth lies or find it evenly balanced, then your verdict must be for the defendant, that is, "No."

The agreed record on appeal indicates that the quoted instructions were given toward the end of the charge and concluded the court's instructions on the issue of negligence.

We hold that the assignment of error is well taken and entitles plaintiff to a new trial.

In 1 Strong, N.C. Index 2d, Appeal and Error, § 50, p. 205, we find the following: "While a charge must be considered contextually, such construction cannot be invoked to reconcile conflicting instructions upon a material aspect which are not interexplanatory or correctional and remain repugnant after such construction. Thus, conflicting instructions on a material aspect of the case must be held prejudicial error, since it cannot be determined that the jury was not influenced by the portion of the charge which is incorrect." (Numerous citations.)

In *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590 (1966) our Supreme Court held that an erroneous instruction on a material aspect of the cause must be held for prejudicial error, notwithstanding that in another part of the charge the court correctly states the law in regard thereto.

In *Barefoot v. Joyner,* 270 N.C. 388, 154 S.E. 2d 543 (1967) the court held that conflicting instructions on a material point, one correct and the other incorrect, must be held for prejudicial error when the incorrect instruction is given in the final summation of what the jury must find in order to answer the issue in the affirmative, so that the jury may have followed the incorrect charge in answering the issue.

Assuming that all other portions of the charge were correct, the challenged portion relates to a material aspect of the case, the condition of defendant's brakes and his knowledge thereof. Although the first paragraph of the challenged instructions contains a contradiction, we doubt that plaintiff was prejudiced thereby; however, the second paragraph was extremely misleading and contradictory and we think the error was sufficiently prejudicial to plaintiff to warrant a new trial.

For the reasons stated, plaintiff is awarded a

New trial.

Judges MORRIS and PARKER concur.

BONNIE EDWARDS SMITH v. OSBORNE WEBSTER SMITH, SR.

No. 7122DC416

(Filed 15 September 1971)

Divorce and Alimony §§ 16, 18— wife's action for alimony without divorce — alimony pendente lite — absolute divorce granted to husband

The wife's action for alimony without divorce was properly dismissed and order awarding the wife alimony *pendente lite* was properly terminated on motion of the husband where the husband had been granted an absolute divorce from the wife in an action instituted by the husband after the order for alimony *pendente lite* was entered in the wife's action.

APPEAL by plaintiff from *Dearman, District Judge,* 15 February 1971 Session of District Court held in IREDELL County.

On 24 March 1970 plaintiff instituted this action for alimony and alimony *pendente lite.* Defendant filed answer denying the material allegations of the complaint. On 10 April 1970 plaintiff's application for alimony *pendente lite* was heard and an order was entered which provided for the payment of alimony *pendente lite* and counsel fees. In December 1970 defendant in this action instituted a separate action for divorce against plaintiff. Plaintiff, though personally served with process, did not file answer or other pleadings. On 14 January 1971 judgment was entered granting defendant an absolute divorce from plaintiff and the bonds of matrimony were dissolved. On 25 January 1971 defendant filed a motion in the present action seeking an order terminating the payment of alimony *pendente lite* because of the change of conditions of the parties *i.e.,* the entry of a judgment of divorce. Defendant was not in arrears. After due notice, defendant's motion came on for hearing. The court found facts substantially in accord with the foregoing and entered a judgment which ordered the termination of the payments of alimony *pendente lite* and dismissed plaintiff's action. Plaintiff appealed.

Collier, Harris and Homesley by Walter H. Jones, Jr., and T. C. Homesley, Jr., for plaintiff appellant.

William E. Crosswhite for defendant appellee.

VAUGHN, Judge.

The judgment of absolute divorce in the husband's action proscribed any subsequent judgment awarding alimony in this

action instituted by the wife. *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867. In *Yow,* after holding that a judgment of absolute divorce in the husband's action did not annul the right of his former wife to receive assistance *pendente lite* under an order rendered in her action for alimony without divorce, before the commencement of the proceedings for absolute divorce, the court said:

> "Since the institution of plaintiff's action for alimony without divorce, the defendant has always had, and has now, the right to bring that action, to a final determination. A final determination would terminate the orders herein for subsistence *pendente lite.* However, it would not affect the payment in arrears. The defendant has no one to blame except himself that these orders are still effective."

In the case under consideration, by motion in the cause, defendant has attempted to bring the pending alimony suit to a "final determination" and terminate the order for alimony *pendente lite.* We hold that defendant chose the proper procedure. In holding that the trial judge was correct in terminating the husband's obligation for payment of alimony *pendente lite,* we find support in the concurring opinion written by Bobbitt, J., (now Chief Justice) in *Yow v. Yow, supra.*

> "1. Such *pendente lite* orders are interlocutory, designed to insure that a dependent wife suffer no disadvantage in the prosecution of her action on account of lack of funds for subsistence and counsel fees during its pendency. *Oliver v. Oliver,* 219 N.C. 299, 13 S.E. 2d 549.
>
> 2. Since Ch. 814, Session Laws of 1955, a wife may file a cross action for alimony without divorce in her husband's action for absolute divorce; and conversely, a husband may file a cross action for absolute divorce in his wife's action for alimony without divorce.
>
> 3. A trial of an action for alimony without divorce, subsequent to a valid decree of absolute divorce, would present, to say the least, an anomalous situation. If such action could be tried, and the wife obtained a final decree for alimony without divorce after trial on the merits, the judgment in her favor, which would supersede all *pendente lite* orders, would be rendered subsequent to the commence-

ment of the action for absolute divorce and so not within the protection of G.S. 50-11."

The judgment from which plaintiff appealed is affirmed.

Affirmed.

Judges BROCK and GRAHAM concur.

ALVESTA SPINKS GLOVER, UNMARRIED, JORHETTA ROBINSON EVANS AND HUSBAND, HAYES EVANS, HOWARD GURNEY STRICKLAND, UNMARRIED, HELEN STRICKLAND ROBBINS AND HUSBAND, ROBERT ROBBINS, PETITIONERS v. LONNIE A. SPINKS AND WIFE, ANNIE SPINKS, RESPONDENTS

No. 7119SC602

(Filed 15 September 1971)

1. **Rules of Civil Procedure § 38— jury trial — lack of factual controversy**

Where there was no controversy as to any of the facts in a partitioning proceeding, a motion for a jury trial was properly denied. G.S. 1A-1, Rule 38.

2. **Wills § 64— doctrine of election — applicability**

Election is required where a beneficiary under a will has two conflicting claims to a decedent's estate.

3. **Wills § 64— election — surviving tenant by the entirety — attempted devise of entirety property**

A surviving tenant by the entirety who was not a beneficiary under her husband's will was not required to make an election as to that part of the will which attempted to devise the entirety property to the testator's son.

4. **Estoppel § 5; Wills § 4; Husband and Wife § 17— devise of entirety property — wife's signature on husband's will — estoppel**

A wife who signed her name at the bottom of her husband's holographic will could not be estopped from challenging her husband's purported devise of entirety property, since the wife's signature constituted a complete nullity.

5. **Rules of Civil Procedure § 56; Courts § 9— denial of summary judgment by one judge — consideration of case on the merits by another judge**

An order of one judge denying a motion for summary judgment does not prevent another judge from considering the case on its merits and rendering judgment.

Glover v. Spinks

APPEAL by Respondents from *Collier, Judge,* 3 May 1971 Session of Superior Court held in RANDOLPH County.

This is a special proceeding instituted by Petitioners to sell land for partition. The petition was subsequently amended to seek actual partition rather than a sale.

The defendant, Lonnie A. Spinks (Lonnie) pleaded sole seizin and the action was transferred to the civil issue docket of the Superior Court.

The stipulations and admissions reveal this factual situation.

The land involved consists of 66 acres situated in Grant Township, Randolph County, North Carolina. This tract of land was conveyed to A. S. Spinks and wife, Maggie Spinks by deed from Elijah Allred and wife dated 26 September 1896 and recorded in Book 150, Page 22 of the Randolph County Public Registry.

Maggie Spinks was the lawful wife of A. S. Spinks at the time of the conveyance in 1896 and remained such wife until the death of A. S. Spinks in February 1956.

A. S. Spinks left a holographic will which was duly probated as such and which was held by the Court as such. *In re Spinks,* 7 N.C. App. 417, 173 S.E. 2d 1 (1970), *cert. denied,* 276 N.C. 575 (1970).

The will of A. S. Spinks purported to devise to his son, G. R. Spinks, a tract of land containing 89 acres and which included the 66 acres involved in this proceeding.

G. R. Spinks, the devisee in the will of A. S. Spinks, died testate in 1968. The will of G. R. Spinks purported to devise to his son, the Respondent Lonnie, the 89-acre tract of land which A. S. Spinks had purportedly devised to G. R. Spinks.

Maggie Spinks died 14 May 1959 intestate and was survived by the Petitioners and the Respondent, her heirs-at-law.

Maggie Spinks was not a beneficiary under the holographic will of her husband A. S. Spinks. She did not dissent from the will.

In January 1971 Petitioners moved for summary judgment. This motion was denied by Judge Blount 12 February 1971.

On 3 May 1971 Respondent requested a jury trial.

Judge Collier heard the matter without a jury, found facts which were supported by the pleadings and stipulations, and then based upon those findings of fact concluded that Maggie Spinks, as the surviving spouse of A. S. Spinks, was the sole owner of the 66-acre tract of land at the time of her death, and that her heirs, including the Respondent Lonnie, were tenants in common of the 66-acre tract of land.

From the judgment entered by Judge Collier, the Respondent Lonnie appealed.

Hoyle, Hoyle & Boone by Harry Rockwell and John T. Weigel, Jr., for Petitioner Appellees.

Miller, Beck & O'Briant by G. E. Miller and F. Stephen Glass for Respondent Appellants.

CAMPBELL, Judge.

The Respondent brings forward five assignments of error in his brief which we will discuss in order.

[1] 1. The denial of trial by jury. The demand for jury trial was not made in compliance with Rule 38 of the Rules of Civil Procedure. There was no controversy as to any of the facts and therefore no issue of fact to be determined by a jury. The denial of a jury trial was not error.

2. The Respondent asserts that Maggie Spinks was required to make an election under the will of her husband, A. S. Spinks; and since she made no election, she was bound by his will. Respondent in his brief states:

> "It is undisputed that the deed from Elijah Allred and wife, Nancy Allred, to A. S. Spinks and wife, dated September 26, 1896, created an estate by the entirety."

[2, 3] The principle of election is not applicable. Maggie Spinks was not a beneficiary under the will of A. S. Spinks. Election is required where a beneficiary under a will has two conflicting claims to a decedent's estate. *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584 (1945). Not only must the person required to make an election to be a beneficiary under the will, but the intent of the testator to require such an election must clearly appear from the will. *Burch v. Sutton,* 266 N.C. 333,

145 S.E. 2d 849 (1966). In *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29 (1946), it is stated:

> "We should also say that as a matter of course there is no election implied or is indeed possible when the person whose right is adversely dealt with in the will receives from the testator no alternative benefit thereunder in lieu of that taken away. . . . "

Maggie Spinks was not deprived of any interest she had in the 66-acre tract of land by reason of her husband, A. S. Spinks, attempting to devise it. *Randolph v. Edwards,* 191 N.C. 334, 132 S.E. 17 (1926). The trial judge was correct in his holding.

[4] 3. Respondent asserts that the doctrine of estoppel should apply and that Maggie Spinks, having signed at the bottom of A. S. Spinks' holographic will, would be estopped to assert that the will of A. S. Spinks did not devise the 66-acre tract of land and that accordingly Petitioners, as some of the heirs of Maggie Spinks, would likewise be estopped. The signature of Maggie Spinks at the bottom of her husband's holographic will, constituted a complete nullity. A paper having no validity cannot be made the basis of an estoppel. *Cruthis v. Steele,* 259 N.C. 701, 131 S.E. 2d 344 (1963).

4. The Respondent asserts that the plea of sole *seizin* is valid. The Respondent bases this assertion upon the doctrine of election or because of an estoppel. Both of these points have already been covered, and it would be vain to do so again.

[5] 5. The final point raised by the Respondent is that Judge Blount, in denying the motion of Petitioners for summary judgment, had decided the case and that it was error for Judge Collier to overrule Judge Blount. The order of Judge Blount denying the motion for summary judgment was based upon the pleadings and was not determinative of the case on its merits. Judge Collier, on the other hand, considered the case on its merits and made findings of fact which were supported by the pleadings and stipulations of the parties and the uncontroverted evidence. The findings of fact of Judge Collier supported the conclusions of law, and the judgment entered by Judge Collier is

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

DOROTHY GWYN v. JACK ROSCOE LINCOLN

No. 7121SC429

(Filed 15 September 1971)

Automobiles §§ 62, 83— injury to pedestrian — issues of negligence and contributory negligence

A plaintiff who was struck by defendant's automobile as she attempted to cross a street at a place other than a marked or unmarked crosswalk failed as a matter of law to offer sufficient evidence of defendant's negligence and established by her own evidence her contributory negligence.

APPEAL by plaintiff from *Armstrong, Judge,* 25 January 1971 Session of FORSYTH Superior Court.

Plaintiff by this action seeks to recover damages for personal injuries sustained when she was struck by defendant's automobile as she attempted to cross 4½ Street in Winston-Salem. At the end of plaintiff's evidence, the court allowed defendant's motion for a directed verdict under Rule 50 on the grounds that plaintiff had offered no evidence of negligence on the part of defendant, and even should there be sufficient evidence of defendant's negligence, plaintiff's evidence disclosed her own contributory negligence as a matter of law. Plaintiff appeals, assigning as error the allowing of defendant's motion for directed verdict.

W. Warren Sparrow for plaintiff appellant.

Edwin T. Pullen for defendant appellee.

MORRIS, Judge.

The order entered on final pretrial conference contained stipulations that the accident occurred on 21 March 1970 on 4½ Street approximately 40 feet west of the intersection of 4½ and Broad Streets, that it was misting rain at the time, and plaintiff was a pedestrian crossing 4½ Street at a place not a marked crosswalk or an unmarked crosswalk.

The investigating police officer testified that 4½ Street is 24 feet wide. Both parties agreed that plaintiff was struck 5 feet from the north curb line of 4½ Street. There is a street light on the northeast corner of the intersection and one approximately 250 feet west (along 4½ Street) of the west curb line

of Broad Street. The loading dock for Sears Roebuck Company is in the southwest corner of the intersection. Sears Roebuck and the wall of the store come up almost to the southern edge of 4½ Street at Broad Street. There is no traffic control signal here. Mr. Lincoln was proceeding northwardly on Broad Street, approaching the intersection of Broad and 4½ Street. He said he had stopped at the intersection waiting for southbound traffic on Broad to pass so that he could make his turn. On the north side of 4½ Street there is no sidewalk. On the southern side of 4½ Street the sidewalk extends all the way down to the intersection of 4½ and Broad with the exception of the driveway at the Sears loading dock. The point of impact was about 39 feet west of the west curb line of Broad Street. Plaintiff was crossing at a place not marked as a crosswalk. The wall of the two story Sears building extends to where the sidewalk is. Mrs. Gwyn was walking diagonally from the southern side of 4½ Street. She had started at a place about 60 or 70 feet west of Broad Street on the southern side of 4½ Street. There was nothing to prevent her from continuing walking down the southern side of 4½ until she got to the intersection where she could have gone across the crosswalk to the other side. It was raining and it was dark. The posted speed limit there is 20 miles an hour. The intersection is not well lighted. The driveway which "runs into the loading dock" is used as a sidewalk. There were no tire marks. The car which hit Mrs. Gwyn did not run over her. It merely struck her and stopped there "at about where they struck."

The plaintiff testified that she had been shopping at Sears and was going back to 5th Street to catch the bus. She came out the back of Sears to 4½ Street near the loading dock and just past the telephone post. She started across the street going to 5th Street. "I didn't see anything coming when I started across the street. I didn't see a car and I crossed." She crossed diagonally. At the time she was wearing a red coat, navy dress with a red and white collar, red and black shoes, had two bags she had bought from Sears and an umbrella. It was dusk and drizzling rain. "As I crossed, I was hit. I was just about to the side and I was hit." There was a light at the corner, a regular street light. There were two lights on the side of the loading dock wall plus a big spotlight on a tower beyond the Sears building which shines in the general direction of the intersection. On cross-examination, plaintiff testified that there were no

cars parked on the street on either side and nothing in the loading dock area blocking her way or preventing her continuing to walk on the sidewalk until she reached the intersection. The place where she crossed was not a crosswalk. She had on a red coat, had her umbrella up, was carrying two packages, and her pocketbook was over her shoulder. She looked before crossing the street.

By deposition introduced by plaintiff, defendant testified that he had driven east on 4th Street, turned north on Broad and had traveled north on Broad to the intersection of 4½ Street. He stopped to allow three or four southbound cars to pass and then proceeded to turn. He traveled some 35 to 40 feet "and this lady was in the center, coming at an angle toward me, and I pulled to the curb, stopped, and at the same instant hit her. She didn't seem like she saw me at all until she was hit, until just an instant—she looked at me and she was hit at the same instant. She laid over—it wasn't a hard blow; it was about the instant of complete stop, and at that instant she was hit, and she laid over on the hood and then fell to the ground—to the street." She had an umbrella. It was dark maroon and the coat was almost the same color as the umbrella. As to how far away from her the witness was when he first saw her: "There wasn't any determination there. It was a split second because, like I say, it was, well it was dusk, or dark, the headlights were on, and it was misty rain, and with her dark apparel it was just—until my headlights was on her I didn't see her at all." There were no cars parked on 4½ Street and it is a one-way street in the direction in which witness was traveling. There was nothing between him and Mrs. Gwyn within the 40 feet from the corner to the point of impact. There was no vehicle in the left lane. He was in the right lane and "stopped and went to the curb to avoid her." He had seen people "jaywalk" there before. His speed when he turned the corner would be between 7 and 10 miles an hour. He went from a standstill on Broad Street and about 10 miles an hour is the highest speed he could have attained as he approached Mrs. Gwyn.

On a motion for a directed verdict the court 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 defendant's motion. In determining the sufficiency of the evidence to withstand the motion, we are

guided by the same principles that prevailed under a former procedure with respect to a motion for judgment as of nonsuit. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Ingold v. Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971). Applying these principles to the evidence before the Court in this case, we come to the conclusion that, as a matter of law, the evidence is insufficient to justify a verdict for plaintiff. She has failed, as a matter of law, to show sufficient evidence of negligence on the part of defendant to submit that issue to the jury, and has, by her own evidence, shown conclusively her contributory negligence.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT D. JENKINS

No. 7127SC597

(Filed 15 September 1971)

1. **Constitutional Law § 32— denial of court-appointed counsel — sufficiency of findings**

Finding by the trial court "from the affirmations made by the applicant and after due inquiry made, that the applicant is financially able to provide the necessary expenses of legal representation," *held* sufficient to support the court's denial of court-appointed counsel.

2. **Constitutional Law § 31; Witnesses § 10— defendant unrepresented by counsel — failure of judge to assist in having subpoenaes issued**

Where the court sustained an objection to a question asked by defendant, who was not represented by counsel, during cross-examination of a State's witness, and defendant stated, "I would like for them to get Mr. Lawes here in the courtroom and he could tell you, with the City Police Department," the trial court did not err in telling defendant that he could call any witness he wanted at the appropriate time, or in failing to advise defendant of his right to subpoena witnesses and to assist him in having subpoenaes issued.

APPEAL by defendant from *Thornburg, Judge*, 4 January 1971 Session of Superior Court held in GASTON County.

Defendant was charged in a bill of indictment, proper in form, with the felony of an assault with a firearm upon a law-enforcement officer while the officer was in performance of his

duty. (G.S. 14-34.2). Upon his plea of not guilty he was tried by jury.

From a verdict of guilty and judgment of imprisonment, defendant appealed.

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

Robert E. Gaines for the defendant.

BROCK, Judge.

Defendant was arrested on 4 October 1970. On 17 November 1970 defendant's request for court-appointed counsel was denied by the District Court Judge upon a finding "from affirmations made by the applicant and after due inquiry made" that the defendant was financially able to provide the necessary expenses for legal representation. Also on 17 November 1970 defendant waived a preliminary hearing and was bound over to the Superior Court for trial. On 7 January 1971 defendant again requested court-appointed counsel to represent him at his trial. On 7 January 1971 Judge Thornburg entered the following order:

> "The above named person, being a party to a proceeding or action listed in G.S. 7A-451(a), specifically, assault with firearm on officer and assault with firearm with intent to kill, and, having requested the assignment of counsel; now therefore,
>
> "It appearing to the undersigned Judge from the affirmations made by the applicant and after due inquiry made, that the applicant is financially able to provide the necessary expenses of legal representation, it is, therefore,
>
> "ORDERED AND ADJUDGED that he is not an indigent, and his request is hereby denied."

Defendant's assignment of error number 1 is as follows: "The Court erred in failing to inquire into the indigency of the defendant and in failing to advise him that he had a right to counsel if he could not afford one and in failing to make findings of fact with regards to the indigency of the defendant."

[1] Obviously the defendant was advised of the right to counsel, because he requested court-appointed counsel. Also it is obvious

that the trial judge inquired into the financial situation of defendant because he had defendant's affidavit before him. We hold that the trial judge made sufficient findings to justify denial of court-appointed counsel. Within a period of three months two judges denied defendant's application for court-appointed counsel upon findings that defendant was financially able to provide the necessary expenses for legal representation, and defendant does not now contend that he was financially unable to employ counsel to represent him at his trial. Also we note that defendant is represented upon this appeal by privately employed counsel.

[2] Defendant's assignment of error number 2 is as follows: "The Court erred in failing to advise the defendant of his rights to have witnesses subpoenaed and erred in failing to assist the defendant, who was without counsel, in having subpoenaes issued for witnesses to testify on his behalf." This assignment of error is based upon an exception to a remark by the judge to the defendant. During the course of defendant's cross-examination of one of the State's witnesses, he asked an improper question to which the judge sustained an objection. However, the witness answered anyway denying the accusation in the question. Then the following transpired:

> "DEFENDANT: Your Honor, if it please the Court, I would like for them to get Mr. Lawes here in the courtroom and he could tell you, with the City Police Department.
>
> "THE COURT: You have had since October 4th, as I understand it, to prepare for the trial Mr. Jenkins. Any witnesses you want, you can call at the appropriate time. Any further questions of this witness?
>
> "DEFENDANT: Yes, sir."

The effect of the judge's remark to defendant was that defendant could call any witness he wanted at the appropriate time, but not while the State was putting on its evidence. This is in accordance with correct procedure. There is no indication at any point during the trial that defendant wanted witnesses whose attendance at trial he did not know how to secure. There is no indication that defendant desired any defense witness who was not made available to him at the appropriate time. In fact, defendant did call a witness to testify in his behalf.

In his efforts to represent himself at trial, defendant showed surprising familiarity with trial procedures and knowledge of his rights. Nevertheless, as might be expected from a layman, he asked numerous improper questions. His assignments of error numbers 3, 4, 5, 6, and 7 challenge the ruling of the trial judge in sustaining objections to questions asked by defendant in cross-examining the State's witnesses. We have carefully reviewed each of these and find them to be without merit. No new or unusual question of procedure or evidence is presented and we conclude that no purpose can be served by a seriatim discussion.

Defendant's remaining two assignments of error, numbers 8 and 9, are addressed to the charge of the Court to the jury. We have carefully reviewed the charge and hold that it fairly presents the case to the jury upon applicable principles of law. In defendant's trial we find no prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

RAMELLE F. AUSTIN v. RAY I. AUSTIN

No. 7120DC549

(Filed 15 September 1971)

1. Divorce and Alimony § 18— alimony pendente lite from time of abandonment

The trial court did not err in awarding the wife subsistence *pendente lite* of $500 per month from the time her husband wrongfully abandoned her, not just from the time she instituted her action for alimony without divorce, and in requiring the husband to pay the wife a lump sum of $2,700 as accrued living expenses.

2. Divorce and Alimony § 18— counsel fees pendente lite — absence of evidence and findings as to reasonable worth

The trial court abused its discretion in ordering defendant husband to pay $3,000 as counsel fees *pendente lite* for plaintiff wife where no evidence was presented as to reasonable attorney's fees and the court made no findings based upon such evidence as to the reasonable worth of attorney's fees.

Austin v. Austin

APPEAL by defendant-husband from *Crutchfield, District Judge,* 10 May 1971 Session, STANLY County District Court Division of the General Court of Justice.

The plaintiff, (wife) instituted this action for separate support and maintenance, alimony *pendente lite,* and attorney's fees for that the defendant, (husband) had wrongfully and unlawfully abandoned her.

The action was heard on 30 April 1971 upon the wife's motion for alimony *pendente lite* and counsel fees. The evidence consisted of the pleadings and numerous affidavits.

Among other things the trial judge found that the parties were married 31 March 1934; had two children, a son now 24 years of age and a daughter now 20 years of age; that the husband is a man of means and possesses considerable property worth approximately $400,000.00 of which approximately $50,000.00 was in cash; on 17 May 1970 husband, without just cause or provocation, removed himself from the home and has failed and refused to live with his wife and "has willfully failed and refused to support plaintiff according to his means and conditions and ability"; wife is a woman of excellent character and reputation and has been a good, faithful and dutiful wife; wife is unemployed and has no income and her only assets consist of her interest as a tenant by the entirety with the defendant in certain tracts of real estate together with a one-half undivided interest in a 7½-acre tract of land in Albemarle, North Carolina; that wife is without sufficient means to provide for her necessary subsistence pending the trial and to provide counsel fees; that $500.00 a month is necessary for wife to subsist pending the trial and since husband left the home on 17 May 1970, he has provided the wife for subsistence with the sum of $2,800.00.

Based upon these findings of fact the trial judge concluded that husband has abandoned the plaintiff-wife; has offered indignities to her person so as to render her condition intolerable and life burdensome; has willfully failed to provide wife with necessary subsistence according to his means and conditions in life so as to render wife's condition intolerable and life burdensome; that wife does not have sufficient means to subsist during the prosecution of this action and to defray the expenses thereof. The trial judge thereupon ordered the

husband to pay the wife $500.00 per month for support and subsistence, said payment to commence as of 20 May 1971, and payments to be made on or before the 20th day of each month thereafter. The judge further ordered that $2,700.00 be paid at once for the period of 1 June 1970 to 1 May 1971, over and above the $2,800.00 paid heretofore; that the wife have possession of the home with the upkeep thereof being charged to the husband; that husband pay plaintiff's attorney $3,000.00 as attorney's fees *pendente lite.*

From this order defendant-husband appealed.

Patterson & Doby by Henry C. Doby, Jr., for plaintiff appellee.

Coble, Morton and Grigg by Ernest H. Morton, Jr., for defendant appellant.

CAMPBELL, Judge.

[1] The husband-appellant presents two questions. The first assignment of error is whether the trial court committed error in ordering the husband to pay the wife the sum of $2,700.00 as living expenses accruing from June 1, 1970 until May 1, 1971.

The trial judge found that the wife was entitled to support in the amount of $500.00 a month and then calculated the period of time since the husband wrongfully separated himself from his wife and gave the husband credit for the payments which had been made during this period of separation upon the calculated amount based on $500.00 a month.

G.S. 50-16.3(b) provides:

> "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 pendancy of the suit in which the application is made."

G.S. 50-16.1(1) provides for payment of alimony "either in lump sum or on a continuing basis."

Under the statutory authority vested in the trial judge he could award a lump payment or monthly payments. The amount of the allowance for subsistence is a matter for the trial judge. The exercise of his discretion in this respect is not reviewable except in case of an abuse of discretion. The fact

that the trial judge used a combination of both a lump sum payment and a continuing monthly payment would not constitute an abuse of discretion. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443 (1960).

The evidence adduced in the hearing before Judge Crutchfield supported the crucial findings of fact made by him, and those findings of fact adequately support the allowance ordered paid plaintiff-wife. We think she was entitled to subsistence in keeping with defendant-husband's means and ability and standard of living, not only from the time she instituted her action, but from the time her husband wrongfully separated himself from her. No abuse of discretion by Judge Crutchfield has been shown. This assignment of error is overruled.

[2] The second assignment of error brought forward by the defendant-husband is that the trial judge abused his discretion in ordering the defendant-husband to pay the sum of $3,000.00 as counsel fees *pendente lite* for the plaintiff-wife.

G.S. 50-16.4 provides that any time a dependent-spouse would be entitled to alimony *pendente lite* "the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse." It is to be noted that the statute uses the word "reasonable."

The record in this case is entirely lacking as to any evidence as to the nature and worth of any legal services rendered, the magnitude of the task imposed, the time required, and the skill and ability called for. In fact, the only reference in the record to counsel fees is the statement contained in the complaint to the effect that the services of the attorneys for plaintiff *pendente lite* "are reasonably worth $4,500.00." It is therefore not surprising that the trial judge made no findings whatsoever as to the reasonable value of the services rendered by the wife's attorneys. Compare the lack of evidence and absence of any findings by the trial judge as to the reasonable worth of the attorney's fees in this case with the evidence and findings of the trial judge in the case of *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967). See also *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949).

Because of the lack of any evidence as to reasonable attorney's fees and the absence of any findings by the trial judge based upon such evidence as to the reasonable worth

of attorney's fees, we think this assignment of error is well taken.

The judgment awarding alimony *pendente lite* is affirmed, and the judgment awarding fees to plaintiff's attorneys is reversed without prejudice to the right of the plaintiff, upon proper showing, to procure reasonable counsel fees.

Affirmed in part.

Reversed in part.

Chief Judge MALLARD and Judge HEDRICK concur.

JEAN H. LITTLE v. GRUBB OIL COMPANY AND JUNE C. LITTLE, SR.

No. 7122SC617

(Filed 15 September 1971)

1. **Bills and Notes § 4— note under seal — presumption of consideration**

A note under seal raises a presumption of consideration.

2. **Bills and Notes § 4— presumption of consideration — burden of rebuttal**

While the presumption of consideration is rebuttable as between the original parties to a note or as to any person not a holder in due course, the burden of rebutting the presumption is on the defendant.

3. **Bills and Notes § 4— husband's note to wife — sufficiency of consideration — jury question**

A wife presented sufficient evidence to go to the jury on the question of whether a $10,000 note executed to her by her husband was given for sufficient consideration, where the wife testified that a check for $10,000, made payable to her, was given to her by her husband, who stated that it represented proceeds from the sale of his deceased mother's house and that his mother had wanted plaintiff to have the money; and that the husband then asked her for a loan of $10,000, stating that he would give her a demand note which would be as good as cash.

4. **Trial § 10— remarks of trial court — harmless effect**

Trial court's remarks during defendant's cross-examination of the plaintiff, "What is the use of all this? It doesn't have a thing in the world to do with the law suit," was not prejudicial to the defendant, since the remark was made in response to a series of irrelevant questions.

APPEAL by defendant from *Crissman, Judge,* 10 May 1971 Civil Session of Superior Court held in DAVIDSON County.

Defendant Little delivered to his wife, the plaintiff, a demand promissory note, dated 8 February 1967, in the amount of $10,000. The note was signed under seal by Little in his individual capacity and also as an official of Grubb Oil Company.

Plaintiff brought this action to recover $6,000 allegedly due and owing on the note. Grubb Oil Company's motion for a directed verdict was allowed and the court submitted a single issue to the jury: "What amount, if any, is the plaintiff entitled to recover of the defendant, June C. Little?" The jury answered the issue "$6,000.00." Judgment was entered in accordance with the verdict and defendant Little appealed.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for plaintiff appellee.

Barnes and Grimes by Jerry B. Grimes for defendant appellant.

GRAHAM, Judge.

Three of appellant's assignments of error raise the question of whether plaintiff proved that she gave any consideration for the subject note.

[1, 2] The note was a negotiable instrument and was under seal. Thus, a presumption of consideration was raised. 1 Strong, N.C. Index 2d, Bills and Notes, § 4. While this presumption is rebuttable as between the original parties or as to any person not a holder in due course, the burden of rebutting the presumption is on the defendant. *Trust Co. v. Smith Crossroads, Inc.,* 258 N.C. 696, 129 S.E. 2d 116. The question of whether a defendant has carried this burden is for the jury unless the plaintiff's own evidence establishes the defense of a failure of consideration. See *Montague v. Womble,* 267 N.C. 360, 148 S.E. 2d 255.

[3] Plaintiff's evidence here did not establish a failure of consideration but was in fact sufficient to take the case to the jury, even without the benefit of any presumption. Plaintiff testified that a check for $10,000, made payable to her, was given to her by her husband who stated that it represented proceeds from the sale of a house which was owned by his

mother at her death. He said his mother had wanted plaintiff to have the money. Appellant then asked plaintiff to loan him the $10,000, stating that he would give her a demand note which would be as good as cash. Plaintiff endorsed the check and gave it to appellant and appellant gave her the note. Appellant later paid plaintiff $4,000 on the note but refused her demand for further payment.

Appellant denied that plaintiff surrendered anything in exchange for the note, and he testified that it was given to plaintiff so that she would have a claim against his business, Grubb Oil Company, in the case it failed.

Under the evidence presented the question of whether the note was given for sufficient consideration was for the jury. No exception was taken to the court's charge and we therefore presume that the court fairly and accurately presented defendant's contention that there had been a lack of consideration.

[4] Defendant's final assignment of error is directed to a statement interposed by the court during defense counsel's cross-examination of plaintiff. The court stated: "What is the use of all this? It doesn't have a thing in the world to do with the law suit."

Defendant contends this statement constituted a prejudicial comment upon the evidence by the trial judge. We disagree. The prohibition against expressions of opinion by a trial judge on the weight, importance or effect of the evidence, applies only to an expression of an opinion related to facts which are pertinent to the issues to be decided by the jury. *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296; *McDonald v. McArthur,* 154 N.C. 11, 69 S.E. 684. The record here shows that the court's statement was in response to a series of irrelevant questions which had been propounded by counsel. It amounts to nothing more than a ruling that the questions were irrelevant. In the exercise of its rights to control and regulate the conduct of the trial, a court may on its own motion exclude or strike evidence which is wholly incompetent or inadmissible. *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912.

No error.

Judges BROCK and VAUGHN concur.

GILBERT KENNEDY, TRADING AND DOING BUSINESS AS HOME FURNITURE CO. v. F. D. TARLTON

No. 7119DC578

(Filed 15 September 1971)

Trial § 11— jury argument — reading of portions of pleadings

The trial court did not err in allowing counsel for plaintiff, over defendant's objection, to read in his argument to the jury portions of the final pleadings upon which the case was tried. G.S. 84-14.

APPEAL by defendant from *Hammond, District Judge,* 19 February 1971 Session of District Court held in RANDOLPH County.

This is a civil action wherein the plaintiff Gilbert Kennedy, trading and doing business as Home Furniture Co., seeks to recover $537.91, the balance allegedly due by defendant on the purchase price of certain items and articles of furniture.

The plaintiff offered evidence tending to show that on 18 December 1962 defendant purchased from John U. Kennedy, trading and doing business as Home Furniture Co., furniture and carpeting for a total price of $1,122.60. The defendant at the time of purchase executed a conditional sales contract which was identified and introduced into evidence as plaintiff's Exhibit A. On 1 October 1968, plaintiff purchased the furniture business from his father, and defendant's unpaid installment account was assigned to plaintiff. The assignment of the account was made on the reverse side of the conditional sales contract, Exhibit A.

Defendant's payments on the account were entered on a ledger sheet which was identified and introduced as plaintiff's Exhibit B.

Defendant, in his answer, denied the indebtedness and offered evidence tending to show that he purchased from plaintiff's father, John U. Kennedy, a certain house and lot in October 1962. Defendant contended that the house did not contain carpeting in living room, hall and den, in accordance with the terms of the purchase agreement, and that he is not therefore indebted to plaintiff for the price of the carpet.

Defendant admitted execution of the conditional sales contract and making the payments credited to the account.

The following issues were submitted to and answered by the jury as indicated:

"1. Did the defendant purchase furniture from John U. Kennedy, trading as Home Furniture Company, as alleged?

Answer: Yes.

2. Was said sale under a conditional sales agreement executed by the parties, as alleged?

Answer: Yes.

3. Was this account and conditional sales agreement assigned by John U. Kennedy to Gilbert Kennedy, as alleged?

Answer: Yes.

4. Is the defendant in default of the payments agreed between the parties, as alleged?

Answer: Yes.

5. In what amount, if any, is the defendant indebted to the plaintiff?

Answer: $537.91."

From judgment entered on the verdict defendant appealed.

H. Wade Yates and John N. Ogburn, Jr., for plaintiff appellee.

Ottway Burton for defendant appellant.

HEDRICK, Judge.

By his first assignment of error, defendant contends the court committed prejudicial error in not sustaining his objection to plaintiff's counsel's reading portions of the amended pleadings in his argument to the jury.

In jury trials the whole case as well of law as of fact may be argued to the jury. G.S. 84-14; *Brown v. Vestal,* 231 N.C. 56, 55 S.E. 2d 797 (1949).

The trial judge has large discretion in controlling and directing the argument of counsel, but this does not include the right to deprive a litigant of the benefit of counsel's argument when it is confined to the proper bounds and is addressed to

material facts of the case. *Puett v. Railroad,* 141 N.C. 332, 53 S.E. 852 (1906).

We hold that the court did not commit prejudicial error by allowing counsel for plaintiff, over defendant's objection, to read portions of the final pleadings upon which the case was tried in his argument to the jury. *Jackson v. Jones,* 1 N.C. App. 71, 159 S.E. 2d 580 (1968). This assignment of error is without merit.

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

In the trial below we find no prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

ALICE LUCILLE CRAVEN BRITT AND HUSBAND, OSSIE GERMAN BRITT, AND IDA LEOLA CRAVEN BRISTOW v. GARLAND W. ALLEN

No. 7119SC551

(Filed 15 September 1971)

1. **Rules of Civil Procedure § 56— summary judgment on court's own motion — notice of hearing**

   Order allowing summary judgment in favor of defendants is reversed where the judgment was entered on the court's own motion and plaintiffs were not given at least 10 days' notice before the time fixed for the hearing as required by G.S. 1A-1, Rule 56(c).

2. **Appeal and Error § 10; Rules of Civil Procedure § 56— motion for summary judgment made on appeal — jurisdiction of Court of Appeals**

   The Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. N. C. Constitution, Art. IV, § 12(2); G.S. 7A-26.

APPEAL by plaintiffs from *Gambill, Judge,* at the 5 April 1971 Session of RANDOLPH Superior Court.

Plaintiffs instituted this action on 25 April 1969 seeking to recover $30,000. A demurrer filed by defendant under the former

practice was overruled on 3 October 1969. Defendant then filed answer denying the material allegations of the complaint and asserting certain affirmative defenses.

The case was calendared to be tried on 12 April 1971. On 8 April 1971 the court entered judgment which is summarized as follows: This action came on to be heard at pretrial conference. From court records presented and statements of counsel made at the time, the court found and concluded that prior to the institution of this action, plaintiffs instituted an action against several parties including defendant herein; that in said previous action plaintiffs submitted to judgment of voluntary nonsuit as to defendant and then instituted this separate action against defendant; that the other action involved the same subject matter as this action and has been terminated adversely to plaintiffs; that plaintiffs have not paid the costs in the other action; that the other action is *res judicata* to this action; that this action is barred by the statute of frauds. The present action was "dismissed with prejudice and judgment as of nonsuit" with plaintiffs to pay all costs.

Duly excepting to the procedure followed, the findings of fact and conclusions of law, and the entering of the judgment, plaintiffs appealed to this court.

Ottway Burton for plaintiffs appellants.

Moser and Moser by Thad T. Moser for defendant appellee.

BRITT, Judge.

[1] Although not designated as such, the judgment appealed from amounted to a summary judgment. Rule 56 of the Rules of Civil Procedure, G.S. 1A-1, Rule 56, relating to summary judgments, provides in pertinent part as follows: * * * "A party against whom a claim, counterclaim, or cross claim 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. * * * The motion shall be served at least 10 days before the time fixed for the hearing."

In the instant case defendant made no motion for summary judgment in the superior court; the record indicates that the judgment was entered on the court's own motion. Not only did defendants fail to move for summary judgment but plaintiffs

were not given at least 10 days' notice before the time fixed for the hearing as required by Rule 56(c). Since the procedure prescribed by Rule 56 was not followed, the judgment appealed from is erroneous. *Ketner v. Rouzer,* 11 N.C. App. 483, 182 S.E. 2d 21 (1971). *Lane v. Faust,* 9 N.C. App. 427, 176 S.E. 2d 381 (1970).

[2] Plaintiffs' motion for summary judgment in this court is denied. Article IV, Sec. 12(2) of the Constitution of North Carolina provides that the Court of Appeals shall have such *appellate* jurisdiction as the General Assembly may prescribe. G.S. 7A-26 provides that "(t)he Supreme Court and the Court of Appeals respectively have jurisdiction *to review upon appeal decisions of* the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this article." (Emphasis added.) Motions for summary judgment are properly heard in the trial courts.

For the reasons stated, the judgment appealed from is reversed and this cause is remanded to the superior court.

Reversed and remanded.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LEWIS CLARK PITTMAN, JR.

No. 7118SC543

(Filed 15 September 1971)

1. **Burglary and Unlawful Breakings § 5— breaking and entering — sufficiency of evidence**

State's evidence, including testimony that defendant's fingerprints were found on pieces of broken glass at the crime scene, *held* sufficient to be submitted to the jury in this prosecution for felonious breaking and entering of an automobile supply store.

2. **Criminal Law § 113— instructions — application of law to evidence**

The trial judge failed to apply the law to the facts in evidence as required by G.S. 1-180 where he merely read the statute under which defendant was charged and summarized the contentions of the parties.

3. Burglary and Unlawful Breakings § 7— failure to submit nonfelonious breaking or entering

In this prosecution for felonious breaking or entering, the trial court erred in failing to submit for jury consideration the lesser included offense of nonfelonious breaking or entering.

APPEAL by defendant from *Johnston, Judge,* 29 March 1971 Session of Superior Court held in GUILFORD County.

At an earlier trial defendant was convicted of felonious breaking or entering and felonious larceny. Defendant's motion to set aside the verdict on the larceny count was allowed. Defendant appealed and, for errors committed in the admission of certain evidence, was granted a new trial in a decision reported in 10 N.C. App. 508. At defendant's retrial on the count of felonious breaking or entering the evidence was, in summary, as follows.

The Western Auto Supply Company store, located at 300 North Elm Street, Greensboro, North Carolina, was closed and locked by its manager at approximately 7:00 p.m., 6 August 1970. When the manager returned at approximately 8:15 a.m., 7 August 1970, he discovered the store had been broken into and entered. A glass, approximately 22 by 32 inches, in the service bay door nearest the retail part of the store had been broken; the locked access door between the retail department and service department of the store had been broken; and the lock on the rear exit door had been sawed off and a bar covering this door removed. The bar and a hacksaw were near the rear exit door. An inventory disclosed that ten television sets, a phonograph, three automobile tape players, and a tape recorder were missing, at a total value of $1277.00. No one had been authorized to enter the building to take this property. The defendant's fingerprints were found on pieces of broken glass at the service bay door. There were several drops of blood near the service bay door and a small amount of blood on the door leading from the service area to the retail store. The defendant had a small cut on his right thumb covered with a bandage on 9 August 1970 at the time of his arrest.

The defendant's evidence tended to show that he had been to the Western Auto Store a few days before his arrest, and was called to the service department by a friend who wanted some change to buy gin. In getting the change from his pocket,

the defendant dropped some coins. After going to his hotel room, about four blocks away, he discovered he had lost his key. He went back to the store, where the service department door was down, and knelt down to look for his key. Since he was not able to find his key on the outside, he went inside the store and obtained permission to look for his key on the inside near the service department door where entry was made and the glass broken. The key was found, and the defendant may have placed his fingers on the door on the inside and outside in looking for his hotel key. His finger was cut on a pool table when he struck the table with his thumb in breaking the balls. The defendant had a criminal record, including convictions of breaking and entering and larceny.

The jury returned a verdict of guilty. From judgment imposing an active prison sentence, the defendant appeals.

Attorney General Robert Morgan by Assistant Attorney General William W. Melvin and Assistant Attorney General William B. Ray for the State.

Assistant Public Defender for the Eighteenth Judicial District R. D. Douglas III for defendant appellant.

VAUGHN, Judge.

[1] The State, in a diligently prepared case, presented evidence which was more than sufficient to withstand defendant's motions for nonsuit. Defendant's assignments of error based on the denial of these motions are overruled.

[2] Defendant's assignments of error directed to the charge of the court are meritorious. In a very brief charge the court's explanation of the law consisted largely of a reading of the statute under which defendant was charged.

> "When a person is on trial, charged with having committed a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. [citations omitted] This 'calls for instructions as to the law upon all substantial features of the case.' " *State v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921.

" 'It is the duty of the court to state the evidence "to the extent necessary to explain the application of the law" arising thereon.' " *Seed Co. v. Mann,* 258 N.C. 771, 129 S.E. 2d 488. In this charge the court made no reference to the evidence except in a short statement as to the contentions of the parties. This is generally held to be insufficient. *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196.

[3] Under the facts of this case, it was also error for the court to fail to submit for jury consideration the lesser included offense of nonfelonious breaking or entering.

For prejudicial errors in the charge of the court there must be a new trial.

New trial.

Judges BROCK and GRAHAM concur.

BETTY ANTHONY HARRIS v. HASKEL EMBERY McLAIN D/B/A TERMINAL CAB COMPANY

No. 7119SC437

(Filed 15 September 1971)

Automobiles § 57—intersection accident — insufficiency of evidence of negligence

Plaintiff passenger's evidence was insufficient to be submitted to the jury in this action against the driver of the automobile in which plaintiff was riding where it tended to show only that the driver of a second automobile pulled up to an intersection, stopped for a stop sign, saw no traffic approaching and, as she entered the highway along which defendant was traveling, was instantly struck by defendant's automobile.

APPEAL by plaintiff from *Gambill, Judge,* 4 January 1971 Session of Superior Court held in CABARRUS County.

This action was instituted on 19 August 1969 to recover damages for injury sustained in an automobile accident which occurred on 20 August 1966. At the conclusion of plaintiff's evidence, the court granted defendant's motion for a directed verdict. Plaintiff appealed.

Johnson, Davis and Horton by Clarence E. Horton, Jr., for plaintiff appellant.

Williams, Willeford and Boger by John Hugh Williams for defendant appellee.

VAUGHN, Judge.

Plaintiff was a passenger in defendant's vehicle when it collided with a vehicle operated by one Sharon Kincaid. Prior to the institution of the present action plaintiff unsuccessfully sued Miss Kincaid, alleging that her negligence was the sole proximate cause of the accident. At the trial of the action against the defendant in this case, the only testimony as to the occurrence of the accident was given by plaintiff and Miss Kincaid. Plaintiff's testimony was silent as to the manner in which defendant's vehicle was being operated. She testified she did not know how the accident occurred. Miss Kincaid testified that she pulled up to the intersection, stopped for a stop sign, saw no traffic approaching and, as she entered the highway along which defendant was traveling, was instantly struck on the left side of her vehicle. There was nothing to obscure her visibility for one block in the direction from which defendant approached the intersection. It is manifest that the evidence was insufficient for submission to the jury. We hold that defendant's motion for a directed verdict was properly allowed.

Affirmed.

Judges BROCK and GRAHAM concur.

EMMETT FRANKLIN SCISM, JR. v. JOHNNY RAY HOLLAND AND INTERSTATE EGG SERVICE, INC.

No. 7121SC485

(Filed 15 September 1971)

1. **Appeal and Error § 45— assignment of error — abandonment**

An assignment of error for which no reason is stated or authority cited will be deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

2. **Appeal and Error § 31— exceptions to the charge — issue not reached by the jury**

Exceptions to the charge on an issue not reached by the jury are moot.

APPEAL by plaintiff from *Armstrong, Judge,* 25 January 1971 Session of Superior Court held in FORSYTH County.

This action for personal injuries was instituted as a result of an accident which occurred on Interstate 40 in the City of Winston-Salem. The first issue "Was the plaintiff injured by the negligence of the defendants as alleged in the complaint?" was answered "No." Plaintiff appealed.

Edwin T. Pullen and George E. Clayton, Jr., for plaintiff appellant.

Hudson, Petree, Stockton, Stockton and Robinson by W. F. Maready for defendant appellees.

VAUGHN, Judge.

[1, 2] Plaintiff contends that the trial judge failed to correctly instruct the jury on the burden of proof. No reason is stated and no authority is cited to support this assignment of error and, under the rules of this Court, it will be taken as abandoned. Rule 28, Rules of Practice in the North Carolina Court of Appeals. The remainder of the plaintiff's assignments of error all relate to the court's instructions on the issue of contributory negligence which was not reached by the jury. The exceptions to the charge on this issue are, therefore, moot. *Williams v. Cody,* 236 N.C. 425, 72 S.E. 2d 867; *Williams v. Stores Co., Inc.,* 209 N.C. 591, 184 S.E. 496. We have, however, reviewed the entire charge of the able trial judge and no prejudicial error appears therein.

To answer the first issue the jury had to consider whether negligence of the defendants proximately caused the collision and, if so, whether the plaintiff was injured as a result of the collision. The evidence in this case was such that the jury may well not have been satisfied by the evidence and the greater weight thereof that either occurred. *Dotson v. Chemical Corp.,* 278 N.C. 677, 180 S.E. 2d 859.

No error.

Judges BROCK and GRAHAM concur.

JOHN HENRY BARKER v. CLAYTON HARRINGTON HICKS

No. 7119SC518

(Filed 15 September 1971)

Venue § 7— removal to the county of the parties' residence

Trial court properly granted defendant's motion to transfer a personal injury action to the county in which both plaintiff and defendant resided, where the motion was made within the period allowed for filing answer. G.S. 1-82; G.S. 1-83.

APPEAL by plaintiff from *Gambill, Judge,* 5 April 1971 Session of Superior Court held in RANDOLPH County.

Plaintiff instituted this action seeking to recover damages allegedly sustained by reason of the negligence of defendant. Suit was filed in Randolph County. Plaintiff and defendant are residents of Chatham County. Plaintiff appealed from an order removing the action to the Superior Court of Chatham County.

Ottway Burton for plaintiff appellant.

Barber, Holmes and Barber by Wade Barber, Jr., for defendant appellee.

VAUGHN, Judge.

Chatham County is the proper county for the trial of this action. G.S. 1-82. Plaintiff contends that the defendant waived his right to have trial conducted in the proper county. Defendant was served with summons and complaint on 29 April 1970. By letter dated 8 May 1970 H. F. Seawell, Jr., Esquire wrote the clerk of superior court of Randolph County and requested "an extension of time in which to file Answer" and tendered an order to this effect, omitting the proposed time of extension. On 12 May 1970 Judge Long signed an order providing that the time within which defendant might answer was thereby "extended for twenty days to and including the 18th day of May, 1970." The statutory time for filing answer did not expire until 29 May 1970. On 20 May 1970 defendant's present counsel filed a motion for removal of the action to Chatham County. This motion was filed well within the period allowed for filing answer. G.S. 1-83 provides that unless defendant demands transfer "before the time of answering expires" the action may be tried in the county where suit is filed. Rule 12(b) of the

North Carolina Rules of Civil Procedure provides that the defense of improper venue is one that may be raised by motion or in the responsive pleadings, at the option of the pleader. We hold that under the circumstances of this case the court could properly order the case transferred to Chatham County.

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES WILLARD BROADNAX

No. 7117SC586

(Filed 15 September 1971)

ON *certiorari* to review judgment of *Bailey, Judge,* rendered 3 March 1971 in the Superior Court held in Wake County on return to a writ of *habeas corpus.*

The Attorney General on behalf of the State filed petition in this Court for a writ of *certiorari* to review an order entered 3 March 1971 by Judge James H. Pou Bailey after a hearing in Superior Court in Wake County upon return to writ of *habeas corpus* in which James Willard Broadnax was ordered released from custody. By order of this Court dated 17 May 1971 the application was granted and the writ issued.

Attorney General Robert Morgan by Staff Attorney Edward L. Eatman, Jr., for the State.

Hugh P. Griffin, Jr., for James Willard Broadnax, petitioner in the habeas corpus proceeding.

PARKER, Judge.

The writ of *certiorari* is dismissed as improvidently granted.

Judges BRITT and MORRIS concur.

Dantzic v. State

SUSAN DANTZIC, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 7029SC550

(Filed 15 September 1971)

APPEAL by petitioner from *Snepp, Judge,* 9 March 1970 Mixed Session of Superior Court held in RUTHERFORD County.

Attorney General Robert Morgan by Staff Attorney Rafford E. Jones for the State.

Smith and Patterson by Norman B. Smith for petitioner appellant.

VAUGHN, Judge.

This case has been reconsidered as directed by the Supreme Court in its decision reported in 279 N.C. 212. We affirm the order of the superior court denying petitioner's application for a new trial and other relief.

Affirmed.

Judges CAMPBELL and BRITT concur.

WILLIAM F. ANDREWS v. OLIVE M. ANDREWS

No. 7110DC607

(Filed 20 October 1971)

1. **Appeal and Error § 45— abandonment of assignments of error**

Assignments of error not brought forward and argued in the brief are deemed abandoned. Court of Appeals Rule 28.

2. **Divorce and Alimony § 23— modification of child support — sufficiency of evidence**

In this hearing upon motions by both parties for modification on the ground of changed circumstances of the father's child support payments, the evidence was sufficient to support the court's determination of the amount necessary to meet the reasonable needs of the children for health, education and welfare, and the court's order showed that the court considered "the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case." G.S. 50-13.4.

3. **Divorce and Alimony § 23— child support order — reasonable needs of child**

While it would be the better practice for the court to state in its child support order that the payment ordered is the amount necessary to meet the reasonable needs of the child for health, education and maintenance, the failure of the court to do so is not reversible error.

4. **Divorce and Alimony § 23— increase in child support — change of conditions of the father**

The trial court did not fail to consider the change of conditions of the father in ordering an increase in child support payments to be made by the father.

5. **Divorce and Alimony § 23— child support — modification of portion of prior order**

Contention that an order increasing the father's child support payments required by a prior order is ambiguous in failing to state clearly whether the father is to continue the house payments and hospitalization insurance premium payments required by the prior order, *held* without merit where the record on appeal agreed to by both parties states that the court's second order changed only the amount of child support and left the remaining portions of the prior order in full force and effect.

6. **Divorce and Alimony § 23— child support — separation agreements**

Separation agreements are not final and binding as to child support payments.

7. **Divorce and Alimony § 23— increase in child support — alimony after divorce**

Court order increasing the amount of child support to be provided by the father did not constitute an award of alimony after a divorce.

8. **Divorce and Alimony § 23— child support — monetary amounts for various expenses**

In increasing the amount of child support to be provided by the father to $200 per month for each child, the court did not err in failing to set specific monetary amounts to be used for medical expenses and certain other expenses.

9. **Divorce and Alimony § 23— increase in child support — attorney fees of the mother**

Where the mother's application for modification of a child support order was necessitated by the father's refusal of her request for additional child support, the father cannot complain of being required to assist in payment of the mother's necessary counsel fees.

APPEAL by plaintiff from *Barnette, Judge,* 3 May 1971 Session, District Court of WAKE County.

Plaintiff and defendant were married in 1943 and separated on 20 May 1965. On 28 June 1965 they entered into a separation agreement. Four children were born of the marriage, and at the time the agreement was executed the ages of the children were 18, 14, 7 and 4. By the agreement custody of all the children was placed in defendant with reasonable visitation rights to plaintiff. The agreement provided, among other things, that plaintiff would pay to defendant the sum of $400 per month until the second oldest child reached age 18 (the oldest child was already 18) or entered college; then $340 per month until the next child reached age 18 or entered college; then $300 per month until the youngest child reached 18 or entered college. From that time plaintiff would continue to pay defendant $200 per month alimony until she obtained a divorce or married, whichever should come first. It was further provided that for income tax purposes $200 monthly payment to defendant should be designated and treated as alimony. Plaintiff agreed to maintain hospitalization insurance on the children "as long as the provisions of the policy permit." It was further agreed that defendant would be entitled to the use and occupancy of the home owned by the parties as tenants by the entirety, with certain limitations not here pertinent, and that plaintiff should continue to make the payments thereon. Upon the occurrence of any one of the specified condi-

tions, the house is to be sold and the proceeds divided equally between the parties.

In May 1966 plaintiff brought an action for divorce. In that action defendant requested the court to inquire into the support payments for the children being made by plaintiff. A hearing was had. At that time, the oldest child was 20 years of age and in college, though at home with defendant and the other three children when she was not in college. Plaintiff was paying her college expenses. At that time plaintiff was earning approximately $20,000 per year in salary and had other income of approximately $890 per year. These facts were found by the court, and an order entered as follows:

> "1. That the plaintiff pay to the defendant, commencing with the month of August, 1966, and thereafter until changed by order of this court, the sum of TWO HUNDRED ($200.00) DOLLARS per month for the use and support of the minor children born of the marriage.
>
> 2. That the plaintiff pay promptly as the same become due and payable all house payments on the property owned by the plaintiff and defendant known as 118 Longview Lake Drive, Raleigh, North Carolina, and that the defendant and children be permitted to use and occupy said dwelling, said payments and occupancy to continue until one of the contingencies in Article III of the separation agreement occurs, or until otherwise ordered by this court.
>
> 3. That the plaintiff maintain a hospitalization policy on his children and pay all premiums therefor until otherwise ordered by this court, and that he furnish to the defendant a copy of said policy showing coverage provided for said children."

On 18 March 1971 defendant filed a motion in the cause alleging change of circumstances and requesting an increase in the support payments for the children and attorneys fees. On 14 April 1971, plaintiff filed a motion requesting a reduction in the payments for support of the children, alleging change of circumstances.

At the hearing, defendant introduced evidence including evidence of plaintiff called as an adverse witness. Plaintiff offered no evidence. The court ordered that defendant's motion

to increase the support payments be allowed and plaintiff's motion to reduce them be denied. The order directed plaintiff to pay $200 per month for each of the two children then under 18 and living in the home, and pay all reasonable medical, dental and drug bills of the two children. Plaintiff was also ordered to pay $300 as attorney's fee for defendant's attorney. Plaintiff excepted and appealed.

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

Manning, Fulton & Skinner, by John B. McMillan, and Tharrington and Smith, by Roger W. Smith, for defendant appellee.

MORRIS, Judge.

In its order, the court made the following findings of fact:

"1. On July 27, 1966, the parties appeared in court and Superior Court Judge, W. A. Johnson ordered the following:

(a) Plaintiff was to pay to the defendant TWO HUNDRED ($200.00) DOLLARS per month for support of the four minor children born of the marriage.

(b) Plaintiff to make all house payments.

(c) Plaintiff to maintain a hospitalization policy on the children.

2. At the present time, there are only two minor unemancipated children living in the home with the defendant: Susan E. Andrews, age 13 and Christy L. Andrews, age 10.

3. That on July 27, 1966, the plaintiff had a gross salary of TWENTY THOUSAND ($20,000.00) DOLLARS per year and an additional income of EIGHT HUNDRED NINETY ($890.00) DOLLARS per year.

4. That the average monthly expenses for all the children except Carolyn Andrews, who was 19 years of age at the time and in college, was THREE HUNDRED EIGHTY-NINE ($389.00) DOLLARS; that these expenses plus those of the defendant totalled SEVEN HUNDRED SIXTY AND 96/100 ($760.96) DOLLARS per month on July 27, 1966.

5. That the defendant had on July 27, 1966, a take-home salary of THREE HUNDRED ($300.00) DOLLARS per month plus she received TWO HUNDRED ($200.00) DOLLARS per month alimony from the plaintiff through a separation agreement.

6. Now the plaintiff receives a gross salary of THIRTY THOUSAND ($30,000.00) DOLLARS per year from his employment—about TWENTY-FOUR THOUSAND ($24,000.00) DOLLARS net per year—plus he receives ONE HUNDRED ($100.00) DOLLARS per year from Duke University as a teacher and TWO HUNDRED FORTY ($240.00) DOLLARS per year from the United States Government because he is a disabled veteran.

7. Now the defendant receives a take-home salary of TWO HUNDRED EIGHTY-FIVE ($285.00) DOLLARS per month and her estimated expenses in order to maintain her accustomed standard of living at the present time, including those of Susan and Christy Andrews, amount to ONE THOUSAND FIFTY-EIGHT ($1,058.00) DOLLARS per month.

8. The estimated monthly expenses of the child Susan Andrews in order to maintain her at her accustomed standard of living at the present time but not including medical, dental or drug bills is approximately TWO HUNDRED ($200.00) DOLLARS.

9. The estimated monthly expenses of the child Christy Andrews in order to maintain her at her accustomed standard of living at the present time but not including medical, dental or drug bills is approximately TWO HUNDRED ($200.00) DOLLARS.

10. That in arriving at the figures set out in PARAGRAPHS 8 and 9 above, the court did not consider the house payments and hospitalization policy which the plaintiff is paying.

11. The plaintiff has since the action of July 27, 1966, remarried and has one child by that marriage. His present wife has three children by a previous marriage and she is receiving THREE HUNDRED ($300.00) DOLLARS per month in support of those children from their father."

Plaintiff excepted to all the findings except 1, 2, 3, 6 and 11.

Upon the facts found, the court made the following conclusions of law, to each of which plaintiff excepted:

"1. The plaintiff's motion to reduce his support payments for his children should not be allowed in that he has not shown a change of circumstances and he has not shown that the monetary needs of the two minor children have been decreased below TWO HUNDRED ($200) DOLLARS per month for both together even though on July 27, 1966, he was required to support four children. The court concludes that the support heretofore allocated and spread out for the support of four children should now be divided among the two since they require at least that much.

2. The defendant's motion to increase the support payments should be allowed in that she has shown a change of circumstances in that: (a) the plaintiff is now making at least TEN THOUSAND ($10,000.00) DOLLARS per year gross more than he was making at the time of the original order; (b) the monetary needs of the two remaining minor children now exceed that which was needed to support the four children on July 27, 1966; and (c) the defendant's ability now to meet these children's needs over and above what the plaintiff was required to provide has greatly diminished, not so much from a decrease in her income, but to a drastic increase in these two children's needs as well as her own.

3. The plaintiff is fully able to pay the sum of TWO HUNDRED ($200.00) DOLLARS per month for the support of the child Susan Andrews plus all her reasonable medical, dental and drug bills. Considering the needs of this child and the respective income of the plaintiff and the defendant and their particular circumstances as to expenses, this sum plus all reasonable medical, dental and drug bills is fair and reasonable and the amount which the plaintiff is required to pay for the support of this child should be increased to this amount.

4. The plaintiff is fully able to pay the sum of TWO HUNDRED ($200.00) DOLLARS per month for the support of the child Christy Andrews plus all her reasonable medical, dental and drug bills. Considering the needs of this child and the respective income of the plaintiff and the defend-

ant and their particular circumstances as to expenses, this sum plus all reasonable medical, dental and drug bills is fair and reasonable and the amount which the plaintiff is required to pay for the support of this child should be increased to this amount.",

and entered the following order:

"THEREFORE, IT IS ORDERED that paragraph 1 of the Order in this cause dated July 27, 1966, is hereby amended and that the plaintiff pay to the defendant:

1. The sum of TWO HUNDRED ($200.00) DOLLARS each month for the support of the child Susan Andrews and upon demand pay all her reasonable medical, dental and drug bills.

2. The sum of TWO HUNDRED ($200.00) DOLLARS each month for the support of the child Christy Andrews and upon demand pay all her reasonable medical, dental and drug bills.

IT IS FURTHER ORDERED that the plaintiff pay to the defendant the sum of THREE HUNDRED ($300.00) DOLLARS as an attorney's fee for the defendant's attorney."

Plaintiff excepted to each numbered paragraph of the order.

[1] Of the 31 assignments of error noted by plaintiff in the record, he fails to bring forward and set out in his brief those numbered 1, 2, 3, 4, 26, 28, 29, 30, and 31. Under Rule 28, Rules of Practice in the Court of Appeals of North Carolina, these are deemed abandoned. Those set out and argued in his brief are argued under seven general headings. For the sake of brevity and clarity, we shall follow the same procedure used by plaintiff and adopted by defendant in her brief.

[2, 3] Plaintiff first contends that the order failed to comply with the statutory standard of G.S. 50-13.4. His argument is apparently directed to section (c) thereof which provides:

"Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

Defendant testified at length and in detail with respect to the needs of the children—both in 1966 and currently. She testified that she had budgeted her income (from her job, the alimony payments, and the child support payments) for the needs of the children and herself, and allocated to the children certain portions of each item such as food, clothing, dental care, medicines, transportation, school expenses, utilities, church contributions, etc. With respect to 1971, she testified "I have computed a budget for 1971, and I arrived at a figure according to what it is costing me right now." Plaintiff argues that the evidence of defendant as to what she "budgeted" and "allocated" in 1966 and 1971 is insufficient for the court to find the amount of "estimated monthly expenses" of each child "to maintain her at her accustomed standard of living at the present time." We find this argument without merit. Defendant testified "According to my budget, that I have very, very carefully worked out, I need $557.00 a month for the children. That would cover what it is actually costing me to take care of them." It is obvious from the evidence that defendant had kept accurate records of her expenses to meet the reasonable needs of the children for health, education and maintenance. It is equally obvious that her salary and the alimony payments had been used, in large measure, to supplement the support payments made by plaintiff. The evidence was uncontradicted that plaintiff had, for at least the year preceding the filing of defendant's motion, reduced the support payments to $140 per month. The evidence was also uncontradicted that defendant's take home pay was slightly less in 1971 than in 1966, although her gross pay had increased; and that plaintiff's salary in 1966 was approximately $20,000 and in 1971 is $30,000 with take home pay of "around $24,000.00." The evidence was, and the court found as a fact, that plaintiff had remarried and had a child by his second wife and that also living in his home are the three children of his present wife by her former husband, who contributes $300 per month to their support. We think the evidence with respect to the amount necessary "to meet the reasonable needs of the child for health, education, and maintenance" was plenary, and that the order entered reflected the fact that the court considered "the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case." We agree that it would be the better practice for the court's order to relate that the payment ordered is the amount necessary to meet the reasonable needs of the

child for health, education, and maintenance. Nevertheless, the failure of the court to do so, certainly in this case, does not constitute reversible error.

[4] Plaintiff next contends that the court erroneously failed to consider the change of conditions of the husband. Plaintiff did not offer any evidence but was called as a witness by defendant. He testified that his salary had increased by some $10,000, that his disability payments as a veteran had increased, his salary as a teacher at Duke had decreased, and his dividend income had not increased. He further testified that he had remarried and that he lived with his present wife, their child, and three children of his wife by her previous marriage for whom their father paid $300 per month support, and that defendant lived in the house which he provided when they were married and that only two of the children were under 18 and living with her. On his motion to reduce his support payments, plaintiff failed to carry his burden of proof. On defendant's motion to increase, plaintiff points to nothing which indicates the court failed to consider the change of circumstances of plaintiff. Indeed, it is obvious from the record and from plaintiff's own evidence that the plaintiff was paying to defendant for the year preceding this hearing some $2,000 less than he was paying in 1966 although his salary had increased by some $10,000.

[5] Plaintiff also argues that the order entered is ambiguous and that it did not clearly state whether plaintiff is to continue house payments and insurance and further that the court "did not consider these items." The record contains what is denominated "statement of case on appeal." We find therein the following: "The District Court judge's order changed only paragraph 1 of the order of Superior Court Judge W. A. Johnson dated July 27, 1966, thereby leaving the remaining portions of that order in full force and effect, including the requirement that plaintiff husband make house payments." On 19 July 1971 plaintiff, through counsel, "stipulated and agreed that the foregoing shall constitute the record, the agreed statement of Case on Appeal, and the Assignments of Error to the North Carolina Court of Appeals." Plaintiff's argument is not tenable.

[6] Plaintiff next argues that the court's findings of fact and conclusions of law ignored the separation agreement entered into between the parties and that the award amounts to an

invalid award of alimony after a divorce. This hearing was had upon a motion by defendant that the court increase the *payments ordered by the court by its order of 27 July 1966,* upon allegations of change of circumstances and upon motion by plaintiff that the court decrease the payments ordered by the court in its order of 27 July 1966, also upon allegations of changed circumstances. Both the separation agreement and Judge Johnson's order were before the court. Plaintiff candidly concedes that separation agreements are not final and binding as to child support payments. Neither party attempts to set aside the separation agreement, nor change any portion of it except the provision with respect to payments for support of the children, nor have the parties or the court ignored its provisions.

> "The provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Such agreement, including consent judgments based on such agreements with respect to marital rights, however, *are not final and binding* as to the custody of minor children or *as to the amount to be provided for the support and education of such minor children.*" (Emphasis added.) *Hinkle v. Hinkle,* 266 N.C. 189, 195, 146 S.E. 2d 73, 77 (1966).

Judge Johnson's order contained four numbered paragraphs. Paragraph one set the amount of monthly payments for the children. Paragraph two provided for use and occupancy of the home by defendant and the children and directed plaintiff to make the house payments. This paragraph referred to Article III of the separation agreement. Paragraph three directed plaintiff to maintain hospitalization insurance on his children until otherwise ordered by the court. Paragraph four taxed the costs to plaintiff. The order entered which is the subject of this appeal specifically states that it amends only paragraph one of Judge Johnson's order.

[7] Assignment of error No. 29, raising the question of whether the order amounts to an award of alimony after a divorce, is not brought forward in the brief and is deemed abandoned. Although plaintiff argues this contention under other assignments of error, we find it to be without merit. There is evidence that defendant, while she could, used her own funds—from her work and alimony—to supplement the children's support.

There is also evidence, uncontradicted, that although defendant's own needs and expenses have increased her take home income has decreased, and she can no longer devote the major portion of her income to the children. "In cases of child support the father's duty does not end with the furnishing of bare necessities when he is able to offer more, . . . " *Crosby v. Crosby,* 272 N.C. 235, 237, 158 S.E. 2d 77, 79 (1967).

[8] Plaintiff next argues that the court failed to set monetary amounts for the house payments, house repairs, car expense, or medical expense. Again, we note that the order appealed from amends only paragraph one of Judge Johnson's order, leaving in full force and effect the balance of the order with respect to the house and hospitalization insurance. We do not see how the court could have ordered the payment of a fixed dollar amount for medical expenses. Surely the court is not clairvoyant, nor should the plaintiff expect to pay up to a certain amount for dental and medical expenses regardless of the additional amount which might be necessary. The separation agreement provided $200 per month alimony and this is not changed by either order. The order specifies $200 per month for the support of each child. The court has complied with the provisions of G.S. 50-13.4.

[9] Plaintiff contends that the court awarded attorney's fees without a finding of fact that defendant is a dependent spouse with insufficient means to defray the expense. Plaintiff does not contend that the amount is unreasonable and candidly states that standing alone, this alleged error would not be sufficient to award a new trial. Under G.S. 50-13.6 the court may, in its discretion, in an action for support of a minor, allow reasonable attorney's fees to a dependent spouse. Here there was sufficient evidence of dependency but under the circumstances of this case defendant could not be the dependent spouse of plaintiff. We think the statement of the Court in *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967), is applicable:

> "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."

The amount which plaintiff should pay to defendant for the support of the children was a matter for the trial judge's determination, reviewable only in case of abuse of discretion. *Teague v. Teague, supra.* We find no abuse of discretion. It appears that the court properly considered the needs of the children and the ability of the father to provide for those needs. The facts found are supported by competent evidence and are binding on this Court.

We find no prejudicial error warranting a new trial.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. MERRILL LANE ANDREWS, HERBERT SILAS ORR, AND JAMES FRANKLIN EDWARDS

No. 7110SC542

(Filed 20 October 1971)

1. **Conspiracy § 4— conspiracy indictment — failure to name co-conspirators**

An indictment alleging that the named defendant "and others" engaged in a conspiracy to force open a safe and vault is not defective in failing to give the names of the other conspirators.

2. **Conspiracy § 5— competency of co-conspirator as a witness**

A co-conspirator is a competent witness to testify to the conspiracy, whether or not his testimony is supported by corroborating evidence.

3. **Conspiracy § 6— conspiracy to force open a safe — sufficiency of evidence**

Evidence of defendants' guilt of conspiracy to force open a safe and vault was sufficient to be submitted to the jury.

4. **Criminal Law § 88— cross-examination of defendant — restrictions as to defendant's criminal record**

A defendant who takes the witness stand in his own behalf cannot demand that the solicitor be prevented from cross-examining him as to his criminal record.

5. **Criminal Law § 102— defendant's right of last argument to the jury**

Defendants who did not testify and who were granted the last argument to the jury cannot contend on appeal that the trial judge

conditioned the last argument to the jury upon the presentation of no evidence by the defendants.

6. **Conspiracy § 4— conspiracy to force open a safe and vault**

Bills of indictment sufficiently alleged a conspiracy to force open a safe and vault.

7. **Criminal Law § 95— conspiracy prosecution — testimony by defendant against codefendants — harmless error**

The admission, over objection by codefendants, of incompetent testimony given by one defendant was not prejudicial error in a prosecution against defendant and the codefendants for conspiracy to force open a safe and vault, where (1) the incompetent testimony did not directly implicate or refer to the codefendants and (2) the judge told the jury three times not to consider the defendant's testimony against his codefendants.

8. **Constitutional Law § 30— speedy trial — one year's delay between indictment and trial**

A defendant who was charged by indictment in February 1970 with the conspiracy to force open a safe and vault and who was brought to trial in March 1971 failed to establish that he was denied the right to a speedy trial, where (1) part of the delay resulted from the inability of the State to locate the co-conspirators, some of whom were out of the State; (2) the defendant did not show that the delay was due to the neglect or wilfulness of the prosecution; and (3) the defendant had been released on bond and was not prejudiced by the delay.

9. **Arrest and Bail § 9— right to bail — incarceration of defendant during trial**

The trial court, during the trial of three defendants for conspiracy to force open a safe, could properly order the incarceration of one defendant, who was out on bond, after an accomplice had testified to the events of the crime.

APPEAL by defendants from *Clark, Judge*, 29 March 1971 Regular Criminal Session of Superior Court held in WAKE County.

Defendant Andrews was charged with the crime of conspiracy to force open a safe and vault. The pertinent parts of the bill of indictment read as follows:

"THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Merrill Lane Andrews and others, late of the County of Wake on the 25th day of January 1970, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously, agree, plan, combine, conspire and confederate, each with the other, to unlawfully,

wilfully and feloniously force open a safe and vault with drills and other tools, said safe and vault being used for storing money and other valuables by Helmold Ford, Inc. against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant Orr and defendant Edwards were also charged with the crime of conspiracy to force open a safe and vault, each in a separate bill of indictment, identical in language except for the name of the party to the foregoing bill of indictment against Andrews.

Defendant Edwards was also charged in a bill of indictment with the felony of breaking and entering the building of Helmold Ford, Inc., on 25 January 1970 with intent to steal.

The cases against the defendants were consolidated for trial. Each defendant entered a plea of not guilty after the trial judge had denied his motion to quash the bill of indictment against him. In addition, Andrews, prior to pleading, made a motion (which was denied) that he be discharged because the State had not given him a speedy trial.

The evidence for the State in substance, except where quoted, tended to show the following: Helmold Ford, Inc. (Helmold), is a corporation dealing in automobiles and has a place of business at 1500 Buck Jones Road in Wake County. On 25 January 1970, the defendant Orr had been employed by Helmold for about eight months as a salesman and had one of the total of two keys to the front door of the building occupied by Helmold. This building contained a number of automobiles and a variety of related tools and equipment, including acetylene torches. In the office section of the building, which could be reached by means of the front door, there was a safe which Helmold used to keep money, checks, titles to automobiles, and other valuable papers.

On 25 January 1970, one Tony Currin, the general manager of Helmold, and members of the Wake County Sheriff's Department concealed themselves in the Helmold building shortly after 7:30 p.m. and remained concealed there until about 10:30 p.m. when one Thomas Moody (a witness for the State) entered the building armed with an automatic pistol. Mr. Currin testified that shortly after he "heard a key click in the door," he heard the sound of footsteps on the rug. He first saw Thomas

Moody (Moody) standing in the "general office" with a deputy sheriff.

While still at the Helmold office, Mr. Currin produced a group photograph of the company's employees (some fifteen to twenty people) which included a picture of the defendant Orr. Moody later testified that he "picked out" Orr in pictures presented to him that night. After he was arrested and searched, the officers found a key in Moody's pocket which would unlock the front door of the Helmold building. Neither Moody nor Edwards had permission to enter the Helmold building at 10:30 p.m. on the night in question.

Moody testified that:

> "I am Joseph Thomas Moody and I am an inmate in the Wake County jail but my residence is Garner, North Carolina. Earlier this week I pleaded guilty to the charges of breaking and entering Helmold Ford and conspiracy to force open the safe at Helmold Ford. I broke and entered Helmold Ford on the 25th day of January, 1970. I gained entrance using a key. I entered Helmold Ford to get money and automobile titles which were in the safe. Prior to the 25th of January, 1970, I had made arrangements to get a key to the place."

Moody also testified that about a month prior to 25 January 1970, he was at the place of defendant Andrews and that Andrews "had told me about this Helmold Ford"; that after he had looked in the telephone directory, at the request of Andrews, for the telephone number of Helmold, Andrews made a phone call; that he took Andrews in a car to Helmold where they sat for about thirty minutes; that Andrews went inside "the station" and made another phone call; that they then went to a shopping center about a quarter of a mile from Helmold's place of business and parked and that after three to five minutes, defendant Orr "pulled up beside us"; that Andrews got out of the car and talked to Orr, then got back into the car and gave Moody a key which Andrews said was a key to Helmold, and that they had to have a duplicate made and get the key back to Orr; and that after receiving the key, he and Andrews went to a store on Person Street, and Moody had a duplicate key made which he used to enter the front door of Helmold's building on the night in question. (He later testified that Andrews gave him the duplicate key.)

Moody also testified that Andrews had told him before they received the key that Helmold "was an inside job and that we would know when to get it and when not to get it, and the man there, which *(sic)* is Herbert Orr, would notify us at what *(sic)* to get the job, when the most money was in the safe; that Herbert Orr did not want anything, any of the money . . . ." Andrews also told Moody that any money obtained was to be divided among the conspirators, and that all Orr wanted and was to receive were the titles to the cars.

Later during the same week in which the key was obtained, Moody, Andrews, and one Judson Jackson (Jackson) discussed the details of the proposed breaking and entering of Helmold. Moody testified that on one occasion prior to 25 January 1970, he and Andrews had ridden by Helmold and would have broken and entered the building at that time except for the presence of a person there. During the day of 25 January 1970, Moody met with Edwards and one Carl Royster (Royster). (Edwards and Royster "were there from Virginia.") They made plans to break in the Helmold building that night. Moody was to watch while Edwards opened the safe, with the assistance of Royster, using the tools that were at Helmold. That night, Moody, Jackson, Royster and Edwards met, as previously agreed, and proceeded to Helmold for the purpose of breaking into the building and opening the safe. Jackson continued to drive the car in the general area while the others watched Helmold's place from the woods for about thirty minutes. The plans were that Royster and Edwards were to follow Moody inside the building. Moody and Edwards were the only ones in the group with guns. They approached the building, and Moody produced the duplicate key that had been made from the one supplied by Orr and used it to enter, where he was promptly apprehended by the officers.

When Moody entered the Helmold building, a deputy sheriff detained him and forced him to lie down on the floor. While lying on the floor, Moody saw Royster inside the building and heard a shot. Deputy Sheriff Munn, who was inside the building with the other officers, had fired a gun while Moody was lying on the floor. Later that same night Royster was apprehended by Deputy Sheriff McKinney near the Helmold place of business. Edwards was there and was seen, but was not recognized by the officers, and was not taken into custody at that time. After Edwards was arrested in Virginia, he was asked

by the officers who were returning him to Wake County why he ran from Helmold, and he replied, "Hell, when a gun goes off it's time to run."

None of the defendants offered any evidence.

From the verdict of guilty as charged and judgment of imprisonment, each defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Evans for the State.

Tharrington & Smith by Wade M. Smith for defendant appellant Andrews.

McDaniel & Fogel by L. Bruce McDaniel for defendant appellant Orr.

Carlos W. Murray, Jr., for defendant appellant Edwards.

MALLARD, Chief Judge.

In a most commendable manner, counsel for the defendants perfected a joint appeal, filed a joint brief in which they consolidated their assignments of error, and agreed upon the order in which they would be heard upon oral argument.

The defendant Andrews has ten assignments of error, Orr has eight, and Edwards has nine. All of these assignments of error have been consolidated in the brief filed herein under ten headings. The first seven are common to all three of the defendants, the eighth relates only to Andrews and Orr, the ninth relates only to Andrews, and the tenth relates only to Edwards. We will discuss them each separately.

[1] The first question presented is whether the trial court committed error in denying the motion of each defendant to quash the bills of indictment. In each bill of indictment charging a conspiracy, it is alleged that the named defendant "and others" engaged in the conspiracy, and the defendants contend that their motions should have been allowed because none of the three bills of indictment contained the names of any of the conspirators except the particular defendant charged therein. (The defendants do not argue that the bill of indictment charging Edwards with the felony of breaking and entering was inadequate.) The defendants cite the recent case of *State v. Galli-*

more, 272 N.C. 528, 158 S.E. 2d 505 (1968), in which a bill of indictment, charging that a named defendant "and others" committed the crime of conspiracy, was held sufficient, but in which it is further stated that the better practice is to name the known conspirators in the bill of indictment. Defendants contend that the solicitors have now had ample time to absorb the "learning" in the 1968 *Gallimore* decision and should prepare proper bills of indictment by naming the known conspirators when charging a conspiracy. It is not contended, however, that the failure to name the other conspirators hampered the preparation of the defense, but it is argued that this court should hold that "such pleading is too weak to support a conviction for conspiracy." The Supreme Court in *State v. Gallimore, supra,* held a similar bill of indictment was sufficient; therefore, we repeat the holding that although the better practice would be to name the conspirators in the bill of indictment, if their identity is known, the bills of indictment in these cases, referring to the co-conspirators as "and others," is sufficient. See also *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969).

The defendants contend that the trial judge committed error in denying the motion of each defendant for a mistrial. They argue that their motions should have been allowed because one of the prospective jurors stated during the selection of the jury that he had formed an opinion that the defendants were guilty. The trial judge excused this prospective juror for cause, and the selection of the jury continued after the defendants had approached the bench and made their motions for a mistrial out of the hearing of the jury. The defendants do not offer any authority in support of their position, and this contention is without merit.

[2] The defendants' third contention is that the court committed error in permitting Moody to testify to the conspiracy. A co-conspirator is an accomplice and therefore is a competent witness. *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964). See also 16 Am. Jur. 2d, Conspiracy, § 41. Defendants also argue that in order to be competent, the testimony of a co-conspirator must be corroborated to a significant degree. These contentions are without merit. The North Carolina Supreme Court held in the case of *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied,* 398 U.S. 959, *rehearing denied,* 400 U.S. 857, that "(t)he unsupported testimony of a co-conspirator is

sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution." In this case, however, there was some evidence, both circumstantial and direct, to support Moody's testimony.

[3] Defendants' fourth contention is that the trial judge erred in failing to allow their motions for judgment as of nonsuit. In *State v. Gallimore, supra,* the Court said:

> "* * * 'A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. (Citing many cases.)' *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389. A conspiracy to commit a felony is a felony. *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25. The crime is complete when the agreement is made. * * *
>
> After a conspiracy is formed, and before it has terminated, that is, while it is a 'going concern,' the acts and declarations of each conspirator made in furtherance of the object of the conspiracy are admissible in evidence against all parties to the agreement, regardless of whether they are present or whether they had actual knowledge of the acts or declarations. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *State v. Jackson,* 82 N.C. 565. However, admissions made after the conspiracy has terminated are admissible only against the party who made them. * * *"

When the evidence in this case is viewed in the light of the applicable rules of law set out in *Gallimore,* we hold that there was ample evidence against each defendant to require submission of this case to the jury.

[4] The defendants, without taking the witness stand, made motions that they be permitted to go upon the witness stand and testify in their own behalf but that the solicitor for the State be denied the right to cross-examine them as to their criminal records. They assert the denial of these motions as error. In *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971), the Supreme Court said: "The court was not required, in advance of the defendant's taking the stand, to rule upon the limits

of permissible cross-examination." In the case before us, none of the defendants took the stand; hence the question as to the limitation of the cross-examination by the solicitor is not presented. Even had it been properly submitted, however, this contention would be of no avail to the defendants because in the case of *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297 (1965), the Supreme Court answered this question against this contention when it said:

> "When a defendant takes the stand as a witness in his own behalf, he 'may be cross-examined with respect to previous convictions of crime, but his answers are conclusive, and the record of his convictions cannot be introduced to contradict him.' Stansbury's North Carolina Evidence, 2nd Ed., § 112; *S. v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343; *S. v. Howie,* 213 N.C. 782, 197 S.E. 611; *S. v. Maslin,* 195 N.C. 537, 143 S.E. 3."

[5] Defendants also contend that it was error for the trial judge to condition the last argument to the jury upon the presentation of no evidence by the defendants. This question is not properly presented either, because the defendants here did not testify and were granted the last argument to the jury. The trial judge was not required to rule upon the sequence of the argument prior to the closing of the evidence. The time and sequence of argument of a case to the jury, however, is controlled by the trial judge under the authority of Rule 10 of the General Rules of Practice for the Superior and District Courts as adopted by the Supreme Court of North Carolina pursuant to G.S. 7A-34.

[6] The court did not commit error when it refused to grant defendants' motions in arrest of judgment on the grounds that the bills of indictment did not properly allege a conspiracy. Three of the bills of indictment did properly allege a conspiracy, and the other indictment against Edwards properly charged him with the felony of breaking and entering with intent to steal.

[7] The defendants assert in their eighth contention that the trial judge erred in overruling objections by the defendants Andrews and Orr to testimony by State's witness Branch as to a statement made by the co-defendant Edwards. While the State's witness Branch was testifying, the following occurred:

> "Q. Tell us what conversation you had with him on the way back?

MR. SMITH: Objection as to Andrews.

MR. MCDANIEL: Objection as to Orr.

COURT: Objections overruled.

DEFENDANT ANDREWS' EXCEPTION NO. 35.

DEFENDANT ORR'S EXCEPTION NO. 36.

COURT: All right, I instruct the jury it is to be considered only against the defendant Edwards and not against any of the other defendants in these cases."

While this witness was testifying, defendants Andrews and Orr moved to strike all of his testimony, and the judge said:

"Motion denied; and I instruct the jury that this is not to be considered against either the defendant Andrews, or the defendant Orr; to disregard it completely as to them, if it does in any way involve or implicate them."

Again while this witness was testifying, Andrews moved to strike a portion of his testimony, and the judge said:

"Motion to strike is denied. But I instruct the jury not to consider it against Andrews."

Immediately after this instruction, defendant Orr's counsel said: "Same as to defendant Orr"; whereupon, the court said, "Same instruction applies to the defendant Orr."

In each instance the trial judge overruled the objection of the defendants and denied their motions to strike, but on each occasion the jury was immediately instructed that the testimony of the witness Branch as to what Edwards told him was not to be considered by them against the other defendants. What defendant Edwards told the officers after the abortive attempt to open the safe was not competent evidence against the other two defendants but was competent against him. *State v. Conrad, supra.*

It was technically incorrect for the trial judge to fail to sustain these objections of Andrews and Orr and to fail to allow their motions to strike—but the trial judge, immediately after making his rulings, told the jury three times not to consider such testimony against Andrews or Orr. Moreover, the testimony of the witness Branch did not directly implicate or refer

to Andrews or Orr. We do not think that the error was prejudicial; therefore, the assignments of error upon which this contention is based are overruled.

[8] In the ninth contention set out in the brief, the defendant Andrews asserts that it was error for the judge to fail to quash the bill of indictment on the grounds that the State did not afford him a speedy trial. The bill of indictment was returned against the defendant Andrews in February 1970. He was brought to trial in March 1971. In denying the motion of the defendant Andrews, the court said:

> ". . . (L)et the record show that some of the co-defendants were out of the State and not subject to the jurisdiction of this State; and for other reasons, other co-defendants were not available for trial; that the defendant has offered no evidence to show that he was prejudiced by the delay; and it further appears that the defendant has been released on bond and has not suffered undue and oppressive incarceration; that he has not heretofore requested a trial of the charges against him; and the defendant has not shown that the delay was due to neglect or wilfullness. Your motion is, therefore, DENIED . . . ."

In the case of *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969), it is said:

> "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. * * *"

In *State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971), the Supreme Court said:

> "* * * The circumstances of each particular case determines whether a speedy trial has been afforded. Undue delay cannot be defined in terms of days, months, or even years. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by the defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. The burden is on the accused who asserts the denial of his right to a speedy trial to show

that the delay was due to the neglect or willfulness of the prosecution. * * *"

There is nothing in the record before us to indicate that the delay in bringing Andrews to trial was due to the neglect or wilfulness of the prosecution. Neither does the record show that the defendant demanded a trial or was prejudiced by the delay. In this case, when all of the circumtances and interrelated factors are considered, we hold that the trial judge did not commit error in refusing to quash the bill of indictment against Andrews. See also *State v. Neas,* 278 N.C. 506, 180 S.E. 2d 12 (1971) and *State v. Wrenn,* 12 N.C. App. 146, 182 S.E. 2d 600 (1971).

[9] The tenth and last contention made by the defendants is that the trial judge committed error when he ordered Edwards incarcerated during the course of the trial. The record reveals that after the accomplice Moody testified, the State moved, out of the hearing of the jury, that all of the defendants be placed in custody. Only Edwards argues that this was error. One of the defendants was apparently already in custody. 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."

The record does not reveal that the defendant Edwards was placed in custody during the trial as a punishment. In fact, he did not receive the maximum punishment for the crimes of which he was convicted. The inference arises that the reason the defendant Edwards was placed in jail was for the proper purpose of ensuring the orderly and expeditious progress of the trial. No abuse of discretion is shown and no prejudicial error appears in the record. We hold that the trial judge did not commit prejudicial error in putting the defendant Edwards in custody after the accomplice Moody had testified.

No error.

Judges CAMPBELL and HEDRICK concur.

Page v. Sloan

CATHERINE D. PAGE, ADMINISTRATRIX C.T.A. OF THE ESTATE OF CHANNING NELSON PAGE, DECEASED, PLAINTIFF v. GEORGE SLOAN AND HIS WIFE, REA SLOAN, CO-PARTNERS, TRADING AND DOING BUSINESS AS OCEAN ISLE MOTEL, DEFENDANTS

No. 7120SC588

(Filed 20 October 1971)

1. **Negligence §§ 5.1, 53; Innkeepers § 5— motel premises — explosion of hot water heater — negligence of motel owner in hiring plumber to make repairs**

Issue of motel owners' negligence should have been submitted to the jury, under the doctrine of *res ipsa loquitur*, in a wrongful death action arising out of the explosion of an electric hot water heater located on the motel premises, where (1) the water heater was under the exclusive management and control of the owners and was maintained for the use of the guests; (2) the owners employed a plumber, rather than an electrician, to repair the heater; (3) the plumber removed a 2500 watt element from the heater, replaced it with a 4500 watt element, and reset the thermostat to a higher temperature reading; and (4) the heater, which was rated for no more than a 3000 watt element, subsequently exploded and killed plaintiff's intestate.

2. **Rules of Civil Procedure § 56— summary judgment — requisites**

Summary judgment is proper only where movant shows that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

3. **Negligence §§ 6, 31— res ipsa loquitur — summary judgment**

Application of the doctrine of *res ipsa loquitur* recognizes a genuine issue as to the material fact of a defendant's actionable negligence and precludes summary judgment for the defendant.

4. **Evidence § 3— matters of common knowledge — commercial use of hot water heaters**

It is a matter of common knowledge that electric hot water heaters are widely used to fill the hot water requirements of residential, commercial, and industrial users.

5. **Negligence §§ 6, 31— res ipsa loquitur — explosion of hot water heater**

In the absence of explanation, the explosion of an electric hot water heater reasonably warrants an inference of negligence.

6. **Negligence §§ 5.1, 53; Innkeepers § 5— owner of motel — liability to guests**

Although the hotel or motel keeper is not an insurer of the guest's personal safety, he has the duty to exercise reasonable care to maintain the premises in a reasonably safe condition; and if his negligence in this respect is the proximate cause of injury to a guest, he is liable for damages.

Page v. Sloan

7. **Negligence § 29— explosion of hot water heater — jury question — thunderstorm or negligence of owner of heater**

It was a question for the jury whether the explosion of an electric hot water heater was caused by a thunderstorm on the night preceding the explosion, or whether the explosion resulted from the negligence of a motel owner in hiring a plumber rather than a licensed electrician to repair the heater.

8. **Master and Servant § 21; Innkeepers § 5— torts of independent contractor — hiring of plumber — repairs to electric hot water heater**

A motel owner could be found negligent for hiring a plumber, rather than a licensed electrician, to make repairs to an electric hot water heater that subsequently exploded, notwithstanding the plumber was an independent contractor.

9. **Master and Servant § 21— torts of independent contractor — liability of employer of the contractor**

An employer or contractee is not ordinarily liable for the torts of an independent contractor committed in the performance of the contract; however, the employer may be liable if he knew, or by the exercise of reasonable care might have ascertained, that the contractor was not properly qualified to undertake the work.

APPEAL by plaintiff from a judgment of *Long, Judge*, filed 31 March 1971, following a hearing at the 18 January 1971 Session of Superior Court held in MOORE County.

Plaintiff, Administratrix C.T.A. of the Estate of Channing Nelson Page, instituted this action on 4 February 1966, to recover for the wrongful death of Channing Nelson Page, who was killed on 29 August 1964, by the explosion of an 82 gallon electric hot water heater located in an utility room of the Ocean Isle Motel in Brunswick County, North Carolina. She alleged that Mr. Page was a paying guest in said motel which was owned and operated by the defendants as co-partners and that Mr. Page was assigned a corner room which adjoined the utility room which contained the motel's hot water heater. This electric hot water heater was installed, used, and operated by defendants for the purpose of furnishing hot water to the various guest rooms of the Ocean Isle Motel. She alleged that the explosion of the electric hot water heater was the direct and proximate cause of the death of Page and that at all times the said water heater was in the exclusive possession and control of the defendants. She further alleged that the explosion of said electric hot water heater was caused by, or due to, the actionable negligence of the defendants.

Defendants answered admitting allegations of residence, the death of Channing Nelson Page, their ownership and operation of Ocean Isle Motel, their acceptance of Page as a paying guest and assigning him a corner room adjoining the utility room containing the electric hot water heater, the water heater serving the function of furnishing hot water to various guest rooms in the said motel, and said electric hot water heater exploding at the alleged time and place. However, the defendants specifically denied negligence on their part.

Pursuant to the provisions of Rule 16 of the Rules of Civil Procedure and Rule 7, General Rules of Practice in the Superior and District Courts, a final pre-trial conference was held in this action on the 7th day of January, 1971. It was stipulated that all the parties were properly before the court, and that the court had jurisdiction over the parties and the subject matter. The parties stipulated and agreed with respect to the following salient facts:

"(i) This hot water heater unit installed by Shallotte Hardware Company at Ocean Isle Motel remained in operation and use in the new units at that place from approximately April, 1962, until the explosion in August, 1964.

* * *

"(k) In June or July, 1964, George Sloan and Rea Sloan had Olaf Thorsen check the hot water unit here in question due to a complaint of no hot water or insufficient hot water by motel guests. Olaf Thorsen removed the lower heating element of the water heater and obtained a replacement from Shallotte Hardware Company. The original heating element was of the size of 2500 watts. After the explosion it was determined that the lower heating element in the heater at the time of the explosion was an element of 4500 watt size.

"(l) The water heater in question was rated by an inscription on a plate attached thereto at 3000 watts for the upper element, at 2500 watts for the lower element, and at 3000 watts maximum.

* * *

"(p) Olaf Thorsen was a licensed plumber in Brunswick County, North Carolina.

* * *

"(r) The 82 gallon electric hot water heater was manufactured by State Stove and Manufacturing Company and installed in the Ocean Isle Motel by Shallotte Hardware Company and worked on by Olaf Thorsen and was the hot water heater which exploded in the utility room adjacent to the motel room occupied by Channing Nelson Page.

* * *

"(s) There was no inspection of the installation of the hot water heater at the time of its installation in 1962 by the N. C. Department of Labor Boiler Inspection Division as required by North Carolina General Statutes. The installation was inspected by the Brunswick County inspector who was not with the Department of Labor."

In addition to the foregoing stipulations, several depositions were considered by the trial judge at the hearing on motion for summary judgment. These depositions, which were considered by consent, included depositions of each of the defendants, the deposition of Olaf Thorsen (the plumber-repairman), and the depositions of each of the three partners in Shallotte Hardware (the original installer of defendants' electric hot water heater).

The deposition of Olaf Thorsen tends to show that he is a licensed plumber, and that he has no license or experience as an electrician. It tends to show that defendants called him to adjust or repair the electric hot water heater because there was no hot water. It tends to show that he removed a 2500 watt heating element and replaced it with a 4500 watt element, and reset the thermostat to a higher temperature reading. The stipulations show that the water heater was rated for a 2500 watt heating element, and a maximum of 3000 watts. The deposition of Alton Milliken, a licensed electrician, tends to show that the introduction of a 4500 watt heating element would heat the water faster and would draw a larger current through the thermostat which would tend to cause its points to melt and thereby freeze the thermostat so that it would no longer control the temperature. The deposition of Glenn Williamson tends to show that the tank of defendants' electric hot water heater was blown some two hundred to three hundred feet by the explosion.

Defendants' motion for summary judgment was heard during the 18 January 1971 Session of Superior Court held in Moore County. It was stipulated that Judge Long might enter judgment out of the District and after expiration of the Session. After consideration of the pleadings, depositions, and stipulations, Judge Long by judgment filed 31 March 1971 found that there was no genuine issue of any material fact as to liability and that defendants' motion for summary judgment should be granted. Plaintiff appeals.

William D. Sabiston, Jr., and Tharrington & Smith, by Roger W. Smith, for plaintiff-appellant.

Anderson, Nimocks & Broadfoot, by Henry Anderson, for defendants-appellees.

BROCK, Judge.

[1] Plaintiff-appellant insists that the doctrine of *res ipsa loquitur* is applicable in this case and, being entitled under that doctrine to have the case submitted to the jury, that summary judgment for defendant was error. We agree.

[2, 3] Summary judgment is proper only where movant shows that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Application of the doctrine of *res ipsa loquitur* recognizes that common experience sometimes permits a reasonable inference of negligence from the occurrence itself. In other words, the application of the doctrine of *res ipsa loquitur* recognizes a genuine issue as to the material fact of defendants' actionable negligence and precludes summary judgment for defendants.

The rules governing the application of the doctrine of *res ipsa loquitur* in North Carolina have been stated as follows: "When a thing which causes injury is shown to be under the exclusive management of the defendant and the accident is one which in the ordinary course of events does not happen if those in control of it use proper care, the accident itself is sufficient to carry the case to the jury on the issue of defendant's negligence." *O'Quinn v. Southard,* 269 N.C. 385, 152 S.E. 2d 538.

[4, 5] In this case the evidence before the trial judge clearly shows that the electric hot water heater was under the exclusive management and control of defendants, and that they had un-

dertaken the maintenance of it. It is a matter of common knowledge that electric water heaters are widely used to fill the hot water requirements of residential, commercial, and industrial users. When in a safe condition and properly managed, electric hot water heaters do not usually explode; therefore, in the absence of explanation, the explosion of an electric hot water heater reasonably warrants an inference of negligence. See: *Harris v. Mangum,* 183 N.C. 235, 111 S.E. 177.

[6] A hotel or motel keeper, from the nature of his occupation, extends an invitation to the general public to use his facilities. When a paying guest goes to a hotel or motel the very thing he bargains for is the use of safe and secure premises for his sojourn. Although the hotel or motel keeper is not an insurer of the guest's personal safety, he has the duty to exercise reasonable care to maintain the premises in a reasonably safe condition; and if his negligence in this respect is the proximate cause of injury to a guest, he is liable for damages.

[7] Defendants argue that *res ipsa loquitur* does not apply because the evidence leaves the cause of the explosion a matter of conjecture. The depositions of the two defendants which were before the trial judge indicated that a thunderstorm was in the area during the night preceding the explosion of the electric hot water heater. This testimony may constitute evidence for consideration by the jury as a possible explanation of the cause of the explosion, but its probative value is for jury determination and it does not remove the more reasonable inference that the cause of the explosion was negligence of defendants in the management and control of the electric hot water heater.

[8] Defendants further argue that they lack the knowledge and skill to inspect and regulate the heater, that they reasonably relied upon an independent contractor for proper installation, and that they reasonably relied upon an independent contractor for repairs. The evidence before the trial judge discloses that defendants hired one Olaf Thorsen to adjust and repair the electric hot water heater. The evidence before the trial judge discloses that Olaf Thorsen is not a licensed electrician and is not experienced as an electrician, but is licensed and experienced only as a plumber. The evidence before the trial judge further discloses that the repair and maintenance on the electric hot water heater required working with, installing, and adjusting electrical wiring, electrical heating elements, and a thermostat

to control the flow of electrical current. At the time of the accident in question, G.S. 87-43 provided in part as follows: "No person, firm or corporation shall engage in the business of installing, maintaining, altering or repairing within the State of North Carolina any electric wiring, devices, appliances or equipment unless such person, firm or corporation shall have received from the Board of Examiners of Electrical Contractors an electrical contractor's license: . . . "

[9] Plumbers who are answerable only for the result of their work are generally regarded as independent contractors. 41 Am. Jur. 2d, Independent Contractors, § 18. The general rule is that an employer or contractee is not liable for the torts of an independent contractor committed in the performance of the contracted work. 41 Am. Jur. 2d, Independent Contractors, § 24; 26 Am. Jur. 2d, Electricity, Gas, and Steam, § 52. However, a condition prescribed to relieve an employer from liability for the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the contractor was not properly qualified to undertake the work, he may be held liable for the negligent acts of the contractor. 41 Am. Jur. 2d, Independent Contractors, § 26. "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons." Restatement, Second, Torts, § 411. The evidence of the repairs and maintenance performed on the electrical system of defendants' electric hot water heater by Olaf Thorsen tends to affirm the incompetence of defendants' independent contractor as an electrician.

[8] This evidence before the trial judge tends to show a specific act of negligence on the part of defendants in failing to secure the services of a competent independent contractor and tends to strengthen the inference that the cause of the accident was defendants' negligence. The application of the doctrine of *res ipsa loquitur* to this case should not be denied because the evidence tends to show a specific act of negligence on the part

of defendants. *Brown v. Manufacturing Co.*, 175 N.C. 201, 203, 95 S.E. 168, 169.

The entry of summary judgment was error.

Reversed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. LEMUEL MARION SHIRLEY, JR.

No. 7110SC667

(Filed 20 October 1971)

1. **Criminal Law § 91— denial of continuance — defense witness awaiting court-martial**

The trial court did not abuse its discretion, and defendant was not deprived of his right to a fair trial, when the court denied defendant's motion for a continuance made on the ground that a defense witness was then unavailable for trial because he was in the custody of military authorities in Texas awaiting court-martial for being absent without leave and, possibly, for desertion, where approximately nine months had already passed since the charges against defendant arose, during eight months of which he was represented by his trial counsel, and defendant's mother testified to certain of the same facts concerning which defendant contends his unavailable witness would have testified.

2. **Searches and Seizures § 3— search warrant — incorrect date in affidavit**

Incorrect date given in an affidavit for a search warrant as to when affiant received information from a reliable informant was clearly a typographical error and was immaterial.

3. **Searches and Seizures § 3— search warrant — description of the premises**

The search warrant described the premises to be searched with reasonable certainty where the affidavit, which was made a part of the warrant, correctly described the premises as being in Raleigh Township, Wake County, "known as 2515 Clark Ave.," and the description was not rendered uncertain by the fact that the affidavit further incorrectly described the premises as "a brick structure" when in fact it was made of stone. G.S. 15-26(a).

4. **Searches and Seizures § 3— search warrant — affidavit based on information from reliable informant**

Affidavit of a police officer that a reliable informant had told the officer that defendant had marihuana in his possession and that

the informant had seen the marihuana, that the informant had given the officer "other information in the past that proved to be correct and resulted in the arrest of at least two other persons," and that the officer had found from his own investigation that defendant was an associate of persons known by the officer to use drugs and to have had marihuana in their possession, *held* sufficient to satisfy constitutional requirements for supporting the magistrate's independent determination that the information given the officer by the informant was probably accurate.

5. **Searches and Seizures § 3— search warrant for "narcotic drugs" — affidavit refers only to marihuana**

Although the affidavit for a search warrant referred only to marihuana, the magistrate was justified in finding probable cause to believe that "illegally held narcotic drugs" were possessed by defendant on the described premises and to authorize search and seizure of the same, and seizure of LSD during a search under the warrant was legal.

6. **Searches and Seizures § 3— search warrant for narcotics — description of the contraband**

Warrant authorizing a search for "illegally held narcotic drugs" described the contraband with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the U. S. Constitution and Article I, § 20 of the N. C. Constitution.

7. **Criminal Law § 124— interpretation of verdict**

The verdict should be considered in connection with the issue being tried, the evidence and the charge of the court.

8. **Narcotics § 2— felonious possession of marihuana — indictment and proof**

In order to sustain a conviction of the felony of unlawful possession of marihuana under G.S. 90-111(a), it is not only necessary that the State prove beyond a reasonable doubt, but it is also necessary that the indictment allege, as an essential element of the crime, that the defendant unlawfully possessed more than one gram of marihuana.

9. **Narcotics § 5— amount of marihuana possessed — indictment — verdict**

Where the indictment for unlawful possession of marihuana did not include an allegation that the amount was more than one gram, the verdict of guilty "as charged" will support a judgment imposing punishment only for a misdemeanor under G.S. 14-3(a).

APPEAL by defendant from *Clark, Judge*, 10 May 1971 Session of Superior Court held in WAKE County.

Defendant was charged in two bills of indictment with unlawful possession of narcotic drugs, to wit: (1) Lysergic Acid Diethyalmide (LSD) (Case No. 69CR39480), and (2) mari-

huana (Case No. 69CR37894). The cases were consolidated for trial. In each case defendant pleaded not guilty, the jury found him guilty, and judgment was entered imposing a prison sentence. In the case charging unlawful possession of LSD (Case No. 69CR39480), defendant was sentenced for a term of five years. In the case charging unlawful possession of marihuana (Case No. 69CR37894), defendant was sentenced for a term of not less than four nor more than five years, this sentence to commence at the expiration of the sentence imposed in the other case. Defendant appealed.

Attorney General Robert Morgan, Associate Attorney General Howard P. Satisky and Associate Attorney General James E. Magner for the State.

Vaughan S. Winborne for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the denial of his motion for a continuance. A motion for continuance is ordinarily addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only for manifest abuse of discretion. *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617. In this case the motion was made on the day of trial upon the ground that a material witness was then unavailable. It appears that the witness was in custody of military authorities in Texas awaiting trial by court-martial on a charge of being absent without leave and, possibly, on a charge of desertion, and that future availability of the witness would depend upon the punishment he might receive in the court-martial. The charges against defendant arose on 16 August 1969; at least as early as 24 September 1969 he had been represented by his trial counsel; he was indicted in January 1970; and trial did not take place until May 1971. Cause for the long delay in bringing defendant to trial does not appear, but it is clear that further delay would have been waranted only by the most compelling of reasons. Another witness, defendant's mother, was available and did testify to certain of the same facts concerning which defendant contends his unavailable witness would have testified. Under these circumstances the record fails to show any abuse of the trial court's discretion when it denied defendant's motion for a continuance, nor does the record indicate that defendant was

thereby deprived of his fundamental right to a fair trial. We find no merit in this assignment of error.

[2] At the time of his arrest on 16 August 1969, defendant occupied a bedroom in the home of his mother at 2515 Clark Avenue, Raleigh, N. C. The charges against him resulted from a search of the premises made under a search warrant. By appropriate exceptions and assignments of error defendant challenges the validity of the search warrant and the admissibility of the evidence seized thereunder. The challenged search warrant was issued by a magistrate upon presentation to him of an affidavit of E. D. Whitley, a Raleigh police officer, which stated that the officer had reasonable grounds to suspect that defendant had illegally in his possession "certain narcotic drugs, to wit: marihuana in vegetable form" on the premises "known as 2515 Clark Ave." As grounds for this belief, the officer stated in his affidavit the following:

> "A reliable informer stated to me on 8-17-69 that the above person has in his possession at this time marihuana and that he saw it. He further stated that he was offered it for a price. This person has given me other information in the past that proved to be correct and resulted in the arrest of at least two other persons. I have received other information from other person *(sic)* that the above person has in his possession marihuana. I have made an investigation into the above person and have found that he is an associate of persons known by me to be in the use of drugs and have had in there *(sic)* possession marihuana. The information from my informer states that the marihuana is being kept in the house of the above person." (The incorrect date given in the affidavit as "8-17-69" was clearly a typographical error, since the affidavit was sworn to and the search warrant was issued on the night of 16 August 1969. We hold this typographical error immaterial.)

Upon this affidavit the magistrate issued a search warrant containing the following:

> "WHEREAS, from the facts and information set forth in the affidavit on the opposite side, and further from the facts and information made known to me from my examination upon oath of the affiant and of the witnesses listed

below, I conclude as a matter of law and find as a fact that there is reasonable grounds and cause to suspect and believe that illegally held narcotic drugs are possessed by the person and upon the premises as set forth in said affidavit which is made a part of this Search Warrant; and I am satisfied that adequate legal grounds for the issuance of this Search Warrant exist and there is probable cause to believe they exist;

YOU ARE THEREFORE AUTHORIZED AND COMMANDED forthwith to enter upon said premises and make due and diligent search of same, seizing all illegally held narcotic drugs found thereon and safely keep the same subject to the order of the Court.

HEREIN FAIL NOT, and of this warrant make due return.

The witnesses examined by me were:

E. D. Whitley

Issued at 9:15 o'clock, P.M.,

This 16 day of August, 1969.

L. M. BURTON
Magistrate"

[3, 4] We find the warrant valid. It was issued by a magistrate upon finding probable cause for the search as required by G.S. 15-25(a). By reference to the affidavit, which was made a part of the warrant, it described with reasonable certainty the premises to be searched as required by G.S. 15-26(a). (In this connection, the premises were correctly described in the affidavit as being the premises in Raleigh Township, Wake County, "known as 2515 Clark Ave." We hold this to describe the premises with reasonable certainty and that the description is not rendered uncertain by the fact that the affidavit further incorrectly described the premises as "a brick structure" when in fact it was made of stone.) The affidavit attached to the warrant sufficiently indicated the basis for the finding of probable cause as required by G.S. 15-26(b). The information which the affidavit recites was given to the affiant by the unidentified informant was, if true, clearly sufficient to establish probable cause. The magistrate was certainly entitled to rely upon the

sworn statement of the affiant, a police officer who appeared before the magistrate in person, in concluding that the affiant was correctly reciting what had been told him by his informant. The facts sworn to in the affidavit as being within the personal knowledge of the affiant were, in our opinion, at least minimally sufficient to satisfy constitutional requirements for supporting the magistrate's independent determination that the information given the affiant by the informer was probably accurate. *United States v. Harris,* 403 U.S. 573, 29 L. Ed. 2d 723, 91 S.Ct. 2075; *State v. Bullard,* 267 N.C. 599, 148 S.E. 2d 565, *cert. denied,* 386 U.S. 917; *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820 (opinion filed 20 October 1971); *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814. In this connection, while the mere characterization of the informer as being "reliable" might not, in itself, provide a sufficient *factual* basis for the magistrate to credit the report of the informer, *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674, the affidavit here went further and stated that the informer had given affiant "other information in the past that proved to be correct and resulted in the arrest of at least two other persons." Further, affiant swore that he had found from his own investigation that defendant was an associate of persons *known by the affiant* "to be in the use of drugs and have had in there *(sic)* possession marihuana." These facts, recited and sworn to in the affidavit as being within the personal knowledge of the affiant, furnished a sufficiently substantial basis to support the magistrate's independent finding crediting the report of the unidentified informer.

[5, 6] Defendant contends that in any event the search warrant was insufficient to justify seizure and introduction in evidence of LSD, since the affidavit upon which it was based referred only to marihuana. The warrant, however, expressly authorized the officers to search the described premises and seize "all illegally held narcotic drugs found thereon," and by statutory definition both LSD and marihuana are narcotic drugs. G.S. 90-87(1) and (9). Even though the affidavit referred only to marihuana, we hold that the magistrate was justified in finding probable cause to believe that "illegally held narcotic drugs" were possessed by defendant on the described premises and to authorize search and seizure of the same. Certainly the words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the

warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and of Article I, § 20 of the Constitution of North Carolina.

The bill of indictment in the case charging unlawful possession of marihuana charged that defendant on 16 August 1969 "did unlawfully, wilfully and feloniously possess and have under his control a narcotic drug, to wit: marijuana against the form of the statute made and provided." The statute, G.S. 90-111(a), as amended by Sec. 10 of Chap. 970 of the 1969 Session Laws which became effective upon ratification on 23 June 1969 and which was in effect on the date of the offense involved in this case, reads in part as follows:

> G.S. 90-111. PENALTIES FOR VIOLATION.—"(a) Any person violating any provision of this article . . . shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars ($1,000.00) or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court: Provided, that any person unlawfully possessing . . . one gram or less of the drug marijuana defined in G.S. 90-87(1)d, shall, for the first offense, be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. . . . "

In the case before us no mention was made in the bill of indictment as to the quantity of marihuana defendant was charged with having possessed. The evidence disclosed that a bag containing 137.9 grams of marihuana was found in defendant's bedroom. The court instructed the jury that defendant was charged with felonious possession of marihuana and that in order to find defendant guilty of that offense the jury must be satisfied beyond a reasonable doubt that defendant "did wilfully, feloniously possess and have under his control narcotic drug, to wit, marijuana in excess of one gram." The jury returned a verdict of guilty "of possession of marijuana as charged."

[7-9] "It is well settled in this jurisdiction that the verdict should be taken in connection with the issue being tried, the evidence, and the charge of the court." *Davis v. State*, 273 N.C. 533, 539, 160 S.E. 2d 697, 702. When the verdict in Case No.

69CR37894 is so considered, it seems clear that the jury found defendant guilty of unlawful possession of more than one gram of marihuana. Nevertheless, we are of the opinion, and so hold, that in order to sustain a conviction of the *felony* of unlawful possession of marihuana under G.S. 90-111(a) as that statute was in effect at all times pertinent to the present case, it was not only necessary that the State *prove* beyond a reasonable doubt, but it was also necessary that the indictment *allege*, as an essential element of the crime, that the defendant unlawfully possessed more than one gram of marihuana. The indictment in Case No. 69CR37894 charged defendant with the *misdemeanor* of unlawful possession of marihuana, since it charged unlawful possession of marihuana but did not include an allegation that the amount was more than one gram. Therefore, the verdict of guilty "as charged" will support a judgment imposing punishment for a misdemeanor under G.S. 14-3(a). Our conclusion in this regard is supported, at least by analogy, by the rationale of the decisions of our Supreme Court in *State v. Benfield*, 278 N.C. 199, 179 S.E. 2d 388; *State v. Ford*, 266 N.C. 743, 147 S.E. 2d 198; and *State v. Fowler*, 266 N.C. 667, 147 S.E. 2d 36.

On this appeal defendant has noted a total of sixty-six assignments of error. We have carefully considered all of these and find no error sufficient to entitle defendant to a new trial. The result is that in Case No. 69CR39480 in which defendant was convicted and sentenced for unlawful possession of LSD, we find no error. In Case No. 69CR37894 in which defendant was convicted and sentenced for unlawful possession of marihuana, the judgment pronounced therein is vacated, and the cause is remanded to the Superior Court of Wake County for the pronouncement of a new judgment within the limits provided by G.S. 14-3(a).

Case No. 69CR39480, No error.

Case No. 69CR37894, Judgment vacated and cause remanded.

Judges BRITT and MORRIS concur.

CROSROL CARDING DEVELOPMENTS, INC. v. GUNTER & COOKE, INC.

No. 7114SC655

(Filed 20 October 1971)

1. **Rules of Civil Procedure § 19; Parties §§ 1, 4— necessary and proper parties**

Rules of Civil Procedure 19(a) and (b) make no substantive change in the rules relating to joinder of parties as formerly set out in G.S. 1-70 and G.S. 1-73.

2. **Parties §§ 1, 4— necessary and proper parties**

Necessary parties *must* be joined in an action; proper parties *may* be joined.

3. **Parties § 1— necessary party defined**

A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence.

4. **Parties § 4— proper party defined**

A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others.

5. **Contracts § 24; Parties § 1— necessary parties — third party beneficiary**

A party to a contract was not a necessary party in an action for breach of the contract brought by a third party beneficiary against the other contracting party.

6. **Contracts § 24; Parties § 4— breach of contract — action by third party beneficiary — other contracting party as proper party**

The corporation which had contracted with defendant was a proper party in an action brought by a third party beneficiary against defendant for breach of the contract, where the contract gave the third party the right to purchase certain equipment from defendant at a specified discount price, with the purchase price to be paid to the corporation and set off against an amount owed by defendant to the corporation, and where any amount recovered by the third party in its action against defendant would likewise constitute a set off against the corporation's claim under the contract, and the trial court did not abuse its discretion in ordering the corporation joined as a party.

7. **Rules of Civil Procedure § 12— joinder of party not subject to court's jurisdiction — dismissal of action**

Dismissal of an action is appropriate where a party ordered joined is not subject to the court's jurisdiction. G.S. 1A-1, Rule 12(b)(7).

8. **Rules of Civil Procedure § 41— failure to join necessary or proper party — dismissal of action**

Dismissal for failure to join a necessary or proper party is not a dismissal on the merits and may not be with prejudice. G.S. 1A-1, Rule 41(b).

9. **Contracts § 14— breach of contract — action by third party beneficiary**

A third party beneficiary of a contract is entitled to maintain an action for its breach provided the contract was made for his direct benefit and any benefit accruing to him is not merely incidental.

10. **Contracts § 24; Parties § 2— breach of contract — third party beneficiary — real party in interest**

Where a contract entered between defendant and another gave plaintiff the right to purchase certain equipment from defendant at specified discount prices, with the purchase price to be paid by plaintiff to the other party and to be set off against an amount which defendant owes the other party, plaintiff has standing to maintain an action against defendant for breach of the contract.

APPEAL by plaintiff and defendant from *Hobgood, Judge,* 7 June 1971 Civil Session of Superior Court held in DURHAM County.

On 23 February 1968 these parties and Carding Specialists (Canada) Limited (Carding Canada) executed a memorandum agreement providing in pertinent part the following:

> "1. Gunther & Cooke agrees to pay to Carding Canada as general damages for infringement of U. S. Letters Patent No. 3,003,195 the sum of $110,000, U. S. funds. The said sum shall be payable as provided in paragraph 3 hereof.
>
> 2. Carding Canada, Crosrol and any other company which is controlled by Andre Varga or his son or their personal representatives or any combination thereof (each of which is hereinafter referred to as a 'Carding Company') will be entitled to purchase from Gunther & Cooke and to sell any equipment which Gunther & Cooke manufactures and sells except the GC 600-M system. Any Carding Company will be entitled to purchase such equipment at the lowest mill price that applies to bulk sales in effect from time to time less a 10% O.E.M. discount. Such prices will be not less favourable to the purchaser than the prices of similar products which are available on the U. S. market.

3. Upon each purchase of equipment by a Carding Company from Gunther & Cooke under paragraph 2 hereof while all or any part of the said sum of $110,000 remains unpaid, the purchase price for such equipment shall be set off and applied against the balance of the said sum of $110,000 then owing. If a Carding Company other than Carding Canada is the purchaser, such company shall thereupon pay or credit to Carding Canada an amount equal to such purchase price.

* * *

6. The right of purchase provided for in paragraph 2 hereof will continue until the said sum of $110,000 owing to Carding Canada under paragraph 1 hereof and all other amounts owing from time to time by Gunther & Cooke to Carding Canada have been paid and satisfied in full. In the event that the value of the purchases exceed the amount owing by Gunther & Cooke to Carding Canada, normal cash terms shall be in effect unless otherwise agreed.

7. Carding Canada hereby releases Gunther & Cooke from all liability and claims of any kind whatsoever arising from any infringement or alleged infringement by Gunther & Cooke of U. S. Letters Patent No. 3,003,195 and of any other patent or invention."

On 24 November 1970 plaintiff instituted this suit, alleging defendant breached the agreement of 23 February 1968 by failing to comply with a purchase order placed with it by plaintiff for certain equipment manufactured by defendant and aggregating in price not more than $110,000.

Defendant moved to dismiss the complaint, alleging: (1) the complaint fails to state a claim upon which relief can be granted in that plaintiff is not the real party in interest, and (2) Carding Canada is a necessary party and is not joined in this action.

On 21 June 1971, Judge Hodgood denied defendant's motion to dismiss the action for failure to state a claim upon which relief could be granted, but entered an order holding that Carding Canada is a party who must be joined under Rule 19 of the Rules of Civil Procedure and ordering plaintiff's action dismissed with prejudice unless Carding Canada is made a party within forty days from the date of the order.

Each party appeals.

Smith, Moore, Smith, Schell & Hunter by Beverly C. Moore and Michael R. Abel, and White & Coch for plaintiff appellant-appellee.

Nye & Mitchell by John E. Bugg, and Richards & Shefte for defendant appellant-appellee.

GRAHAM, Judge.

PLAINTIFF'S APPEAL

Plaintiff contends the court erred in holding that Carding Canada is a party which must be joined under Rule 19 and in ordering plaintiff's action dismissed with prejudice if Carding Canada is not joined within forty days from the date of the order.

Rule 19(a) of the North Carolina Rules of Civil Procedure provides, "[s]ubject to the provisions of Rule 23 [Rule 23 relates to class actions], those who are united in interest must be joined as plaintiffs or defendants. . . ."

Section (b) of Rule 19 provides: "The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action."

[1] These provisions make no substantive change in the rules relating to joinder of parties as formerly set out in G.S. 1-70 and G.S. 1-73. Both G.S. 1-70 and G.S. 1-73 were repealed by Session Laws 1967, c. 954, s. 4, effective 1 January 1970. "The new rules of civil procedure make no change in either the categorizing of parties as necessary, proper and formal, or in the underlying principles upon which the categories have been based." 1 McIntosh, N. C. Practice and Procedure 2d, § 585 (Supp. 1970).

[2-4] Necessary parties *must* be joined in an action. Proper parties *may* be joined. Whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Strickland v. Hughes,* 273 N.C. 481, 160 S.E. 2d 313. A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action com-

pletely and finally determining the controversy without his presence. *Strickland v. Hughes, supra.* A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others. *Simon v. Board of Education,* 258 N.C. 381, 128 S.E. 2d 785.

Defendant alleges in its motion that a complete determination of plaintiff's alleged claim cannot be made unless Carding Canada is made a party, because without Carding Canada's presence, "defendant will be precluded from attacking in its further answer and defense the validity of the underlying patent." Defendant has filed no pleadings and the question of whether the invalidity of the patent which defendant agreed to pay damages for infringing can be pleaded as a defense in this action is not before us. Suffice to say, however, any defense which would relieve defendant of liability under the contract may be asserted in any action brought for its breach, irrespective of whether all of the parties to the contract are present.

[5] We do not view Carding Canada as a necessary party. Plaintiff, although a formal party to the agreement, is in effect a third party beneficiary. A party to a contract is ordinarily not a necessary party in a suit brought against the other contracting party by a beneficiary who claims the contract has been breached. *Pickelsimer v. Pickelsimer,* 255 N.C. 408, 121 S.E. 2d 586. It does not follow, however, that the court committed reversible error in ordering the joinder of Carding Canada as a party, for if it is a proper party, plaintiff may not complain of its joinder. *Simon v. Board of Education, supra.*

Paragraph 3 of the agreement sued upon provides that when a company other than Carding Canada purchases equipment from defendant, the purchasing company must pay or credit Carding Canada an amount equal to the purchase price. While this is a matter primarily between Carding Canada and plaintiff, it nevertheless represents an interest which Carding Canada has in this litigation. Furthermore, under the terms of paragraph 3 of the agreement the purchase price of any equipment purchased by plaintiff from defendant must be set off and applied against the balance which defendant owes Carding Canada. It follows that any amount recovered by plaintiff in this suit would likewise constitute a set off against Carding Canada's claim under the contract. Therefore, Carding Canada most as-

suredly has interests in this controversy, although its interests are not of such a nature as to render it impossible for the court to finally adjudicate the question of defendant's liability to plaintiff without Carding Canada's presence.

[6] We hold that Carding Canada is a proper party to the lawsuit. Consequently, the question is whether the trial court abused its discretion in ordering Carding Canada joined as a party. "When not regulated by statute the procedural processes which will best promote the administration of justice are left to the judicial discretion of the trial judge. He has plenary power with respect to those who ought to be made parties to facilitate the administration of justice." *Overton v. Tarkington,* 249 N.C. 340, 345, 106 S.E. 2d 717, 721. The addition of Carding Canada as a party will undoubtedly facilitate an early disposition of various questions which may arise as to defendant's remaining obligation to Carding Canada under the agreement and Carding Canada's rights to any proceeds recovered by plaintiff. The trial judge exercised sound discretion in ordering Carding Canada made a party.

[7, 8] The court's order is erroneous, however, insofar as it purports to dismiss plaintiff's action with prejudice in the event Carding Canada is not made a party within forty days from the date of the order. Dismissal is appropriate where, as here, the party ordered joined is not subject to the court's jurisdiction. G.S. 1A-1, Rule 12(b) (7). However, dismissal for failure to join a necessary party is not a dismissal on the merits and may not be with prejudice. G.S. 1A-1, Rule 41(b). The same is true, of course, where the party ordered joined is not a necessary party but is a proper party which the court, in its discretion, decides should be joined. The following language relating to Rule 12(b) (7) of the Federal Rules of Civil Procedure is applicable also to our Rule 12(b) (7) :

> "When faced with a motion under Rule 12(b) (7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. . . . A dismissal under Rule 12(b) (7) is not considered to be on the

merits and is without prejudice." 5 Wright & Miller, Federal Practice and Procedure, § 1359, pp. 628, 631.

The court order is modified by striking therefrom the words "with prejudice." The order as modified is affirmed. Unless Carding Canada is made a party to this action within forty days from the date this opinion affirming the order is certified to the Clerk of Superior Court of Durham County the action will be dismissed.

DEFENDANT'S APPEAL

Defendant appeals from the denial of its motion to dismiss the action on the grounds plaintiff is not the real party in interest. G.S. 1A-1, Rule 17(a) provides:

> "Every claim shall be prosecuted in the name of the real party in interest; but . . . a party with whom or in whose name a contract has been made for the benefit of another, . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . ."

This rule is identical to Rule 17(a) of the Federal Rules of Civil Procedure. In 3A Moore's Federal Practice, § 17.13(1), pp. 502, 503, it is stated: "Whether a third party beneficiary has a right of action depends upon the substantive law. The result is that if by the substantive law the beneficiary has a right of action, the effect of the inclusion of this clause is that the beneficiary may sue, and the party with whom or in whose name the contract was made may also sue and need not join the beneficiary."

In the Comment of the General Statutes Commission appearing in Annotations to G.S. 1A-1, Rule 17, we find:

> "Furthermore, the third-party contract beneficiary has well established substantive rights which he should be allowed to sue for in his own name, notwithstanding the contract parties alone are 'real' parties to the contract and hence, possibly, to the rights arising under it."

[9] It is well established in this jurisdiction that a third party beneficiary to a contract is entitled to maintain an action for its breach. 2 Strong N. C. Index 2d, Contracts, § 14, p. 318. This rule is not applicable, however, where the contract is not

made for the direct benefit of the third party and any benefit accruing to him is merely incidental. *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273; *Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233.

[10] Defendant says that at most plaintiff has only incidental rights under the agreement in question. We disagree. Not only does plaintiff have the right to purchase specifically described equipment from defendant, but it also has the right to make such purchases at specified discount prices. The agreement does not purport to give plaintiff the right to make purchases of equipment simply as the agent of Carding Canada. The purchases may be made for plaintiff's own benefit. The fact that plaintiff becomes indebted for the purchase price to Carding Canada rather than to defendant is a matter between plaintiff and Carding Canada. *Credit Corp. v. Equipment Co.*, 7 N.C. App. 29, 171 S.E. 2d 46.

Defendant argues that to permit plaintiff to maintain this action would expose defendant to double liability in that Carding Canada could still sue for defendant's indebtedness under the agreement, even if the indebtedness is recovered by plaintiff in this action. This position is unsound because the agreement provides in paragraph 3 that the purchase price of any equipment purchased, by plaintiff or any other Carding Company, is to be set off against defendant's indebtedness to Carding Canada. Moreover, since Carding Canada has been ordered made a party, the contention that it may subsequently bring another suit for this identical claim is no longer pertinent.

It is our opinion that plaintiff has standing to maintain this action and the court's order denying plaintiff's motion to dismiss on the merits on the grounds plaintiff is not the real party in interest was proper.

Plaintiff's appeal modified and affirmed.

Defendant's appeal affirmed.

Judges BROCK and VAUGHN concur.

SALLIE C. WEST, EMPLOYEE v. J. P. STEVENS COMPANY, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7118IC525

(Filed 20 October 1971)

1. **Master and Servant § 77— workmen's compensation — claim for change of condition — barring of claim**

A plaintiff who failed to appeal from an Industrial Commission finding that there was no causal relation between the immobility in her right leg and an accident arising out of her employment *is held* barred from asserting a subsequent claim for change of condition with respect to the right leg.

2. **Master and Servant § 77— workmen's compensation — claim for change of condition — change in degree of permanent disability — no change in physical condition**

The Industrial Commission properly assessed the plaintiff's disability of her left leg, which was caused by phlebitis, at 27.5% upon hearing medical testimony that there was no longer any chance for improvement in the leg, notwithstanding the actual physical condition of the leg had not changed since the Commission previously assessed her disability at 12.5%, where the previous assessment of 12.5% had been based upon medical testimony that plaintiff had a 25% to 30% permanent partial disability which could be expected to improve to a disability of 10% to 15%.

3. **Master and Servant § 77— change in condition — change in degree of disability**

A change in the degree of permanent disability is a change in condition within the meaning of G.S. 97-47.

4. **Master and Servant § 47— construction of workmen's compensation statute**

The Workmen's Compensation Act should be liberally construed so that its benefits are not denied upon technical, narrow and strict interpretations.

APPEALS by plaintiff and defendants from order of North Carolina Industrial Commission filed 19 February 1971.

Plaintiff claims additional Workmen's Compensation benefits, pursuant to G.S. 97-47, on the ground she has undergone a change of condition.

On 7 October 1965 plaintiff fell in her home and broke her right leg. While she was in the hospital for treatment for this injury she reported to her employer, for the first time, that sometime in September 1965, she fell while at work and injured

her left leg. During her hospitalization it was noted that she had phlebitis in both legs. The broken leg healed but she continued to suffer from the phlebitis and was rehospitalized for this condition on 7 January 1966.

Hearings were held in December 1966 and February 1967 before Commissioner Shuford. On 15 March 1967 Mr. Shuford filed his order finding and concluding, among other things, that: On an unspecified date in September 1965 plaintiff sustained a compensable injury; she had reasonable excuse for not timely reporting the accident to her employer; as a result of phlebitis caused by that accident, plaintiff was temporarily totally disabled from 7 January to 14 September 1966; disability suffered prior to 7 January 1966 resulted from plaintiff's broken leg which did not constitute an injury by accident arising out of and in the course of her employment; and that plaintiff had recovered from her compensable injury without permanent disability. No appeal was taken from this order.

Plaintiff thereafter applied for review, pursuant to G.S. 97-47, on the ground that her condition had changed. A hearing was held in June of 1968 before Deputy Commissioner Delbridge, and on 9 December 1968, Mr. Delbridge filed an order in which he found that since the first hearing plaintiff's condition had changed and that she "now has a 12.5 percent permanent partial disability of her left leg." Additional compensation was awarded accordingly. The Full Commission affirmed the order. Plaintiff appealed to this Court, contending that the testimony of her physician Dr. John A. Lusk, who was the only witness, would support only a finding of a 25 or 30% permanent partial disability of the left leg. This Court rejected her contention and affirmed the Commission's order. *West v. Stevens,* 6 N.C. App. 152, 169 S.E. 2d 517.

Plaintiff thereafter applied a second time for additional compensation, again on the ground that her condition had changed. A hearing was held before Deputy Commissioner Thomas on 1 October 1970. Plaintiff's physician, Dr. Lusk, testified that a permanent disability which plaintiff had suffered in her right leg as a result of phlebitis at the time of the June 1968 hearing had increased about 10 to 15% and now constituted a 20 to 25% permanent partial disability; also, that the permanent disability in plaintiff's left leg was unchanged and that in his opinion future improvement in that leg is highly unlikely.

In an order filed 19 October 1970, Mr. Thomas denied any disability benefits with respect to the right leg. However, additional benefits were allowed with respect to the left leg, based upon a finding that plaintiff has sustained a change of condition to her left leg in that it has not improved as expected and she now has a 27.5% permanent partial disability in that leg. Mr. Thomas' order was affirmed by the Full Commission and both parties appealed to this Court.

Smith & Patterson by Norman B. Smith for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellants-appellees.

GRAHAM, Judge.

PLAINTIFF'S APPEAL

[1] The Commission concluded that plaintiff is now barred from asserting a claim for disability to the right leg because in the order of 15 March 1967, which was not appealed, it was determined that the injury to that leg did not result from an accident arising out of and in the course of her employment. Plaintiff contends this conclusion is erroneous, arguing that there was competent evidence from which the Commission could have found that the phlebitis in both legs resulted from the industrial accident of September 1965 in which only her left leg was injured.

Plaintiff's physician, Dr. Lusk, did not testify on direct examination as to any causative connection between the present condition in plaintiff's right leg and the industrial accident of September 1965. On cross-examination he stated:

> "I am testifying as to a condition of Mrs. West's legs, right and left, without regard at this point to the cause of that condition.
>
> * * *
>
> She was hospitalized by Dr. William Wright for a fracture of the right ankle in late 1965, the injury having occurred in October 1965. She was readmitted to the hospital in early 1966 for phlebitis of both lower extremities. This was before I saw her for the first time. I would say

that the immobility could well have been the probable cause of the phlebitis in the right leg; she had phlebitis in both legs subsequently. As to whether my testimony is that the phlebitic syndrome in both legs could or might have, and in all probability would have been caused by the fracture of the right leg and the resulting immobility of the patient in the hospital, yes; I would put more emphasis on the immobility having caused the phlebitic syndrome, than the fracture having caused this."

Dr. Lusk's testimony, which is the extent of the evidence respecting causation, would not support a finding that the disability to plaintiff's right leg resulted from the industrial accident in September of 1965 in which only the left leg was injured. The immobility to which Dr. Lusk attributes plaintiff's right leg difficulties, was occasioned by her hospitalization for the broken right leg. Commissioner Shuford's order, filed 15 March 1967, finds that the fall which caused this injury did not arise out of and in the course of plaintiff's employment. We agree with the Commission that, no timely appeal having been taken from that order, plaintiff is now barred from claiming benefits with respect to the right leg.

Plaintiff argues that the condition of the right leg is due to a progression to the right leg of phlebitis, which was formerly disabling only in the left leg. The evidence does not support this theory. According to Dr. Lusk, a 10 to 15% permanent disability, caused by phlebitis, was already present in the right leg at the time of the hearing in June 1968. However, no award was made for this disability, and plaintiff did not contend, at least on appeal to this Court, that she was entitled to benefits for any disability to that leg. It is that disability which Dr. Lusk testified has now increased.

Plaintiff likens her case to that of *Knight v. Ford Body Co.*, 214 N.C. 7, 197 S.E. 563. There blood poisoning, which had caused the plaintiff to lose the use of his arm, progressed to other parts of his body and caused total disability. An award for a change of condition was upheld. However, the award in that case contained a finding that the employee's condition "at this time has been caused by the injury by accident suffered while employed." The Supreme Court found that there was competent evidence to support this finding. Here, we find no evidence which would support a similar finding with respect to the present condition of plaintiff's right leg.

The portion of the order denying plaintiff's claim for disability to the right leg is affirmed.

DEFENDANTS' APPEAL

[2] Defendants have appealed from that portion of the Commission's order in which plaintiff was awarded additional compensation on the ground she has suffered a change of condition of the left leg.

Whether there has been a change of condition is a question of fact; whether the facts found amount to a change of condition is a question of law. *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27.

There is no finding in the order now before us that the actual physical condition of plaintiff's left leg has changed since the Commission found, from evidence presented in the June 1968 hearing, that plaintiff "has a 12.5 percent permanent partial disability of her left leg." The Commission's present assessment of disability of the left leg at 27.5% is based upon its finding that the condition of the leg "has not improved as expected."

The evidence was that there has been no change in the disability of plaintiff's left leg although there has been a change in her physician's prognosis for any recovery. He testified: "I recall having testified in an earlier hearing in this matter in June, 1968. It was my testimony at that time that Mrs. West had a permanent partial disability to the left leg of 25% to 30%, and further that there was some hope for improvement of this condition, and if it did improve, I had hoped that it might improve to 10% to 15%. . . . [A]t the present time I find there has been no change in her legs since 1968; in other words there has been no improvement. It would be highly unlikely that there would be any further improvement at the present time."

Defendants contend that since plaintiff has failed to show any actual deterioration in her left leg since the prior order, she is not entitled to additional benefits. A change of condition, as that term is used in G.S. 97-47, means an actual change and not a mere change of opinion with respect to a pre-existing condition. *Pratt v. Upholstery Co., supra.*

However, in its present order the Commission has in effect interpreted its prior order as holding that in June of

1968 plaintiff had a temporary 25 to 30% disability of the left leg which would improve and leave her with a permanent disability of 12.5%. In that order the Commission found that "it was the doctor's opinion that the plaintiff has a 25 to 30 percent permanent partial disability of the left leg now, but it could improve to a disability of 10 to 15 percent." This finding is followed by an assessment of the permanency at 12.5%.

Confusion arises because of the doctor's testimony, and the Commission's finding in accordance therewith, that plaintiff's *permanent* disability to the left leg of 25 to 30% could be expected to improve to 10 to 15%. Obviously, if plaintiff's condition improved, the degree of the disability she was then suffering was not permanent. By the same token, if the 25 to 30% disability she then suffered was permanent, it could not be expected to improve.

[3] We agree with the Commission's interpretation of its prior order. In that order there is no finding that plaintiff had reached a point of maximum recovery. It appears that the Commission undertook to rate the permanency of her disability during her healing period by attempting to anticipate the degree of her future recovery. Consequently, the 25 to 30% disability which she was found to have at that time, though designated in the order as permanent, must have in fact been considered by the Commission as only temporary. The Commission has now found this same degree of disability to be beyond improvement and therefore permanent. This means that there has been an actual change in the degree of plaintiff's permanent disability of the left leg from the 12.5% found in the prior order to 27.5%. A change in the degree of permanent disability is a change in condition within the meaning of G.S. 97-47.

[4] In reaching this conclusion we are guided by the fundamental principle that the Workmen's Compensation Act should be liberally construed so that its benefits are not denied upon technical, narrow and strict interpretations. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857; *Johnson v. Hosiery Company*, 199 N.C. 38, 153 S.E. 591.

A question similar to the one presented here was considered by the Georgia Supreme Court in the case of *Miller v. Indemnity Insurance Co. of North America*, 55 Ga. App. 644, 190 S.E. 868. In that case the claimant was awarded compensation for only

75% loss of use of a broken leg on the theory that improvement would occur in the future. Later, it was determined that improvement was impossible. An award for an additional 25% loss of use of claimant's leg was allowed on the grounds that there had been a change of condition from an injury which was total with a possibility of reduction to one which was total with no possibility of improvement. We agree with this reasoning.

The portion of the order appealed from by defendants is affirmed.

Plaintiff's appeal affirmed.

Defendants' appeal affirmed.

Judges BROCK and VAUGHN concur.

FLORA McDOWELL POE AND HUSBAND, BRENT POE v. DANNY G. BRYAN, JUNE BURNEY AND JERRY BURNEY

No. 7113DC644

(Filed 20 October 1971)

1. **Trespass to Try Title § 4— fitting deed to the disputed land — sufficiency of plaintiffs' evidence**

In a trespass to try title action, plaintiffs husband and wife offered sufficient evidence to support a jury finding that the disputed tract of land was embraced within the description of the deed on which they relied, where (1) feme plaintiff testified that she had been familiar with the boundaries of the tract since 1916; (2) the feme plaintiff also testified in detail, without objection, as to the location of the lines and boundaries of the tract; and (3) the court surveyor testified that the land described in the plaintiffs' deed was the same tract as the plaintiffs' contended tract.

2. **Boundaries § 10; Trespass to Try Title § 4— deed reference to road as boundary line — sufficiency of plaintiffs' evidence**

Although the defendants in a trespass to try title action offered substantial and persuasive evidence that a highway relied upon by plaintiffs as a boundary line was not actually constructed until after the delivery and execution of the plaintiffs' deed, which referred to the boundary in question as the "public road," the plaintiffs' own evidence, which was offered without objection, was nonetheless sufficient to support a jury finding that at the time the deed was executed a "public road" existed at the exact place where the highway now stands and that it was this "public road" to which the deed referred.

Poe v. Bryan

3. **Adverse Possession § 25— adverse possession of wooded tract of land — sufficiency of evidence**

Plaintiffs, in a trespass to try title action instituted in 1971, offered sufficient evidence to establish their ownership of a wooded tract of land by adverse possession, where they offered evidence that (1) since 1916 they or their predecessor in title maintained a drain ditch across the tract and cleaned the ditch each year; (2) a predecessor in title obtained logs from the tract to build his home, obtained clay and sticks for use in building other peoples' chimneys, and sold the timber off the tract in 1931; (3) plaintiffs have gathered firewood from the tract; (4) one plaintiff set out fifty trees in 1967; (5) the same plaintiff advised the defendant in 1957 not to cut any more timber on her tract; and (6) the defendant did not go back on the tract until 1970.

APPEAL by defendants from *Clark, District Judge,* 29 March 1971 Session of District Court held in BLADEN County.

This is an action of trespass to try title to a tract of land situated in White Oak Township, Bladen County. Defendants admit having cut and removed timber from the land, but they deny that the land is owned by plaintiffs and contend that it is owned by defendant Bryan.

The land in controversy is a 3.1 acre tract bounded on the west by the center of N. C. State Highway 53 and on the east by the center of an old road known as the "old main road." The corners to the tract in controversy are illustrated on the court map as points 1 and 4, which are in the center of Highway 53, and points B and C, which are in the center of the "old main road."

Plaintiffs' contended tract, as shown on the court map, is bounded by the following lines: (1) Beginning at point 4 and running N. 52° 15′ E. 405.6 feet to point C and continuing past point C 767.4 feet to a point designated on the map as point 3. (2) From point 3, S. 41° E. 384 feet to a point designated on the map as point 2. (3) From point 2 S. 49° W. 924.7 feet to point B and continuing past point B 181 feet to point 1. (4) From point 1 with the center of Highway 53 454.5 feet to the point of beginning.

Defendants' contended tract, as shown on the court map, is bounded by the following lines: (1) Beginning at point C and running S. 51° 15′ W. 405.6 feet to point 4 and continuing past point 4 2580 feet to a point designated on the map as

point D. (2) From point D S. 43° E. 1390 feet to a point designated on the map as point E. (3) From point E N. 48° E. 2640 feet to a point designated on the map as point A. (4) From point A, N. 30° 34′ W. 564.9 feet to a point in the center of the "old main road" and continuing with the center of the "old main road" in a generally northerly direction, past point B, to the point of beginning.

Plaintiffs and defendant Bryan claim record title, and title by adverse possession for seven years under color of title, and for twenty years without color of title. The following facts are established by stipulation:

(1) Plaintiffs and defendant Bryan claim record title from a common source; to wit, a deed, recorded 21 December 1888, to R. L. Bryan, describing 160 acres, more or less.

(2) Plaintiffs claim record title from that source through a deed from R. L. Bryan to Thomas McDowell, feme plaintiff's grandfather. This deed (McDowell deed), dated 30 January 1901 and recorded 24 March 1922, contains the following description: "Beginning at stake in W. H. Bryan's line at the Public Road and runs with his line North 45 East to T. M. Woodburn's corner, then as his line South 45 East to the upper line of the Estate of A. J. Bryan, deceased, then as that line South 25 West to the Public Road, then up the road to the beginning, containing 10 acres more or less."

(3) Plaintiffs have acquired all the interest that was owned by Tom McDowell in the lands described in the McDowell deed.

(4) Defendant Bryan claims record title through a deed, dated and recorded 20 July 1957, from R. L. Bryan's only heir at law.

(5) Plaintiffs' contended tract of land and defendants' contended tract of land are divided either by the "old main road" or N. C. Highway 53.

At the conclusion of plaintiffs' evidence and again at the conclusion of all the evidence, defendants moved for a directed verdict on the grounds the evidence was insufficient to show record title in plaintiffs or to show that plaintiffs have acquired title by adverse possession for seven years under color of title or twenty years without color of title. The motions were denied and the case was submitted to the jury under instructions which

permitted the jury to find that plaintiffs or defendant Bryan own the disputed tract under any one of the three theories asserted.

The jury returned a verdict finding that plaintiffs are the owners of and entitled to immediate possession of the land in dispute; defendants trespassed thereon by removing timber as alleged in the complaint, and plaintiffs are entitled to damages in the sum of $244.60. Judgment consistent with the jury verdict was entered and defendants appealed.

Frank T. Grady and James W. Hill, III, Associate, for plaintiff appellees.

Worth H. Hester for defendant appellants.

GRAHAM, Judge.

Defendants assign as error the overruling of their motions for a directed verdict.

"In an action of trespass when both parties claim title to the land involved, and each seeks an adjudication that he is the owner and entitled to the possession of the disputed property, each has the burden of establishing his title by one of the methods specified in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; *Day v. Godwin* and *Day v. Paper Co.* and *Day v. Blanchard,* 258 N.C. 465, 128 S.E. 2d 814. Where, as here, the parties claim through a common source, the burden on the issue of title rests upon the 'party asserting title and right of possession to connect his title to the common source of title by an unbroken chain of conveyances and show that (1) the land in controversy is embraced within the bounds of the deeds or other instruments upon which he relies, and (2) the title thus acquired is superior to that claimed by his adversary.' " *Cutts v. Casey,* 278 N.C. 390, 411, 180 S.E. 2d 297, 307.

[1] Stipulations entered by the parties in this case establish that plaintiffs and defendant Bryan claim title to the disputed property from a common source; that plaintiffs' claim of title is connected to the common source by an unbroken chain of conveyances; that the deed from the common source in plaintiffs' chain of conveyances is senior to the deed from the common source in defendants' chain of conveyances. Thus, the only remaining element which plaintiffs were required to prove was

that the land in controversy is embraced within the bounds of the deeds upon which they rely. Since it was stipulated that plaintiffs own whatever lands were conveyed in the McDowell deed, the question is: Did plaintiffs offer evidence sufficient to support a finding by the jury that the disputed tract is embraced within the description contained in that deed? Plaintiffs' evidence on this question tended to show the following:

The feme plaintiff came to Bladen County in 1916 to live with her grandfather, Tom McDowell. She became familiar with the boundaries of the tract of land described in the McDowell deed by following her grandfather around when she was a little girl. She stated "I know the lines and boundaries of this tract" and proceeded to testify, without objection, to where the lines and boundaries are located. Point 4 on the court map (shown as a point in Highway 53) was identified as the beginning point in the McDowell deed and feme plaintiff stated that that corner was marked by a stake, as called for in the McDowell deed, when she first observed it in 1916. The stake was at a road which is now Highway 53. It remained there at least until 1949. W. H. Bryan's line and T. M. Woodburn's corner, referred to in the McDowell deed, were identified by feme plaintiff as the lines shown on the court map as the northerly boundary of plaintiffs' contended tract and the corner designated on the map as point 3. She recalled that this corner was once marked with an iron stake. The next line called for in the McDowell deed proceeds S. 45 E. to the upper line of the estate of A. J. Bryan. The witness testified that this line is between points 3 and 2 on the court map. She stated, "At point 2 on the Court Map there is a pine tree marked with an iron stob down behind it. It's been there ever since I can remember." As to the last two boundaries called for in the McDowell deed, the witness stated: "That is back to number 1 on the map and that's back up the road to the beginning. . . . At point 1 on the map there is just a grapevine there now but when I was about 6 there was a lightwood stob there, but when the road was being worked and being broadened out it took that stake up and it never was put down again, but a grapevine grew up there, and there was a large oak tree there and now there is a small oak tree with that same grapevine on it. . . . Part of the grapevine is still there."

The court surveyor testified in substance that the courses on the court map were normal variations from the courses on

the deed and that the land described in the deed is the same tract of land shown as plaintiffs' contended tract. Other witnesses corroborated plaintiffs' evidence as to the location of several of the corners.

We are of the opinion that the testimony of the feme plaintiff and the court appointed surveyor constitutes sufficient evidence that the description of the McDowell deed fits the land and embraces the land in controversy. See *McDaris v. "T" Corporation,* 265 N.C. 298, 144 S.E. 2d 59. The McDowell deed contained no distances. The courses, according to the surveyor, are substantially those shown on the court map. The corners shown on the court map as points 2 and 3 are not in dispute. Whether the other two corners of the description in the McDowell deed are points 1 and 4 in Highway 53, as contended by plaintiff, or points C and D in the "old main road" as contended by defendants is the crucial question. Another way of putting it is: Is the public road referred to as a boundary in the McDowell deed the "old main road," or another public road located where Highway 53 is now situated?

[2] Defendants contend that Highway 53 was not constructed until after 1901, the year the McDowell deed was executed and delivered; further, that the public road servicing the area before the construction of Highway 53 and at the time the McDowell deed was executed, was the road shown on the court map as the "old main road." They introduced substantial and persuasive evidence in support of these contentions. Plaintiffs, on the other hand, were unable to show what roads existed in the area before the feme plaintiff arrived in Bladen County in 1916. Defendants argue that in failing to offer evidence in this regard, plaintiffs failed to make out a case for the jury. However, feme plaintiff stated that she knew the lines and boundaries of the disputed tract and proceeded to testify as to the location of each of them, including in particular the line from the third corner called for in the McDowell deed "up the road to the beginning." She testified that this line was the same as the one shown between points 1 and 4 on the court map; also, that for many years the beginning corner of the property described in the McDowell deed was marked by an iron stake located at a public sand-clay road which is now Highway 53. The sand-clay road was where Highway 53 is now situated when feme plaintiff arrived in Bladen County in 1916. The "old main road" was also present at that time.

No objection was made to any of feme plaintiff's testimony. Since the admissibility of this testimony was not challenged by objection, it must be treated as before the jury with all its probative force. *Freeman v. City of Charlotte,* 273 N.C. 113, 159 S.E. 2d 327. This being so, the evidence was sufficient to permit the jury to find that at the time the McDowell deed was executed a public road existed at the exact place where Highway 53 is now situated and that it was this public road which was referred to in the McDowell deed as a boundary. Where a boundary line is actually located on the ground is an issue of fact for the jury. *Coley v. Telephone Co.,* 267 N.C. 701, 149 S.E. 2d 14.

[3] We are also of the opinion that the evidence is sufficient to support a finding for plaintiffs on their alternate theory of ownership by adverse possession. The boundaries of the disputed property were well marked and known. Plaintiffs' evidence tended to show that since 1916 they, or their predecessor in title, Tom McDowell, maintained a drain ditch across the property and cleaned the ditch and its bank each year. Tom McDowell used logs from the tract to build his home. He obtained clay and sticks therefrom for use in building chimneys for people in the area. In 1931 he sold the timber off the tract. Since 1916 Tom McDowell, and later plaintiffs, have kept a one-half acre area across the tract "cut down" so that the mailbox located at the road (now Highway 53) can be seen. Firewood has been gathered from the disputed area by plaintiffs and their predecessor in title over a period of years. Feme plaintiff set out fifty trees on the disputed tract in 1967. In 1957 defendant Bryan came on the disputed tract and started cutting logs and wood. The feme plaintiff advised him that the property belonged to her and told him that if he cut any more he would be in trouble. Bryan left and did not go back on the property until 1970.

"Adverse possession means 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, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. . . ." *Lindsay v. Carswell,* 240 N.C. 45, 81 S.E. 2d 168. Here the tract in question was completely

wooded. The tract was hardly susceptible to acts of dominion different in nature from those which plaintiffs described as having been repeatedly exercised over the land for a period considerably in excess of twenty years. It was for the jury to say whether these acts constituted open, notorious and adverse possession. *Memory v. Wells,* 242 N.C. 277, 87 S.E. 2d 497.

Other assignments of error brought forth and argued by defendants have been reviewed and found without merit.

No error.

Judges BROCK and VAUGHN concur.

WELDON CAMPBELL AND WIFE, ERIE CAMPBELL v. CLARK C. MAYBERRY AND WIFE, NINA M. MAYBERRY

No. 7123DC552

(Filed 20 October 1971)

1. **Quieting Title § 2— establishment of title — requisites of proof**

In an action to remove cloud from title to real property, plaintiffs' showing of a connected chain of title to the disputed property for a period of thirty years was insufficient, standing alone, to establish plaintiffs' title, for plaintiff also had the burden to show title by one of the methods set out in *Mobley v. Griffin,* 104 N.C. 112. G.S. 1-39; G.S. 1-42.

2. **Trial § 57; Rules of Civil Procedure § 39— trial without jury — duty of trial judge**

In cases tried by the trial judge without a jury, the judge becomes both judge and jury, and it is his duty to consider and weigh all competent evidence before him.

3. **Adverse Possession § 25— trial without jury — ruling on sufficiency of evidence — review on appeal**

A ruling of the trial judge sitting without a jury that the plaintiffs have failed to prove title by adverse possession will not be disturbed on appeal where there is sufficient and competent evidence to support his ruling.

4. **Adverse Possession §§ 5, 25— continuous possession for 20 years — intermittent acts of ownership**

Defendants' evidence which showed intermittent acts of ownership over disputed property between the years 1935 through 1952—the selling of timber in 1935 and the planting of tobacco beds and bean

patches in 1938, 1939, 1950, 1951 and 1952—was insufficient to establish a continuous possession of the property for a twenty-year period.

5. Quieting Title § 2— quieting title action — plaintiffs' and defendants' failure of proof

Evidence in a quieting title action was insufficient to support a determination that either plaintiffs or defendants owned the land in dispute.

APPEAL by plaintiffs from *Osborne, District Judge,* 22 February 1971 Session of District Court held in WILKES County.

Action to remove cloud from title to a 13.60-acre tract of land in Wilkes County.

In a complaint filed 7 May 1968, plaintiffs allege they are the fee simple owners of a 5/6 undivided interest in the disputed realty and that defendants claim an adverse interest which constitutes a cloud on plaintiffs' title. Defendants deny that plaintiffs have any interest in the land and claim fee simple title in themselves on the grounds of adverse possession for more than seven years under color of title and more than twenty years without color of title.

The case was tried by the court without a jury.

Plaintiffs offered in evidence, as the source of their alleged title, five deeds recorded at various times during the period from 27 April 1929 through 10 May 1961. The deeds purport to convey to E. E. Mayberry (father of plaintiff Erie Campbell and defendant Clark C. Mayberry) the interests of E. E. Mayberry's five siblings in the lands of their father, J. C. Mayberry. Four of the deeds describe a tract of land consisting of 160 acres, more or less. The 13.60-acre tract in dispute is included within the boundaries of the 160 acres, more or less, which is described in these deeds. The fifth deed describes a tract of 122 acres which does not include the disputed land.

Plaintiffs also offered evidence tending to show that they have acquired title to all of the property owned by E. E. Mayberry and his wife at the time of their deaths, except for a 1/6 interest in the disputed tract which plaintiffs concede is owned by defendants.

Defendants offered in evidence a deed to them from the Executrix of the Estate of Addie C. Lonsford. This deed, which

was executed 14 June 1963 and recorded 16 August 1963, describes the land in dispute.

Both parties presented evidence that they, and their alleged predecessors in title, had exercised certain acts of ownership over the property in question.

The court entered judgment concluding in effect that: (1) neither E. E. Mayberry nor his wife owned the disputed tract at the time of their deaths, (2) plaintiffs have not used nor possessed the property and they own no interest in it, (3) the property is owned by defendants in fee simple as a result of adverse possession by them and their predecessors in title for a period of at least twenty years. Plaintiffs' action was dismissed and plaintiffs appealed.

Franklin Smith for plaintiff appellants.

Wicker, Vannoy & Moore by J. Gary Vannoy for defendant appellees.

GRAHAM, Judge.

Plaintiffs ask that the judgment be reversed and that this court declare them the legal owners of a 5/6 interest in the 13.60 acres of land in dispute. Their apparent position is that the evidence entitles them, as a matter of law, to the relief sought. We hold to the contrary.

In an action to remove cloud from title to real property, the burden is on the plaintiff to prove good title either against the whole world or against defendant by estoppel. *Walker v. Story,* 253 N.C. 59, 116 S.E. 2d 147; *Lane v. Faust,* 9 N.C. App. 427, 176 S.E. 2d 381.

In *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889), the various ways by which a party may prove title are clearly and precisely set forth. They are:

> "1. He may offer a connected chain of title or a grant direct from the State to himself.
>
> 2. Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. (Citations omitted.)

3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. (Citations omitted.)

4. He may show, as against the State, possession under known and visible boundaries for thirty years, or as against individuals for twenty years before the action was brought. Secs. 139 and 144, Code.

5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. Code, sec. 147; (citations omitted).

6. He may connect the defendant with a common source of title and show in himself a better title from that source. (Citations omitted.)"

In accord: *King v. Lee,* 279 N.C. 100, 181 S.E. 2d 400; *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297; *Day v. Goodwin* and *Day v. Paper Co.* and *Day v. Blanchard,* 258 N.C. 465, 128 S.E. 2d 814; *Paper Co. v. Cedar Works,* 239 N.C. 627, 80 S.E. 2d 665; *Meeker v. Wheeler,* 236 N.C. 172, 72 S.E. 2d 214; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209.

Plaintiffs presented no evidence tending to show title by estoppel or that they and defendants claim title from a common source. Neither did they offer evidence of a direct chain of title or a grant direct from the State to themselves. "[I]n all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but 'there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself.' " *Tripp v. Keais,* 255 N.C. 404, 407, 121 S.E. 2d 596, 598.

[1] Plaintiffs are apparently under the mistaken impression that to prove title they are only required to show a connected chain of title to the disputed property for a period of thirty years. Two of the deeds introduced by plaintiffs to show the original source of their alleged title were recorded more than thirty years before the institution of this action. In support of

their position that these deeds constitute a *prima facie* showing of title, plaintiffs cite G.S. 1-42 which provides in pertinent part:

> "In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law."

G.S. 1-42 and G.S. 1-39 are to be construed together. *Williams v. Board of Education,* 266 N.C. 761, 147 S.E. 2d 381. G.S. 1-39 provides:

> "No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law."

G.S. 1-42, when construed with G.S. 1-39, simply means that proof of a connected chain of title to real estate for a period of thirty years by a party seeking possession thereof is *prima facie* evidence that such party has been in possession of the real estate within twenty years next preceding the institution of the action, as required by G.S. 1-39, and thus has standing to maintain his action. It does not mean that a party may meet the burden of proving title simply by basing his claim on an instrument recorded at least thirty years before the institution of his action. That burden must still be met by one of the methods set out in *Mobley v. Griffin, supra.* Indeed, a defendant might well stipulate that a plaintiff is entitled to prosecute his action to recover realty because he has been "possessed of the premises in question within twenty years before the commence-

ment of the action" without conceding that the plaintiff has good title to the property or is presently entitled to possession.

[2, 3] Plaintiffs further argue that they sufficiently proved title by showing their continuous adverse possession of the disputed tract for the statutory periods of seven years under color of title or twenty years without color of title. It is not necessary that we inquire as to whether the evidence was sufficient to support findings favorable to plaintiffs on these issues. The case was tried by the trial judge without a jury. In cases tried without a jury, the judge becomes both judge and jury and it is his duty to consider and weigh all competent evidence before him. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29. In an action to quiet title to realty, a plaintiff may acquire title to the disputed property by adverse possession only if the jury is satisfied that the acts of ownership described by the witnesses constitute open, notorious and adverse possession. *Board of Education v. Lamm,* 276 N.C. 487, 173 S.E. 2d 281. Plaintiffs' evidence tended to show that they and E. E. Mayberry, under whom they claim, engaged in certain acts of ownership over the property for a period of more than twenty years. Defendants presented evidence tending to show the contrary. The judge, sitting as a jury, resolved the issue in defendants' favor and made findings accordingly. His findings on this issue, which are supported by the evidence, have the full force and effect of a verdict by a jury and may not be disturbed on appeal. *Blackwell v. Butts,* 278 N.C. 615, 180 S.E. 2d 835.

[4] Plaintiffs except to that portion of the judgment which declares defendants to be the fee simple owners of the property in dispute. This exception is well taken. The court's declaration of ownership in defendants is based upon a finding "that defendants and their predecessors in title have used the said 13.60 acre tract for uses for which the land is susceptible for more than 20 years." The evidence does not support this finding. Defendants presented evidence, and the court found, that in 1935 timber was sold from the tract, and that in 1938, 1939, 1950, 1951 and 1952, defendants, with the consent of the Lonsford heirs, planted tobacco beds and bean patches on the property. The record contains no evidence that the land was thereafter used by defendants, or any of their alleged predecessors in title, for any purpose. Defendants claim they acquired a deed to the land in August 1963 from the Executrix of the Estate of Addie

Lonsford, who was a widow of one of the heirs of J. W. Lonsford. The male defendant was asked on cross-examination: "[W]hat have you done on it [the disputed tract] since 1964?" He replied: "Well, I haven't done anything on it."

"In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. . . ." 1 Strong, N. C. Index 2d, Adverse Possession, § 1 at 54. Defendants' evidence, which at most shows certain intermittent acts of ownership over the disputed property between the years 1935 through 1952, obviously falls short of showing a continuous possession of the property for a twenty-year period.

[5] When both parties claim title to land, and each seeks an adjudication that he is the owner and entitled to possession of the disputed property, each has the burden of establishing his title by one of the methods specified in *Mobley v. Griffin, supra. Cutts v. Casey, supra.* "There are cases involving a disputed title to land in which neither party can carry the burden of proof." *Cutts v. Casey, supra* at 412, 180 S.E. 2d at 308; *Keller v. Hennessee,* 11 N.C. App. 43, 180 S.E. 2d 452. In this case the evidence is insufficient to support a determination that either plaintiffs or defendants own the land in dispute.

The second conclusion of law contained in the judgment is modified by striking therefrom the portion providing that the defendants are owners in fee of the 13.60-acre tract of land in dispute. Except as modified the judgment is affirmed.

Modified and affirmed.

Judges BROCK and VAUGHN concur.

MABEL R. SNELLINGS, ADMINISTRATRIX OF THE ESTATE OF CHARLIE JACK SNELLINGS, DECEASED v. MARY LANIER ROBERTS AND WILLIAM HUBERT ROBERTS, JR.

No. 7110SC598

(Filed 20 October 1971)

1. **Rules of Civil Procedure § 50— directed verdict — judgment notwithstanding verdict**

On motion by a defendant for a directed verdict or for judgment notwithstanding the verdict, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff.

2. **Automobiles § 58— motorcyclist struck from rear — negligence of automobile driver**

In this action for the wrongful death of a motorcyclist who was struck from the rear by defendant's automobile while attempting to make a left turn, plaintiff's evidence was sufficient to support a jury finding that the motorcyclist's death was proximately caused by the negligence of defendant in failing to drive on the right side of the highway and in failing to keep a proper lookout.

3. **Automobiles § 73— contributory negligence as matter of law — intoxication**

In an action for wrongful death of a motorcyclist, plaintiff's evidence did not support defendant's contention that the intestate was intoxicated at the time of the collision and failed to disclose that the intestate was contributorily negligent as a matter of law, the issue of contributory negligence being for the jury.

4. **Automobiles § 140— motorcyclist — failure to wear helmet — negligence**

Fact that a motorcyclist was not wearing a helmet as required by G.S. 20-140.2(b) at the time of the collision did not constitute contributory negligence *per se*.

APPEAL by plaintiff from *Clark, Judge,* April 1971 Regular Civil Session, WAKE Superior Court.

Prior to trial plaintiff filed a motion of dimissal of her claim against the male defendant pursuant to Rule 41(a), therefore the femme defendant is hereinafter referred to as the defendant.

Plaintiff as administratrix of the estate of Charlie Jack Snellings (intestate) instituted this action seeking to recover for the alleged wrongful death of her intestate. Pertinent allegations of the amended complaint are summarized as follows: De-

fendant was the owner and operater of the 1967 Ford that on 24 December 1969 negligently struck from the rear the Harley Davidson motorcycle being operated by intestate on Rural Paved Road 1829 in Wake County, causing intestate's instant death. At the time of the collision defendant operated said Ford in the following negligent respects: carelessly and heedlessly; at excessive speed; on the wrong side of the highway; attempted to pass without giving audible warning of her intention; turned to the left without ascertaining that such movement could be made in safety; and failed to keep a proper lookout and keep her vehicle under proper control.

In her answer, defendant denied negligence on her part and alleged contributory negligence in that intestate failed to exercise due care and caution for his own safety, was driving under the influence of intoxicants, failed to yield the right-of-way to defendant, drove from a place of safety across the highway directly into the path of defendant's vehicle, and operated his motorcycle in the nighttime without lights. Defendant counterclaimed for damages to her Ford in the amount of $511.97.

At trial at the conclusion of plaintiff's evidence, defendant moved for a directed verdict upon the grounds that the evidence failed to disclose any negligence on defendant's part that was the proximate cause of the collision and that there was contributory negligence as a matter of law on the part of intestate. The motion was denied and was renewed at the close of all of the evidence when it was again denied.

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

1) Did Charlie Jack Snellings receive injuries which resulted in his death by the negligence of the defendant Mary Lanier Roberts as alleged in the complaint? *Answer:* Yes.

2) If so, did the said Charlie Jack Snellings by his own negligence contribute to his death as alleged in the answer? *Answer:* No.

3) What damages, if any, is the plaintiff Mabel R. Snellings, Administratrix of the estate of Charlie Jack Snellings, entitled to recover? *Answer:* $5,000.

4) Was the defendant's automobile damaged by the negligence of Charlie Jack Snellings, as alleged in the counterclaim? *Answer:* —

5) What amount, if any, is the defendant entitled to recover of said estate for damages to her automobile? *Answer:* —

Upon the coming in of the verdict, defendant moved to set the verdict aside and to have judgment notwithstanding the verdict entered in accordance with her motion for a directed verdict; the Court granted the motion for judgment NOV on the grounds that the evidence failed to disclose actionable negligence on the part of defendant and that the evidence disclosed negligence on the part of intestate that was a proximate cause of the collision. From this judgment, plaintiff appealed.

Yarborough, Blanchard, Tucker and Denson by James E. Cline for plaintiff appellant.

Smith, Anderson, Dorsett, Blount and Ragsdale by Willis Smith, Jr., for defendant appellee.

BRITT, Judge.

Did the court err in entering judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50? We hold that it did.

[1] In determining the sufficiency of the evidence upon a motion for judgment notwithstanding the verdict, we are guided by the same principles that prevailed under our former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under now repealed G.S. 1-183. *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). The same test is to be applied on a motion under Rule 50(b)(1) for judgment notwithstanding the verdict as is applied on a motion under Rule 50(a) for a directed verdict. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971). The question of law presented by defendant's motion for a directed verdict under Rule 50(a) is whether plaintiff's evidence was sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 398 (1971). On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a mat-*

ter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Stewart v. Check Corp.,* 279 N.C. 278, 182 S.E. 2d 410. (1971).

In view of the foregoing, two questions arise in the instant case: Was evidence of defendant's actionable negligence sufficient to survive defendant's motion for a directed verdict? Did plaintiff's evidence establish intestate's contributory negligence as a matter of law?

[2] As to the first question stated, it is well settled in this jurisdiction that 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. *Musgrave v. Savings & Loan Assoc., supra.* The evidence in the case at bar when considered most favorably to plaintiff, tended to show: On Christmas Eve 1969 intestate resided in a house on the north side of Rural Paved Road 1829; his mother resided in a house on the south side of the road some 250 feet west of intestate's house. Driveways led from the highway to the two residences. Between 5:00 and 5:30 p.m. while it was still light, intestate drove his motorcycle out of his driveway onto the highway and headed west with the expressed intention of going to his mother's house. The taillight of the motorcycle was burning when he left his driveway. Defendant's Ford was traveling west and struck the motorcycle near the center of the paved portion of the highway at a point adjacent to the mother's driveway. Immediately after the collision, defendant's car was seen skidding down the middle of the highway with the motorcycle under the front end of the car. About 30 feet before the car came to a stop, intestate's body came over the left front fender and hood of the car, landing on or near the left shoulder of the highway. The car slid approximately 225 feet down the highway from the point of impact, straddling the highway dividing line. Skid marks ran for about 225-230 feet, on each side of the highway dividing line and led directly up to the rear wheels of defendant's car, gradually leading to the left side of the road. There was a double yellow line at the point of impact indicating no passing in either direction. The road from intestate's driveway to the point of impact is fairly straight and begins to curve at the point of impact. The motorcycle, pointing to the driver's left, was pinned

under the car with the left front wheel of the car imbedded in the front wheel of the motorcycle. The condition of the motorcycle after the accident indicated that it was struck from the rear or left rear. Defendant stated at the scene of the accident that she did not see intestate until the moment of impact.

On the question of defendant's negligence, we think the evidence meets the standards required to withstand a motion for a directed verdict or judgment notwithstanding the verdict, and was sufficient to support plaintiff's allegations that defendant failed to drive on the right side of the highway and failed to keep a proper lookout, and that her negligence was a proximate cause of intestate's death. *Dawson v. Jennette,* 278 N.C. 438, 180 S.E. 2d 121 (1971); *Kelly v. Harvester Co., supra.*

[3] We now consider the question of intestate's contributory negligence. On a motion for a directed verdict on the grounds of contributory negligence, the allowance of the motion is proper only if plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injuries that no other reasonable inference might be drawn therefrom. *Pompey v. Hyder,* 9 N.C. App. 30, 175 S.E. 2d 319 (1970); *R. R. Co. v. Hutton & Bourbonnais Co.,* 10 N.C. App. 1, 177 S.E. 2d 901 (1970). Defendant's evidence tended to show that decedent was intoxicated, but there was no evidence by plaintiff which would support this contention. On the contrary, plaintiff's rebuttal evidence tended to show that shortly before the collision there was no odor of intoxicants discernible from intestate and there was nothing unusual about his walking, his talking or the manner in which he drove his motorcycle. " . . . (U)nless plaintiff's own evidence so clearly establishes his contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom, the issue of contributory negligence is for the jury." *May v. Mitchell,* 9 N.C. App. 298, 176 S.E. 2d 3 (1970).

[4] Plaintiff's evidence did disclose that intestate was not wearing a helmet as required by G.S. 20-140.2(b) at the time of the collision; however, the statute expressly provides that, "(v)iolation of any provision of this subsection shall not be considered negligence *per se* or contributory negligence *per se* in any civil action."

We hold that a directed verdict or judgment notwithstanding the verdict on the grounds of contributory negligence was not justified.

The judgment entered for defendant notwithstanding the verdict is reversed, and defendant not having moved in the alternative for a new trial pursuant to Rule 50(c)(1), it is ordered that the jury verdict be reinstated and that judgment be entered thereon. *Musgrave v. Savings & Loan Assoc., supra.*

Reversed and remanded.

Judges MORRIS and PARKER concur.

EAC CREDIT CORPORATION v. FREDERICK M. WILSON AND HELEN A. WILSON

No. 7120SC535

(Filed 20 October 1971)

Attorney and Client § 9— promissory note — guaranty of payment — liability of guarantors for attorneys' fees of creditor

Where a promissory note contained a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contained no such provision, the guarantors are not liable for attorneys' fees of the creditor in an action on the contract of guaranty, since G.S. 6-21.2 authorizes collection of attorneys' fees only in cases in which the instrument on which suit is brought expressly so provides.

Judge BROCK dissenting.

APPEAL by defendants from *Thornburg, Judge,* 29 March 1971 Civil Session of Superior Court held in UNION County.

The background of this controversy may be arrayed by the following quotation from that part of the record on appeal labeled "Statement of Case on Appeal":

> "This is an action instituted by the plaintiff, EAC Credit Corporation, against the defendants, Frederick M. Wilson and wife, Helen A. Wilson, to recover the sum of $44,320.00 pursuant to a guaranty agreement executed by the defendants in which the defendants guaranteed the

payment of a promissory note executed by Landmark Inn of Durham, North Carolina, and payable to EAC Credit Corporation. The case was heard without a jury and before Lacy H. Thornburg, Judge presiding, at the March 22, 1971 Civil Session of the Superior Court in and for Union County. After hearing evidence for plaintiff and defendants, Judge Thornburg entered judgment in which he awarded to the plaintiff the sum of $39,182.78, representing the sum due upon the note, plus attorney's fees in the amount of $5,877.42 as part of the costs of the action.

"Both the original negotiable promissory note in the amount of $37,375.00 and dated March 4, 1966, executed by Landmark Inn of Durham and payable to the plaintiff, EAC Credit Corporation and a subsequent modification agreement dated February 13, 1968, contained a provision for the payment of reasonable attorney's fees in the event that the note was placed with an attorney for collection. The guaranty agreement signed by the defendants and executed on June 14, 1966 contained no such provision for the payment of reasonable attorney's fees. In his judgment Judge Thornburg found that the defendants were liable for the payment of attorney's fees in the sum of $5,877.42, pursuant to the provisions of G.S. 6-21.2(5)."

The defendant appealed assigning error to that portion of the judgment awarding to the plaintiff the sum of $5,877.42 as attorney's fees as part of the costs of the action.

Thomas and Harrington by L. E. Harrington for plaintiff appellee.

Powe, Porter and Alphin, P.A. by James G. Billings for defendant appellants.

VAUGHN, Judge.

On the first occasion that the question was presented for review, the Supreme Court of North Carolina held that provisions calling for a debtor to pay attorney's fees incurred by a creditor in the collection of a debt were contrary to public policy and, therefore, unenforceable. *Tinsley v. Hopkins,* 111 N.C. 340, 16 S.E. 325. The prohibition against the enforcement of such provisions in negotiable instruments was subsequently made statutory. C.S. 2983, G.S. 25-8. Effective as of 1 July

1967, Chapter 25 of the General Statutes was repealed by Chapter 700 of the Session Laws of 1965 and thus removed the express statutory injunction against enforcing provisions in instruments requiring a debtor to pay his creditor's attorney's fees. It is our view, however, that sound public policy continues to bar the enforcement of such provisions unless the same are clearly and expressly authorized by statute.

Plaintiff contends and the trial judge held that plaintiff was entitled to recover attorney's fees by virtue of G.S. 6-21.2 which was enacted effective 1 July 1967. This section, in part, is as follows:

> "§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.—Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> * * * *
>
> (5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees. If such party shall pay the 'outstanding balance' in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions."

Plaintiff contends that G.S. 6-21.2 "is sufficiently broad to include guarantors under the instant facts, that a substantial body of case law from other states supports this conclusion, and that the judgment of the trial court should be affirmed."

The contract of guaranty signed by defendants contains no provisions relating to attorney's fees. "In situations where the contract of guaranty is silent about costs of collection but the primary obligation provides that such cost shall be payable, the decisions are in disagreement as to the liability of the guarantor." 4 A.L.R. 2d 138, p. 141. The decisions in several of the jurisdictions which have allowed the plaintiff to recover attorneys' fees have been cases in which the action was brought against the maker and the guarantor jointly. *College National Bank v. Morrison,* 100 Cal. App. 403, 280 P. 218; *California Standard Finance Corp. v. Bessolo & Gualano,* 118 Cal. App. 327, 5 P. 2d 480; *Bank of California v. Union Packing Co.,* 60 Wash. 456, 111 P. 573; *Franklin v. The Duncan,* 133 Tenn. 472, 182 S.W. 230. In these cases where the maker and guarantor were sued together and the plaintiff was successful, the attorney's fees were viewed as a valid indebtedness of the maker which the guarantor had agreed to pay. Other jurisdictions have also reasoned that when a guarantor guarantees a note his agreement covers everything in the note, including a provision for attorney's fees. *National Bank & Trust Co. of South Bend v. Becker,* 50 Ill. 2d App. 151, 200 N.E. 2d 40; *McGhee v. Wynnewood State Bank,* 297 S.W. 2d 876, Texas App. Court; *Dean v. Allied Oil Co.,* 261 S.W. 2d 900, Texas App. Court; *Townsend v. Alewel,* 202, S.W. 447, Mo. App. In *National Bank v. Becker, supra,* the Court stated at p. 43:

> "Since the maker undertook to pay these attorney's fees to bring about payment, the guarantor is necessarily liable since his obligation here is coextensive with that of the maker."

Also, in *Townsend v. Alewel, supra,* it was stated at p. 448:

> "Defendant guaranteed payment of the note. That meant the note as written, and the note included the payment of an attorney's fee."

Jurisdictions that do not allow recovery of attorneys' fees by a successful plaintiff when such are called for in the note but not in the guaranty agreement, and the latter is the

instrument sued upon, base their decisions on the fact that the two instruments are separate and distinct, each with its own provisions regarding the liability of the parties. *Collins v. Kingsberry Homes Corp.*, 243 F. Supp. 741, Aff'd 347 F. 2d 351; *Continental Supply Co. v. Tucker Rose Oil Co.*, 146 La. 671, 83 So. 892; *Schauer v. Morgan*, 67 Mont. 455, 216 P. 347. The Court in *Schauer v. Morgan, supra* at p. 352 states this position as follows:

> "The note delivered to plaintiff with the guaranty provided for a reasonable attorney's fee, if the note was placed in the hands of an attorney for collection. This action is upon the guaranty. The provision for an attorney's fee relates only to proceedings to collect the note, and since the action is not upon the note the attorney's fee was improperly allowed."

North Carolina also recognizes that the obligation of the guarantor and that of the maker, while often coextensive are, nonetheless, separate and distinct. In a case holding that payment of interest by the maker of a note, after maturity, did not prevent an action against the guarantor thereon from being barred by the lapse of three years from maturity of the note, the Court said:

> "A guaranty is a contract, obligation or liability arising out of contract, whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Cowan v. Roberts*, 134 N.C. 415, 46 S.E., 297; *Carpenter v. Wall*, 20 N.C. 279; *Chemical Co. v. Griffin*, 202 N.C., 812. And the right to sue upon said contract or guaranty arises immediately upon the failure of the principal debtor to pay the debt at maturity or to meet his obligation according to its tenor. *Beebe v. Kirkpatrick*, 321 Ill., 612, 152 N.E., 539, 47 A.L.R., 891."
>
> * * * *
>
> "Guarantors are not sureties; nor are they endorsers, though with respect to the plea of the statute of limitations, their liability is more nearly analogous to that of the latter than to that of the former. *Coleman v. Fuller*, 105 N.C. 328, 11 S.E., 175. The obligation of a surety is primary, while that of a guarantor is collateral. *Rouse v. Wooten*,

140 N.C. 557, 53 S.E., 430; *Dole v. Young,* 24 Pick. (Mass.), 252. A surety may be sued as a promisor with the principal debtor; a guarantor may not; his contract must be especially set forth or pleaded. *Coleman v. Fuller, supra; Bank v. Haynes,* 8 Pick. (Mass.), 423, 19 Am. Dec., 334." *Trust Co. v. Clifton,* 203 N.C. 483, 166 S.E. 334.

Defendants' contract of guaranty is their own separate contract with plaintiff to pay the debts of Landmark Inn of Durham, Inc. when due, if not paid by Landmark. They are not in any sense parties to the note executed by Landmark. *Milling Co. v. Wallace,* 242 N.C. 686, 89 S.E. 2d 413; G.S. 6-21.2. Defendants' contract does not call for the payment of plaintiff's attorneys' fees. The statute on which plaintiff relies, G.S. 6-21.2, does not authorize the collection of attorneys' fees except in cases where the instrument on which suit is brought expressly so provides. That part of the judgment which awards plaintiff attorney's fees is reversed. The cause is remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Judge BRITT concurs.

Judge BROCK dissents.

Judge BROCK dissenting:

The guaranty agreement sued upon in this case reads in part as follows:

> " . . . I (we) do hereby guaranty to EAC Credit Corporation, . . . the payment when due of any and all notes, accounts receivable, conditional sales contracts, chattel mortgages, indebtedness and liability . . . at any time made or incurred by Landmark Inn of Durham, Inc., . . . to said Company, or acquired by said company and any and all commercial paper at any time purchased or acquired from said debtor, by said Company, and endorsed by said debtor to said Company, with or without recourse, whether said commercial paper so made or incurred, or so purchased and acquired, be retained by said company or transferred before or after maturity, with or without recourse.

"Said company without notice to me (us), may elect which specific commercial paper this guaranty shall apply to and, from time to time, may change its election.

"The liability of the undersigned is direct and unconditional and this guaranty is given without regard to any security, or otherwise, and shall be effective as to any of said commercial paper as if no other guaranty or security had been given therefor. . . . I (we) waive notice of the acceptance of this guaranty, notice of the commercial paper to which the same shall apply, also presentment, demand, protest, and notice of protest on any and all such commercial paper. No renewal or extention of time of payment of any commercial paper, and no release or surrender or other security for such commercial paper, or delay in enforcement of payment of the principal obligation or any security thereto shall affect my (our) liability thereon, even though such renewal or extension or release or surrender may have been given subsequent to my (our) death. . . .

"This guaranty shall be a continuing one and shall remain in force until written notice from me (us) of its discontinuance shall be received by said company, and until all commercial paper and liability covered hereby, existing at the time of such notice, shall have been fully paid."

In my opinion a guaranty with language as broad as set out above contemplates and covers the payment of attorney fees as provided for in the debtors' obligation to plaintiff.

I vote to affirm the judgment appealed from.

STATE OF NORTH CAROLINA v. ALEXANDER J. FLOWERS

No. 7112SC528

(Filed 20 October 1971)

Searches and Seizures § 3— narcotics search warrant — sufficiency of the affidavit

Affidavit to a narcotics search warrant complied with constitutional and statutory prerequisites and was sufficient to support a magistrate's finding of probable cause that heroin would be found on the defendant's person and in a certain house trailer. U. S. Constitution, IV Amendment; G.S. 7A-170; G.S. 15-25; G.S. 15-26.

State v. Flowers

APPEAL by defendant from *Cooper, J.*, 22 February 1971 Session of Superior Court held in CUMBERLAND County for the trial of criminal cases.

The defendant appellant herein was charged in a bill of indictment with the felony of possessing a quantity of narcotic drugs, to wit: heroin. The evidence for the State tended to show that on the night of 3 November 1970, Cumberland County Deputy Sheriff Blaine O'Brien, acting pursuant to information received from a confidential informant, obtained a warrant at 9:25 p.m. for the search of a house trailer located at Lot 13, Averette's Trailer Court, Yadkin Road, Fayetteville, North Carolina. Armed with this search warrant and accompanied by officers and agents from the State Bureau of Investigation, Army C.I.D. agents from Fort Bragg and a uniformed member of the sheriff's department, Deputy Sheriff O'Brien then immediately proceeded to the premises at Lot 13, Averette's Trailer Court, arriving there about 9:30 p.m. A search was then and there conducted in the presence of defendant Flowers, one William Bailey (who was subsequently charged and tried with the defendant), and a girl. A search of the bedrooms of the trailer produced a quantity of heroin, paraphernalia allegedly used in connection with narcotics, and a rent receipt for the trailer made out to the defendant Flowers.

The defendant testified that he was a soldier and had been stationed at Fort Bragg for two years; that he had lived in quarters at Fort Bragg for about a year and a half; that he had then moved to Lot 13, Averette's Trailer Court with his wife and child, but after about three months, his wife had returned to her home in New York City; and that he continued to occupy the trailer along with the defendant Bailey and two other individuals by the names of Watson and Whitaker. He further testified that on the night in question, he had been at the trailer with a young woman; that Bailey and another man had come to the trailer and departed shortly thereafter; and that he and the woman had continued to watch television until the police arrived and conducted the search. He admitted that he and Bailey shared the south bedroom but denied any knowledge of the glassine bags (which contained heroin) found there. It further appeared from the defendant's testimony that he, Flowers, paid the monthly rental of $110 for the trailer but that the money for this payment came from all of the four

persons living there and that a number of other people had had access to the trailer in the period immediately preceding 3 November 1970. The defendant further offered evidence that he had a good reputation in the community in which he lived in New York City.

From a verdict of guilty and judgment of imprisonment entered thereon, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorneys Sauls and Evans for the State.

William S. Geimer, Assistant Public Defender, for defendant appellant.

MALLARD, Chief Judge.

Defendant's principal assignment of error concerns the refusal of the trial judge to suppress any evidence seized in the search of the premises located at Lot 13, Averette's Trailer Court, on the third day of November 1970. He contends that the affidavit of Deputy Sheriff O'Brien, upon which the search warrant was issued, was insufficient to enable the magistrate to make an independent determination of probable cause, that the search warrant was issued on the basis of hearsay evidence, and that under the cases of *Aguilar v. Texas,* 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. U.S.,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), the affidavit and evidence were not sufficient to have enabled the magistrate to properly find probable cause. When this issue was raised in the superior court, the jury was sent out and a *voir dire* hearing was conducted; but in view of our holding herein, it is not necessary to summarize all the testimony given. Suffice it to say, that the testimony on *voir dire,* taken in the light most favorable to the State, was more persuasive than the affidavit.

The affidavit which appears as a part of the search warrant in the record on appeal is denominated as the "Appellant's Exhibit A" in one place and in another as "Court Exhibit 1." The pertinent part of the affidavit portion of the search warrant reads as follows:

> "Blaine OBrien Deputy Sheriff, Cumberland County Sheriffs Dept, Fay N.C. being duly sworn and examined under oath, says under oath that he has probable cause

to believe that Alexander Flowers And William Bailey has *(sic)* on their premises and in their Persons certain property, to wit: Narcotic Drugs To wit Heroin, The possession which constitutes evidence of a Crime, to wit: Possession of Narcotic Drugs (G.S.-90-88 11/3/70 Lot # 13 Averittes Tr Ct, Yadkin Road, Fayeteville N.C. The property described above is located On the premises and on the persons described as follows: A white Trailer with Green trim, has a broken hitching post in front yard, has two sets of steps at front door, a tan 1965 Dodge car New York Lic Plate—5U5758 parked in yard. The facts which establish probable cause for the issuance of a search warrant are as follows: Received imformation *(sic)* from a relaible *(sic)* and confidential imformant *(sic)* that *(sic)* has furnished imformation *(sic)* in the past that has resulted in the arrest and convictions of Dope peddlers in the Fayetteville area, that with-in the past eight hours he has been to the above location and that he has seen a quanity *(sic)* of Heroin, that he knows the above mentioned subjects seal (this word reads 'deal' in the original record on file) in Narcotics. These above mentioned subjects are known to Narcotic Agents in the Fayetteville area and have a bad reputation for dealing in the Drug traffic in Fayetteville. Due to the reliability of the imformant *(sic)* and to the reputation of the suspects I pray that a search warrant be issued and that all evidence found be confiscated and held for futher *(sic)* Court action."

The Fourth Amendment to the United States Constitution provides that " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It has been held by the Supreme Court of the United States that the Fourth Amendment also requires that a neutral authority be placed in an intervening position between the police and the public. *Berger v. New York,* 388 U.S. 41, 18 L. Ed. 2d 1040, 87 S.Ct. 1873 (1967).

In the case before us, there was an intervening magistrate who was an officer of the district court (G.S. 7A-170) and was authorized, upon the finding of probable cause, to issue a search warrant. G.S. 15-25. The warrant to search contains the statement that it was issued by the magistrate after he had examined the affiant under oath and had found probable cause.

The place to be searched was described with particularity in the warrant, and the things to be seized were referred to as those things described in the affidavit, such as the narcotic drug, heroin. It is permissible to incorporate the description of the items to be searched for and the place to be searched in the warrant by reference to the affidavit. *State v. Mills,* 246 N.C. 237, 98 S.E. 2d 329 (1957).

It appears from the record that the foregoing affidavit portion of the search warrant was on one side of the sheet of paper and the warrant portion was on the reverse. The affidavit was signed and sworn to by Blaine O'Brien, and the warrant to search portion was signed by Magistrate L. G. Waldrop and bore the date and hour of its issuance above his signature. In the search warrant the magistrate stated, "I have examined under oath the affiant and am satisfied that there is probable cause to believe" that the defendants had the property described in the affidavit. In addition, the magistrate stated that he was issuing it upon information furnished under oath by the affiant, Blaine O'Brien.

The provisions of our statute (G.S. 15-26) relating to the contents of search warrants read as follows:

> "(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.
>
> (b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.
>
> (c) The warrant must be signed by the issuing official and bear the date and hour of its issuance above his signature."

The search warrant issued herein complied with each of the foregoing provisions of the statute.

In the case of *United States v. Ventresca,* 380 U.S. 102, 13 L. Ed. 2d 684, 85 S.Ct. 741 (1965), the Court held that a finding of probable cause for the issuance of search warrants may rest upon evidence which is not competent in a criminal trial. In

United States v. Harris, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S.Ct. 2075 (1971), the Court said:

> " * * * More important, the issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in a specific premise. * * * "

Defendant's contention that the search warrant was issued on hearsay evidence is without merit. See *Aguilar v. Texas, supra; Jones v. United States,* 362 U.S. 257, 4 L. Ed. 2d 697, 80 S.Ct. 725 (1960); *Draper v. United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S.Ct. 329 (1959); and *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

The Court said in *United States v. Ventresca, supra,* that affidavits for search warrants " . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."

"Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trusworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York, supra.*

We think that the affidavit in this case complies with the Constitution of the United States, the decisions of the United States Supreme Court, the decisions of the Supreme Court of North Carolina, and the statutory law of North Carolina. We hold that it was sufficient as the basis for the finding by the magistrate of probable cause and that the trial judge did not commit error in denying defendant's motion to suppress the evidence.

The State contends in its brief that Aguilar and Spinelli are limited almost to the point of extinction by the Harris case. Further, the State seems to contend that it is not necessary for the affidavit to contain all information necessary to support the finding of probable cause. While this question is not specifically presented or decided, we think it is proper to briefly discuss it.

Rule 41 of the Federal Rules of Criminal Procedure relates to search and seizure. Under Section (c) of this rule, it is provided that "(a) warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant." In *Aguilar v. Texas, supra,* the Court held that the issuance of the search warrant by a justice of the peace in Texas was improper because " . . . *the affidavit* did not provide a sufficient basis for a finding of probable cause . . . . " (Emphasis added) The requirement under Section (b) of G.S. 15-26 that the affidavit indicate the basis for finding probable cause, when interpreted in the light of G.S. 15-27(b) which states that "(n)o search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required," together with a concurring opinion of Judge Graham in *State v. Milton,* 7 N.C. App. 425, 430, 173 S.E. 2d 60, 63 (1970), and footnotes in Aguilar, may suggest that all of the material and essential facts necessary to support the finding of probable cause need not be set out in the affidavit. The intimation is that there is a difference between information necessary to establish a finding of probable cause and information sufficient to indicate a basis for such finding.

In Aguilar, the Court held that under the United States Constitution, the affidavit in the state court of Texas did not provide a "sufficient basis" for finding probable cause. In our statute it is specifically stated that the affidavit must indicate "the basis" for the issuance of the warrant. There may be a distinction that we have overlooked in the words "sufficient basis" as held to be constitutionally required in Aguilar and "the basis" in our statute. The word "basis" means "the bottom of anything considered as a foundation for the parts above." Webster's Third New International Dictionary (1968). The words "the basis," therefore, seem to imply the entire foundation—not just a part. In any event, the better practice would be for the issuing official to require that the affidavit contain the material and essential facts (but not all the evidentiary details) necessary to support the finding of probable cause before issuing a search warrant.

Defendant also assigns as error the failure of the court to allow his motion for judgment as of nonsuit made at the close of the State's evidence and again at the close of all the evi-

dence. We hold that there was ample evidence to require submission of the case to the jury.

We have carefully examined defendant's other assignments of error and find no prejudicial error therein.

In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE HARRISON BAILEY

No. 7112SC524

(Filed 20 October 1971)

Criminal Law § 75— admission of inculpatory statements — advising of rights — non-indigent defendant

A defendant who was represented by privately-employed counsel during the trial and on appeal may not challenge the admissibility of his in-custody inculpatory statements on the ground that the arresting officer did not advise him of the constitutional rights of an indigent.

APPEAL by defendant from *Cooper, Judge,* 22 February 1971 Session of Superior Court held in CUMBERLAND County.

The defendant Willie Harrison Bailey was charged in a bill of indictment, proper in form, with the felony of possessing a quantity of narcotic drugs, to wit: heroin. The evidence for the State tended to show that on the night of 3 November 1970, Cumberland County Deputy Sheriff Blaine O'Brien, acting pursuant to information received from a confidential informant, obtained a warrant at 9:25 p.m. for the search of a house trailer located at Lot 13, Averette's Trailer Court, Yadkin Road, Fayetteville, North Carolina. Armed with this search warrant and accompanied by officers and agents from the State Bureau of Investigation, Army CID agents from Fort Bragg and a uniformed member of the sheriff's department, Deputy Sheriff O'Brien and P. E. Beasley, a detective with the Fayetteville Police Department, then immediately proceeded to the premises at Lot 13, Averette's Trailer Court, arriving there about 9:30 p.m. A search was then and there conducted in the presence of defendant Bailey, one Alexander Flowers (who was subsequent-

ly charged and tried with the defendant), and a girl. A search of the bedrooms of the trailer produced a quantity of heroin, paraphernalia allegedly used with narcotics, and clothing belonging to defendant Bailey.

The defendant testified that he was a soldier attached to Headquarters Company, First 508th Airborne Division, and had been stationed at Fort Bragg for about a year and eight months; that he was living at Headquarters Company barracks and stayed there sometimes during the week and on nights and weekends when he had duties; that when he did not stay at the barracks or go home he stayed at the trailer he occupied along with defendant Flowers and two other individuals by the names of Watson and Whitaker. On the night in question, according to defendant's testimony, he had come to the trailer with a friend, and after waiting twenty or twenty-five minutes Flowers arrived with a young woman and opened the door so they could all go in; that he showered, dressed, and went to the Seven-Eleven to get some food; that he was gone twenty to twenty-five minutes and when he returned he threw his shirt on the bed in the north bedroom and began cooking until the police arrived and conducted the search. Defendant testified that he kept most of his clothes in his quarters at Fort Bragg, but admitted some of his clothes were kept in the trailer; that he paid rent and shared the trailer with three other soldiers, but denied any knowledge of heroin being in the trailer.

From a verdict of guilty and judgment of imprisonment entered thereon, the defendant appealed to the Court of Appeals.

Attorney General Robert Morgan, Assistant Attorney General T. Buie Costen and Staff Attorney Ernest L. Evans for the State.

Barrington, Smith & Jones by Carl A. Barrington, Jr., for defendant appellant.

HEDRICK, Judge.

By assigning as error the court's denial of his motion to suppress any evidence seized in the search of the premises located at Lot 13, Averette's Trailer Court, on 3 November 1970, the defendant Bailey challenges the validity of the same search warrant discussed by Chief Judge Mallard in the case of *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820 (1971), filed

at the same time as the opinion in the instant case. For the same reasons stated therein, this assignment of error is overruled.

Defendant's third assignment of error, based on exception number 3, is stated in the record as follows:

> "3. That the Court erred in overruling the Defendant Bailey's objection to, and by allowing into evidence, certain testimony in the form of an admission against interest by the Defendant Bailey allegedly made to the arresting officer on the night of the arrest, such statements allegedly being made by the Defendant before he was fully warned of his constitutional rights. That the testimony of the officer showed a failure to warn the Defendant of his rights at a critical stage in the arrest proceedings as required by law. As shown by Exception #3 (R p 32)."

The record reveals that before any witness for the State was permitted to testify as to any statements made by the defendant Bailey, the court conducted a *voir dire* examination of the witness, Detective Beasley.

On *voir dire* the detective testified that he asked defendant Bailey if he lived in the trailer and which was his bedroom, before he advised defendant of any of his constitutional rights under the Fifth Amendment. Beasley testified that after the north bedroom, which defendant Bailey indicated was his, had been searched, and after two empty capsules with residue of white powder had been found under defendant's shirt on the bed in the bedroom, he arrested defendant, advised him of his constitutional rights, and proceeded to question him further about the entire matter.

At the conclusion of the *voir dire,* the court made the following findings of fact and conclusions of law:

> "That Mr. P. E. Beasley, a detective of the Fayetteville Department, on November 3, 1970, went to Lot Number 13 of the Averette's Trailer Court in Cumberland County, with other officers, arriving there at approximately 9:30 p.m., that the Defendant Bailey was present when the officers arrived at the trailer located on Lot Number 13. That a search warrant was read by one of the officers, authorizing a search of the trailer located on Lot Number 13,

Averette's Trailer Court. That subsequent to the reading of the search warrant, Detective Beasley asked the Defendant Bailey his name and was told that his name was Bailey; that he asked the defendant Bailey if he lived there, to which the defendant Bailey answered in the affirmative. He asked the defendant Bailey which was his bedroom; at which point the defendant Bailey pointed to the bedroom located at the northern end of the trailer; that Detective Beasley, Snipes and the defendant Bailey went to the north bedroom; that the room was searched and that upon finding some capsules, Detective Beasley then advised the defendant of his constitutional rights under the decision in the case of MIRANDA versus ARIZONA; that Detective Beasley advised the defendant Bailey that he was placing him under arrest for a narcotics investigation; that he had a right to remain silent, that anything he said could be used against him; that he was entitled to consult with an attorney before answering any questions and that if he decided to answer any questions, he could quit at any time. That at this time the defendant Bailey was asked if he understood these rights, to which he answered in the affirmative. That in the opinion of Detective Beasley, defendant Bailey was not under the influence of any alcohol or narcotic drug; that no threats were made to him and no promise made.

"Based upon the foregoing findings of fact, the Court concludes as a matter of law that any statement made by the defendant Bailey to Officer Beasley, after having been advised of his constitutional rights, was freely, knowingly, understandingly and voluntarily made and might be admitted to the trial of this case. That any statements made by the defendant Bailey prior to being advised of his rights, at a time when he was a suspect in a narcotics investigation and was a subject of this investigation, are inadmissible and will not be allowed."

The exception upon which this assignment of error is based presents only the question of whether the facts found support the court's conclusions of law. The defendant does not contend that the evidence does not support the findings of fact.

The defendant does contend, however, that his in-custody inculpatory statements were inadmissible because the officer had

not advised him that if he were an indigent and unable to compensate counsel an attorney would be provided for him.

In *State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366 (1971), Chief Justice Bobbitt said:

> "It does not appear that defendant was then an indigent and unable to compensate counsel of his choice. In fact, at the preliminary hearing on December 11, 1969, defendant was represented by privately-retained counsel. If, in fact, defendant was able to select and compensate counsel, it was unnecessary to advise defendant in respect of the rights of an indigent. *State v. Gray,* 268 N.C. 69, 81-83, 150 S.E. 2d 1, 10-12."

In *State v. Gray, supra,* where the record failed to disclose that defendant was an indigent and where defendant did not contend that he was an indigent, the North Carolina Supreme Court held that his in-custody inculpatory statements were admissible into evidence even though the record clearly disclosed that the defendant had not been advised that if he were an indigent, counsel would be provided for him.

There is no contention on the part of the defendant Bailey that he is, or was, an indigent, and there is nothing in the record to indicate that the defendant is, or was, an indigent unable to employ and compensate counsel. Indeed, it appears from the record that at his trial, as here, the defendant was represented by privately-employed counsel. Therefore, it is our opinion and we so hold that the findings of fact support the court's conclusion that any statements made by the defendant after he was advised of his constitutional rights, as set out in the court's findings of fact, were freely, understandingly and voluntarily made.

The defendant also assigns as error the court's denial of his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. We hold there was ample competent evidence to require submission of the case to the jury on the charge set out in the bill of indictment.

The defendant has additional assignments of error which we have considered and find to be without merit.

We hold that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

CHARLES A. BLALOCK, EMPLOYEE, PLAINTIFF v. ROBERTS COMPANY, EMPLOYER, AND PACIFIC EMPLOYERS INSURANCE COMPANY, INSURER, DEFENDANTS

No. 7111IC505

(Filed 20 October 1971)

1. **Master and Servant § 94— workmen's compensation — injury by accident**

There was sufficient evidence to support a finding by the Industrial Commission that plaintiff suffered an injury by accident to his left leg while plaintiff and a fellow employee were moving a heavy object.

2. **Master and Servant § 93— workmen's compensation — hypothetical questions**

In this workmen's compensation proceeding, hypothetical questions asked plaintiff's expert medical witnesses did not contain assumptions of fact not established by the evidence either directly or by fair and necessary implication.

3. **Master and Servant § 94— workmen's compensation — findings of Industrial Commission**

The findings of fact of the Industrial Commission are conclusive on appeal if supported by competent evidence in the record even though the record contains evidence which would support a contrary finding.

4. **Master and Servant § 93— workmen's compensation — credibility of witnesses**

The Industrial Commission is the sole judge of the credibility of the witnesses in a workmen's compensation proceeding and the weight to be given their testimony; it may accept or reject all or any part of the testimony of a witness.

5. **Master and Servant § 56— accident causing eventual amputation of leg — sufficiency of evidence**

There was sufficient competent evidence to support the Industrial Commission's finding that an injury by accident to plaintiff's left leg on 23 November 1968 caused a clot to form which obstructed an artery in the left leg and resulted in the amputation of the leg on 5 June 1969.

APPEAL by defendants Roberts Company, Employer, and Pacific Employers Insurance Company, Insurer, from the opin-

ion and award of the North Carolina Industrial Commission (Commission) filed 29 March 1971.

This is a proceeding under the North Carolina Workmen's Compensation Act wherein the plaintiff seeks to recover compensation for the loss of his left leg as a result of an accident allegedly sustained on 23 November 1968. Facts sufficient for an understanding of the questions raised by this appeal are set forth in the following pertinent portions of the opinion and award of the Commission:

"FINDINGS OF FACT

"1. Plaintiff had a left ankle fusion in 1955 and a myocardial infarction in 1965.

"2. On 3 [sic] November 1968 plaintiff and a fellow employee engaged in handling a pan of generator parts which weighed 150 to 175 pounds. While so engaged plaintiff lost his balance and went down to the floor. The fellow employee let go his end of the pan and all of the weight of the pan went upon plaintiff. At such time plaintiff had a sharp, knife-like pain in the back of his left leg at a point just below the knee.

"3. Plaintiff sustained, as described above, an injury by accident arising out of and in the course of his employment with defendant employer.

"4. Following his accident, plaintiff continued to work despite the continuation of pain in his injured leg. On 27 November 1968 plaintiff consulted Dr. Lawrence Alexander, general practitioner of Sanford. Plaintiff gave a history of injuring himself on 23 November 1968 while lifting a pan of gears on his job and of pain in the left leg. Dr. Alexander's initial diagnosis was a strained muscle in the left leg. However, plaintiff did not respond to treatment and Dr. Alexander referred plaintiff to Dr. Daniel of Pinehurst. A diagnosis of plaintiff having torn a tendon in the leg was then made. However, plaintiff still did not respond to treatment and the doctor's final diagnosis was that plaintiff had sustained a vascular injury. Plaintiff was therefore referred to Dr. George Johnson, surgeon of Chapel Hill.

"5. Dr. Johnson first saw plaintiff on 9 February 1969. Plaintiff was still suffering with left leg pain at the time. Dr. Johnson felt that plaintiff had sustained an occluded artery in the injured leg, and on 13 February 1969 a femoral artery bypass was done. Plaintiff was out of work and temporarily totally disabled for two and one-half weeks at such time.

"6. Thereafter, plaintiff returned to work, but his injured leg continued to cause pain and to swell. He worked with defendant employer until 1 May 1969, when he stopped work in order to change jobs. He secured a new job as a truck driver in order to get off of his feet. While working as a truck driver, plaintiff's injured leg became worse while he was making a trip to Florida. He was hospitalized and treated there and then returned to North Carolina.

"7. Plaintiff was rehospitalized under the care of Dr. Johnson at Chapel Hill on 28 May 1969. It was found that the bypass graft in the injured leg had occluded and there was nothing to do but to amputate the leg. The left leg was therefore amputated at a point above the knee on 5 June 1969. Plaintiff reached maximum improvement or the end of the healing period from the amputation on or about 5 September 1969.

"8. Dr. Alexander is of the opinion that plaintiff's vascular injury occurred at the time of plaintiff's accident giving rise hereto and the onset of the left leg pain. Such doctor is further of the opinion that such accident eventually led to plaintiff's injured leg being amputated.

"9. Dr. Johnson is also of the opinion that the amputation could have been a result of the accident giving rise to this claim. The trauma sustained by plaintiff on 23 November 1968 caused a clot to form in plaintiff's left leg which caused blockage of one of the veins which eventually resulted in amputation of the leg.

"10. As a result of the injury by accident giving rise hereto, plaintiff was temporarily totally disabled for 2.5 weeks in February, 1969, and for the period 28 May 1969 to 5 September 1969.

"11. As a result of the injury by accident giving rise hereto, plaintiff sustained the loss of the left leg.

"The above findings of fact and conclusions of law engender the following additional

"CONCLUSIONS OF LAW

"1. On 23 November 1968, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer. G.S. 97-2(6).

"2. As a result of the injury by accident giving rise hereto, plaintiff was temporarily totally disabled for 2.5 weeks in February, 1969, and for the period 28 day May to 5 September 1969. Plaintiff is entitled to compensation at the rate of $42.00 per week for such periods. G.S. 97-29.

"3. As a result of the injury by accident giving rise hereto, plaintiff sustained the loss of the left leg, for which he is entitled to compensation at the rate of $42.00 per week for a period of 200 weeks, commencing 5 September 1969. G.S. 97-31(15)."

From an opinion and award of the Full Commission denying the exceptions filed by the defendants, and affirming the opinion and award of the hearing commissioner, the defendants appealed to the North Carolina Court of Appeals.

Pittman, Staton & Betts by William W. Staton and William E. Marshall, Jr., for plaintiff appellee.

Young, Moore & Henderson by Gerald L. Bass for defendant appellants.

HEDRICK, Judge.

[1] By appropriate assignment of error defendants contend that the Commission's finding of fact number 2 is not supported by the evidence. There is ample competent evidence in the record to support this finding of fact, and in addition thereto, defendants state in their brief:

"The question in this case is not whether Blalock sustained an injury to the calf of his leg while moving a heavy object on the job. This is admitted. The question in the case is whether certain operations and the ultimate amputation of Blalock's leg above the knee were causally connected with a minor injury to the calf of his leg which Blalock sustained

in moving the heavy object some 2½ months prior to the first operation and 5½ months prior to the amputation."

[2] By assignments of error 1, 2 and 3, defendants contend that the hypothetical questions asked of plaintiff's expert witnesses, Dr. Alexander and Dr. Johnson, were improperly phrased and contained assumptions of fact not warranted under the evidence adduced. In hearings before the Industrial Commission, a hypothetical question asked of an expert witness is competent when it assumes facts which the evidence directly, fairly, and reasonably tends to establish. *Blassingame v. Asbestos Co.*, 217 N.C. 223, 7 S.E. 2d 478 (1940); *MacRae v. Unemployment Compensation Com.*, 217 N.C. 769, 9 S.E. 2d 595 (1940). We have examined all of the hypothetical questions asked of the expert witnesses and conclude that they assume only facts which were established by the evidence either directly or by fair and necessary implication. The probative force of the witnesses' responses is for the Commission.

The defendants' additional assignments of error present the question of whether there is any competent evidence in the record to support the Commission's determinative finding that plaintiff's injury by accident to his left leg on 23 November 1968 caused the clot which occluded the artery in his left leg which resulted in the amputation of the leg on 5 June 1969.

Expert witness Dr. Lawrence Alexander, a general practitioner, testified that he first examined and treated the plaintiff's injury, allegedly sustained on 23 November 1968, on 27 November 1968. The plaintiff remained under his care and treatment from 27 November 1968 until he was referred to Dr. Johnson at N. C. Memorial Hospital. With respect to the injury by accident on 23 November 1968 and its causal connection with the subsequent amputation of the left leg, Dr. Alexander testified:

"My own personal opinion would be like this: this was obviously the onset of symptoms for this particular illness that led to the period of disability, to the surgery to try to improve the circulation and finally to the amputation. This was the beginning of this particular illness.

* * *

Apparently, from the very beginning, although we could not measure it exactly, and could not pinpoint it exactly; some

vascular injury must have occurred at the time of the onset of the pain."

With respect to the vascular injury, Dr. Alexander testified:

"I have an opinion that that vascular injury made the circulation even worse than it was."

Expert witness Dr. George Johnson, Jr., a specialist in general and vascular surgery, first saw and examined plaintiff with respect to the particular illness on 9 February 1969. He performed the femoral artery bypass graft on 13 February 1969 and was present and participated in the amputation of plaintiff's leg on 5 June 1969.

In response to a competent hypothetical question, Dr. Johnson testified: "I think that it is possible that the amputation could have been the result of the accident."

In explaining his answer to the hypothetical question, Dr. Johnson stated:

"[T]rauma to a vessel, a direct blow on a vessel, as allegedly happened, in some instances apparently has resulted in injury to the vessel sufficient to cause the vessel to clot. If this is what happened to Mr. Blalock, I think it is possible that this could have caused a thrombosis in that segment of the vessel. . . . "

[3, 4] The findings of fact of the Industrial Commission are conclusive and binding on appeal if supported by competent evidence in the record even though the record contains evidence which would support a contrary finding. *Hollman v. City of Raleigh,* 273 N.C. 240, 159 S.E. 2d 874 (1968). The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part and reject a part. *Robbins v. Nicholson,* 10 N.C. App. 421, 179 S.E. 2d 183 (1971); *Morgan v. Furniture Industries, Inc.,* 2 N.C. App. 126, 162 S.E. 2d 619 (1968); *Anderson v. Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265 (1951). The Commission has the duty and authority to resolve conflicts in the testimony of a witness or witnesses. If the findings made by the Commission are supported by competent evidence, they must be accepted as final truth. *Rooks v. Cement Co.,* 9 N.C. App. 57, 175 S.E. 2d 324

(1970); *Petty v. Associated Transport*, 4 N.C. App. 361, 167 S.E. 2d 38 (1969). Webster's Third New International Dictionary (1967) defines trauma as "an injury or wound to a living body caused by the application of external force or violence [injuries . . . such as sprains, bruises, fractures, dislocation, concussion—indeed *traumata* of all kinds—*Lancet*]."

[5] After considering all of the testimony in the record in the light of the foregoing well established principles of law, it is our opinion that there is sufficient competent evidence in the record to support the Commission's finding that the trauma sustained by plaintiff on 23 November 1968 caused a clot to form in plaintiff's leg which caused blockage of one of the arteries which eventually resulted in amputation of the leg.

The findings of fact support the conclusion that as a result of the injury by accident on 23 November 1968 the plaintiff sustained the loss of his left leg for which he is entitled to compensation.

The opinion and award of the North Carolina Industrial Commission dated 25 March 1971 is affirmed.

Affirmed.

Chief Judge MALLARD and Judge CAMPBELL concur.

DAVID A. JOHNSON v. JANINE M. JOHNSON

No. 7110DC570

(Filed 20 October 1971)

Divorce and Alimony §§ 6, 26; Judgments § 37— husband's action for absolute divorce — plea of res judicata — effect of husband's prior action for divorce

The husband's unsuccessful action in 1970 for absolute divorce on the ground that the wife had wrongfully separated herself from him in 1964 and that the parties have lived separate and apart since that date, which action resulted in a jury verdict that the husband had abandoned the wife, does not bar the husband's subsequent action in 1971 for absolute divorce on the ground that the parties were judicially separated in 1964 on the motion of the wife and that the parties have lived separate and apart since that date, the basis of the husband's 1971 action being entirely different from the husband's unsuccessful action in 1970.

Johnson v. Johnson

APPEAL by defendant from *Barnette, District Judge,* 12 April 1971 Civil Session of District Court held in WAKE County.

Action for absolute divorce. In his complaint, filed 4 January 1971, plaintiff-husband alleged, among other things, that he and defendant "were separated on March 27, 1964 pursuant to judicial decree entered at the request and motion of defendant for separate maintenance and application for divorce from bed and board or judicial separation," and that "since the time of said order of judicial separation and for the past six years and ten months, plaintiff and defendant have lived continuously separate and apart." Answering, the defendant admitted all allegations of the complaint except an allegation that plaintiff was entitled to judgment of absolute divorce, and as a further answer and defense alleged the following:

On 27 March 1964 the plaintiff and defendant began living separate and apart from each other; on 5 January 1970 plaintiff filed an action for absolute divorce in the District Court of Wake County; defendant was served with summons and filed answer alleging that the plaintiff had abandoned the defendant and the minor child of the parties; by order of the District Judge dated 26 October 1970 plaintiff's action for divorce commenced 5 January 1970 was consolidated for trial with an action for alimony and child support filed by the defendant herein; on 30 November 1970 the consolidated cases came on for trial, "at which time the jury returned a verdict in favor of the defendant, Janine M. Johnson and against the plaintiff David A. Johnson." On these allegations, defendant moved "that the complaint of the plaintiff be dismissed on the grounds of *res adjudicata (sic).*"

Examination of the pleadings in the prior actions reveals the following:

On 19 March 1964 the wife, defendant in the present action, filed action under former G.S. 50-16 against her husband in the Superior Court of Wake County, alleging that her husband had abandoned her, had offered such indignities to her person as to render her condition intolerable and her life burdensome, and that by cruel and barbarous treatment he had endangered her life. In that action the wife asked for reasonable subsistence for herself and for the infant child of the parties, permanent and *pendente lite,* and for sole custody of the child.

On 26 March 1964 the husband filed answer, denying he had abandoned or mistreated his wife. The wife's motion for custody of the child and alimony *pendente lite* was heard by Judge Edward B. Clark, presiding at the March 1964 Civil Session of Superior Court held in Wake County. After considering the pleadings and affidavits filed by the parties and hearing testimony of witnesses, Judge Clark signed an order on 27 March 1964 awarding custody of the child to the wife and awarding her alimony *pendente lite* and support for the child. This order also directed that, pending the trial and determination of the issues, the wife be awarded "sole and exclusive possession, for herself and the infant child," of the residence of the parties in the City of Raleigh, together with all furnishings therein.

In the husband's action for absolute divorce filed 5 January 1970 in the District Court in Wake County, he alleged that on 13 March 1964 his wife had separated herself from him and that the parties had lived separate and apart for more than one year next before commencement of the action. The wife filed answer in which she denied that she had separated herself from her husband and alleged that on 13 March 1964 her husband had abandoned her without just cause or excuse. On 26 October 1970 an order was entered consolidating the husband's action for absolute divorce with the wife's still pending prior G.S. 50-16 action for alimony without divorce. The consolidated actions were heard in the District Court before judge and jury, resulting in a jury verdict finding that the husband had abandoned his wife as alleged in her complaint, that he had offered such indignities to her person as to render her condition burdensome and intolerable, and that by cruel or barbarous treatment he had endangered her life. Upon this verdict, the District Judge signed judgment dated 4 December 1970, awarding the wife permanent alimony.

The present action, commenced 4 January 1971, was heard by the District Judge without a jury, neither party having requested a jury trial. The court answered issues in favor of the plaintiff, finding that plaintiff and defendant had lived separate and apart from each other for more than one year next preceding the institution of this action as alleged in the complaint. From judgment granting plaintiff an absolute divorce, defendant appealed.

Boyce, Mitchell, Burns & Smith by Ben H. Clifton, Jr., for plaintiff appellee.

William T. McCuiston for defendant appellant.

PARKER, Judge.

Plaintiff alleged, and in her pleadings defendant admitted and on this appeal her counsel has stipulated, that plaintiff and defendant were separated on 27 March 1964 "pursuant to judicial decree entered at the request and motion of defendant for separate maintenance and application for divorce from bed and board or judicial separation" and that "since the time of said order of judicial separation" the parties have lived continuously separate and apart from each other. The trial court, as trier of the facts, has answered an issue finding this to be true. Defendant appellant's sole assignment of error is that the trial court erred in overruling her plea in bar of *res judicata.* We find no merit in this contention and appellant's assignment of error is overruled.

"In determining whether two actions are on the same cause of action, for the purpose of applying the doctrine of *res judicata,* a comparison of the relief sought in each action is not necessarily a proper test. It is clear that the mere fact that the same relief is sought in two actions does not make the causes of action identical within the meaning of the doctrine of *res judicata.*" 46 Am. Jur. 2d, Judgments, § 412, p. 579. In the husband's prior action for absolute divorce, filed on 5 January 1970, he alleged that his wife had separated herself from him on 13 March 1964 and he sought a divorce on the grounds that such separation, wrongfully initiated by her, had continued thereafter for the required statutory period prior to the institution of his action. This his wife denied, alleging on the contrary that on 13 March 1964 her husband had abandoned her without just cause or excuse. Upon trial of the prior action, the jury answered the issue of abandonment in favor of the wife. In the present action, instituted on 4 January 1971, the husband alleged, and the wife in her answer admitted, that the parties were separated on 27 March 1964 pursuant to judicial decree entered at the request and motion of the wife and that since the time of said order of judicial separation the parties have lived continuously separate and apart. Thus, the basis of the present action is entirely different from that which the husband sought, unsuccessfully, to establish in his prior action.

According to decisions of our Supreme Court, "the effect of a divorce *a mensa et thoro,* obtained by the wife on the ground her husband abandoned her, is to legalize their separation from the date of such judgment; and in such case the husband, after two years (now one year) from the date of such judgment, may proceed to an absolute divorce." *Richardson v. Richardson,* 257 N.C. 705, 711, 127 S.E. 2d 525, 530. A decree awarding a wife alimony without divorce in an action under former G.S. 50-16 has also been held to legalize the separation, even though the decree be based on the wrongful act of the husband in abandoning the wife, so that if such separation continues for the required statutory period thereafter, the husband will become entitled to a divorce. *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865.

When the order dated 27 March 1964 was entered on motion of the wife in her action for alimony without divorce, the court not only awarded her alimony *pendente lite,* but went further and awarded her "sole and exclusive possession, for herself and the infant child," of the residence of the parties. This had the effect of legalizing the separation of the parties from the date of the order, and such separation having continued for the requisite statutory period thereafter, the husband became entitled to a divorce. In the husband's prior action for divorce, the jury determined that the separation on which that action was based was the result of the husband's wrongful abandonment of his wife. That verdict, however, was not determinative of any issue presented in the present action, in which the period of separation alleged commenced only when the separation became legalized by judicial decree. The two actions being based on different grounds, the doctrine of *res judicata* does not apply and the court committed no error in overruling defendant's plea in bar. The judgment appealed from is

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. CHARLES RICHARD BRADSHAW

No. 7115SC501

(Filed 20 October 1971)

1. **Criminal Law § 164— denial of nonsuit motion at close of State's evidence — waiver by defendant**

The denial of defendant's motion for nonsuit made at the conclusion of the State's evidence is waived by the defendant's introduction of evidence and is not available to him on appeal.

2. **Narcotics § 4— possession of amphetamine for sale — sufficiency of evidence**

In a prosecution charging defendant with the unlawful possession of amphetamines for the purpose of sale, the evidence of defendant's guilt was sufficient to go to the jury.

3. **Criminal Law § 7; Narcotics § 4— sale of amphetamines — evidence that undercover agent had a gun — entrapment**

The defense of entrapment became a jury question in a prosecution for the unlawful possession of amphetamines for purpose of sale, where the defendant testified that he never would have sold the drugs to an undercover agent of the police but for the fact that a police informant, who was accompanying the agent, remarked to the defendant in the presence of the agent, "We try to get along with people, but he [the agent] has got a gun," and where there was no evidence that the agent denied that he had a gun.

APPEAL by defendant from *Bickett, Judge,* 8 March 1971 Session, Superior Court of ALAMANCE County.

Defendant, an indigent, was tried on a bill of indictment, proper in form, charging that on 7 November 1969, he did unlawfully, wilfully and feloniously have in his possession stimulant drugs, to wit: amphetamine, for the purpose of sale and in violation of G.S. 90-113.2(5). At the trial on 10 March 1971, the defendant, through his court-appointed counsel, tendered a plea of not guilty.

The evidence for the State tended to show that a confidential informant called defendant by telephone several days prior to 7 November 1969, and the defendant told the informant that he had no drugs at that time. The State's evidence also tended to show that on 7 November 1969 the informant called defendant, and a meeting was arranged for that evening at Ritchie's Drive-In. Officer Thomas L. Scott of the Chapel Hill police department was brought into the case by the Burlington police department to act as an undercover agent, since he was

not known in the area. Detective O. F. Hoggard of the Burlington police department testified that at about 9:30 p.m. he searched Officer Scott before he left to meet with the defendant, and that Officer Scott had no weapon on his person at the time of the search. The evidence tended to show that Officer Hoggard kept Officer Scott's weapon and I.D. card at the Burlington police station.

Officer Scott testified that the confidential informant had been acting in close conjunction with him on this particular case for about three weeks, and this included the time when the informant telephoned the defendant on two different occasions. Officer Scott's testimony tended to show that the informant was with him when the meeting took place at the drive-in at about 10:30 p.m.; that the defendant got into Officer Scott's car; that the officer then asked defendant if defendant had brought the pills he was supposed to bring and defendant answered that he had; that Officer Scott then asked the price and defendant said the price was $25; and that the pills consisted of 23 amphetamines, three pills of a legal variety and one barbiturate. Officer Scott also testified that at no time did defendant ever refuse to sell the drugs to them but that there was some haggling over price and a final figure of $25 was settled upon.

Upon cross-examination of Officer Scott, the evidence tended to show that Scott was not armed on this occasion, but that prior to drugs being mentioned the informant might have told defendant that Officer Scott was armed. The evidence tended to show that Officer Scott never denied to defendant or anyone else that he was armed or had a gun when defendant was told by informant that Scott was armed. Officer Scott testified that after a brief conversation with defendant, he drove to the Burlington police station where he gave the pills to Detective Hoggard who sent them to the S.B.I. laboratory for analysis. At the close of the State's evidence, defendant's motion to dismiss was denied.

The defendant's evidence tended to show that on 7 November 1969 at about 6:00 p.m. he received a telephone call from the confidential informant who wanted to purchase drugs from him; that defendant stated in response that he had no drugs and did not wish to sell any. The defendant then testified that at about 10:00 p.m. that same night, defendant was called again

by the informant, who told defendant he had heard defendant had drugs to sell; that defendant told him that all he had was a prescription issued by Dr. Ivey through the Mebane Drug Company; and that the informant stated he still wanted to talk to defendant and would defendant meet him at Ritchie's Drive-In. The defendant's evidence tended to show that defendant agreed and went to the drive-in alone; that he arrived at about 10:20 p.m., at which time the informant and Officer Scott came across the parking lot and got into the car with him; that Officer Scott was in the front seat and the informant was in the back seat; that the informant then asked the defendant if he had brought the drugs; and that defendant answered that he had drugs with him, but they were prescribed and he always carried them. The defendant testified that when he refused to sell the drugs, the informant said: "We try to get along with people, but we have got a gun"; and that the informant stated that Officer Scott had a gun in his back pocket. The defendant's evidence tended to show that at this point, additional money was offered for the drugs and he went ahead and sold them, because, according to the defendant, he wanted to get away. The defendant testified that he refused to sell the drugs at least three times and would never have sold them but for the mention of the gun.

On cross-examination, the defendant stated that he went to the drive-in in response to a telephone call he received at about 10:00 p.m. on the night in question; that he did not go there for the purpose of selling drugs; and that he never saw a gun at any time in the car and nobody held one on him. Defendant's renewed motion to dismiss at the close of all the evidence was denied. Defendant requested special instructions on the issue of entrapment, but the request was refused by the court. The jury returned a verdict of guilty and defendant moved to set the verdict aside as against the greater weight of the evidence. The motion was denied and the defendant was sentenced to a term of not less than four years nor more than five years.

On appeal the defendant contends the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence. The defendant also contends that it was error for the trial court to refuse defendant's written request for special instructions on the issue of entrapment.

Attorney General Morgan by Assistant Attorneys General Melvin and Ray for the State.

Donald S. Kelly for defendant appellant.

MORRIS, Judge.

[1, 2] Defendant appellant first assigns as error as the court's denial of his motion to dismiss at the conclusion of the State's evidence. The denial of a motion for nonsuit made at the conclusion of the State's evidence was waived by the defendant's introduction of evidence and is not available to him on appeal. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789 (1971). In any event, the evidence was sufficient to go to the jury.

[3] Defendant appellant next contends that the court erred in refusing defendant's written request for special instructions to the jury on the issue of entrapment. Only a portion of the court's charge to which defendant excepted was included in the record on appeal and is as follows: " . . . and you are instructed Ladies and Gentlemen of the Jury, that there was *no evidence as to entrapment* in this case, that he (defendant) was given the opportunity to commit the crime and was not induced to do so." (Emphasis added.)

> "Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, with respect to both law and evidence, and the denial of a request for special instructions cannot be held prejudicial." 1 Strong, N.C. Index 2d, Appeal and Error, §§ 42, 46, pp. 185, 186, 191; *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596 (1968).

The assignment of error for failure to instruct necessitates inclusion of the entire charge in the record. The assignment of error for failure to instruct in this case might, therefore, for sound reasons, be dismissed as ineffectual. Due to the possible prejudice to the defendant appellant, however, we choose to consider the question sought to be raised. *State v. Brooks,* 225 N.C. 662, 36 S.E. 2d 238 (1945).

We believe the above excerpt from the charge appearing in the record that there was no evidence of entrapment is erroneous and to recognize the error does not require consideration of the whole charge.

> "Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette,* 242 N.C. 164, 173, 87 S.E. 2d 191, 197 (1955); see also 3 Strong, N.C. Index 2d, Criminal Law, § 121.

From the facts of this case we believe there was sufficient credible evidence to submit the issue of entrapment to the jury. The prevailing rule in this jurisdiction is that mere initiation, instigation, invitation or temptation by enforcement officers is not sufficient to establish the defense of entrapment. It is also necessary to show that the defendant would not have committed the offense except for the persuasion, encouragement, inducement, and importunity of the officer or agent. 2 Strong, N.C. Index 2d, Criminal Law, § 7; *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971). From the record it appears that both the informant and the undercover agent in this case were connected with the State, and if they induced the defendant to commit the offense, it would constitute a good defense. *State v. Jackson,* 243 N.C. 216, 90 S.E. 2d 507 (1951). The evidence is conflicting as to the presence of a gun, but Officer Scott never denied that he did have a gun when, in the presence of the defendant the informant suggested that the officer did have a gun. Credible evidence of persuasion used by the State to move the defendant to criminal conduct requires the court to instruct the jury as to the legal principle of entrapment and the weight to be given such evidence is for determination by the jury. *State v. Caldwell,* 249 N.C. 56, 105 S.E. 2d 189 (1958); *State v. Yost,* 9 N.C. App. 671, 177 S.E. 2d 320 (1970). The court's instruction that there was no evidence of entrapment was erroneous.

New trial.

Judges BRITT and PARKER concur.

MARTHA KNOWLES ALLEN v. MAGGIE PEARSAL HINSON

No. 7111SC590

(Filed 20 October 1971)

Evidence § 50— plaintiff's injuries — opinion testimony by chiropractor

In this personal injury action, the trial court erred in allowing an expert in chiropractic to give opinion testimony as to plaintiff's injuries which was beyond the limitations of his qualification as an expert in chiropractic.

APPEAL by defendant from *Hall, Judge,* 3 May 1971 Session of Superior Court of JOHNSTON County.

This is an action to recover damages for personal injuries allegedly resulting from the negligent operation of her automobile by defendant. The collision between plaintiff's car and defendant's car occurred at about 8:35 a.m. on U.S. Highway 70, about three-tenths of a mile west of Goldsboro, North Carolina. At the place where the collision occurred, there was a crossover entrance providing access for traffic to move from the westbound lanes of traffic to the eastbound lanes of traffic. Immediately prior to the collision, defendant had been proceeding westwardly in the westbound lanes of traffic and had approached and entered the crossover into the eastbound lanes. Plaintiff was approaching the crossover headed in an easterly direction. Defendant crossed over into the eastbound lanes and her car collided with the car driven by plaintiff.

Plaintiff alleged that defendant turned her car from a direct line into plaintiff's automobile without first ascertaining that the movement could be made in safety and without yielding the right-of-way to plaintiff who was traveling in a direct line.

Defendant answering, denied all allegations of negligence, averred that the collision resulted solely from plaintiff's negligence in operating her automobile at a speed greater than was reasonable and prudent under the conditions then existing, in her failure to maintain her automobile under proper control, and in her failure to keep a proper lookout; and that even if defendant were guilty of negligence, plaintiff's contributory negligence specifically set out, should bar her recovery.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in plaintiff's favor. Defendant appealed.

Corbett and Corbett, by Albert A. Corbett and Albert A. Corbett, Jr., and C. G. Grady, for plaintiff appellee.

Spence and Mast, by Robert A. Spence, for defendant appellant.

MORRIS, Judge.

Dr. Harold K. Underwood was qualified, without objection, to testify as an expert in the field of "chiropractory" to be allowed to "express his opinion in that field." Defendant contends that Dr. Underwood was permitted, over objection, to give his opinion as an expert on subject matters for which he was not qualified as an expert as to his diagnosis, treatment and opinion as to disablement, injuries of the plaintiff, and permanence of her injuries, and that this constitutes prejudicial error. We agree.

G.S. 90-143 defines chiropractic as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body."

G.S. 90-18 provides that it shall be a misdemeanor for any person to practice medicine without a license first obtained in accordance with the statutory requirements and provides further: "Any person shall be regarded as practicing medicine or surgery within the meaning of this article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited: . . . (10) The practice of chiropractic by any legally licensed chiropractor *when engaged in the practice of chiropractic as defined by law,* and without the use of any drug or surgery." (Emphasis added.)

In the trial of this case, Dr. Underwood was, without objection, qualified to express his opinion *in the field of "chiropractory."* We are aware that there is respectable authority to be found holding that a chiropractor is competent to testify in a personal injury action, as an expert witness, concerning

matters within the scope and profession of chiropractic. Annotation, 52 A.L.R. 2d 1384 and cases there cited: *Badke v. Barnett,* 35 App. Div. 2d 347, 316 N.Y.S. 2d 177 (1970); *Fries v. Goldsby,* 163 Neb. 424, 80 N.W. 2d 171 (1956); *Ward v. American Rayon Corp.,* 211 Tenn. 535, 366 S.W. 2d 134 (1963); *Watson v. Ward,* Tex. Civ. App., 423 S.W. 2d 457 (1967); *Jones v. National Biscuit Co.,* 29 App. Div. 2d 1033, 289 N.Y.S. 2d 588 (1968). It has also been held that a chiropractor is competent to express his opinion as to the probable cause of an injury or condition, in a personal injury action, within the scope of the practice of chiropractic, *Agler v. Schine Theatrical Co.,* 59 Ohio App. 68, 17 N.E. 2d 118 (1938); and to give his opinion as to probable effects and permanence of an injury within the field of chiropractic, *Oklahoma Natural Gas Corp. v. Schwartz,* 146 Okla. 250, 293 P. 1087 (1930); *O'Dell v. Barrett,* 163 Md. 342, 163 A. 191 (1932); *Lowman v. Kuecker,* 246 Iowa 1227, 71 N.W. 2d 586 (1955).

Plaintiff in this case alleged that she sustained serious injury to her neck and back, among others. Defendant does not object to Dr. Underwood's testifying as to what he found upon examination nor to his treatment of the plaintiff.

The testimony to which defendant did object at trial and the admission of which she now urges was prejudicial error was as follows:

"Q. Doctor, without enumerating all the questions over again, but relating solely to the last part of it, do you have an opinion satisfactory to yourself as to whether or not the automobile wreck of July 18, 1969, in which Mrs. Allen was involved could or might have caused those conditions?

A. Yes, sir.

Q. What is that opinion?

A. That it could have.

Q. Dr. Underwood, without reframing all the question using the same facts, do you have an opinion satisfactory to yourself as to whether or not Mrs. Allen could or may continue to suffer pain during the years to come?

A. Yes, I do.

Q. What is that opinion?

A. Due to the history that I obtained from Mrs. Allen and my treatment over the period of time she could continue to have difficulty with her symptoms—disability.

Q. Dr. Underwood, from your training and experience over the years with patients and the type narrowing of the vertebrae between 4 and 5, what does that indicate to you?

A. It creates an instable or unstable condition of the spine at that point.

Q. What does that indicate as to whether it can progressively get worse over a period of time?

A. It indicates a stretching or injury to the ligament tissue which has created the unstable condition, if scar tissue and sufficient damage has been done to this ligament structure then as years pass along then a degenerative condition could progressively get worse.

Q. State whether or not when the soft tissue is gone between the vertebrae whether or not that generates pain and causes pain.

A. Ask the question again, please?

Q. When there is a narrowing of the vertebrae because of the degeneration of the tissue between the vertebrae, state whether or not in years to come it could cause pain?

A. Yes, sir.

Q. Do you have an opinion satisfactory to yourself as to whether that could or might get progressively worse and she would continue to have pain permanently?

A. Yes.

Q. What is that opinion?

A. Again, due to the history and due to my treatment of the patient it could be possible that degenerative changes could take place at this area and cause difficulty in the future."

Of course, it is obvious that Dr. Underwood did not intend to testify that possible future difficulty would be "due to my treat-

ment" but intended to say that his judgment as to possible future difficulty was based on her history and the treatment he found necessary.

Chiropractic is said to be the largest of all drugless healing professions. It is apparent that the fields of drugless healing and medicine and surgery are not co-extensive. The statutes of North Carolina carefully define the practice of chiropractic. Both by definition and exclusion it is limited. Doctors with unlimited licenses are competent to give expert testimony in the entire medical field. Chiropractors, on the other hand, are limited in their testimony to their special field as defined and limited by statute.

In our opinion, Dr. Underwood was allowed to testify as an expert to an extent which carried his expertise far beyond the limitations of his qualification as an expert in the field of chiropractic.

Since there must be a new trial, we do not discuss the sufficiency of the evidence. Suffice it to say that the evidence was sufficient for submission to the jury of issues of negligence and contributory negligence.

New trial.

Judges BRITT and PARKER concur.

PEGRAM-WEST, INC. v. HIATT HOMES, INC., J. T. CARRUTHERS, JR., TRUSTEE, E. E. BOONE, JR., TRUSTEE, AND GATE CITY SAVINGS & LOAN ASSOCIATION

No. 7118DC415

(Filed 20 October 1971)

1. **Appeal and Error § 24— exceptions and assignments of error — alleged error**

The exceptions and assignments of error must point out specifically and distinctly the alleged error of which review is sought.

2. **Rules of Civil Procedure § 41— general motions to dismiss — insufficiency**

Where it was not disputed that plaintiff was entitled to a money judgment against one defendant, general motions to dismiss made by all defendants were insufficient to raise the question of whether the

evidence was sufficient to establish plaintiff's right to the particular relief sought against appellant, that is, to have the judgment declared a lien and to have the lien declared superior to the lien of appellant's deed of trust.

3. Laborers' and Materialmen's Liens § 3— perfection of materialmen's lien

Where a lien claimant properly files notice of lien within six months of the last date on which materials were furnished and commences an action to enforce the lien within six months from the date of filing the notice of lien in the county where the property is situated, the lien relates back to the time when the lien claimant began the furnishing of materials, and takes precedence over the lien of a deed of trust on the property recorded after the first materials were furnished.

4. Laborers' and Materialmen's Liens § 9— materialmen's lien — relation back — priority over deed of trust

There was sufficient evidence to show that plaintiff was entitled to a valid lien which under the relation back doctrine would relate back and become effective before 27 January 1969, the date on which appellant's deed of trust was recorded, where the evidence showed that plaintiff delivered the first materials to the lot on 8 January 1969, that the last delivery was made on 14 February 1969, that proper notice of claim of lien was filed on 20 June 1969, well within the time required, and that suit to enforce the lien was filed on 19 December 1969, which was within six months of the filing of the notice of claim of lien. [Former] G.S. 44-39 and 44-43.

5. Laborers' and Materialmen's Liens § 9— material delivered before deed recorded — priority of lien over deed of trust

Even though the owner's deed was not recorded until after a materialman made his first delivery of materials, the materialman's lien was superior to a deed of trust recorded 11 days after the recordation of the deed where materials were delivered after the deed was recorded and before the deed of trust was recorded.

6. Mortgages and Deeds of Trust § 2— purchase money deed of trust — instantaneous seisin

In order for the doctrine of instantaneous seisin to apply so that no lien against a vendee can attach to the title of the property superior to that of a purchase money deed of trust, it must appear that the deed of trust and deed to the property were delivered and recorded as a part of the same transaction.

7. Laborers' and Materialmen's Liens § 9; Mortgages and Deeds of Trust § 2— purchase money deed of trust — recordation — priority of materialman's lien

The doctrine of instantaneous seisin did not apply to give a purchase money deed of trust a superior lien over a materialman's lien where the deed of trust was not recorded until 11 days after the vendee's deed was recorded, since the instruments were not recorded as part of the same transaction.

8. **Appeal and Error § 57— failure to except to court's findings**

Where no exceptions were taken to any of the court's findings, they are presumed to be supported by competent evidence and are binding on appeal. Court of Appeals Rule 21.

9. **Rules of Civil Procedure § 41— motion to dismiss — findings by court**

A motion to dismiss under G.S. 1A-1, Rule 41 (b), does not raise the question of whether the particular findings made by the court are supported by the evidence, but only the question of whether any findings could be made from the evidence which would support a recovery.

APPEAL by defendant Boone from *Kuykendall, District Judge,* 4 February 1971 Session of District Court held in GUILFORD County.

In this action, instituted 19 December 1969, plaintiff seeks judgment against Hiatt Homes, Inc. (Hiatt) for materials furnished in the construction of a house; to have the judgment declared a lien on the lot on which the house is situated, and to have the lien declared superior to the liens of certain deeds of trust.

Plaintiff filed notice of claim of lien on 20 June 1969. The notice specifies the materials furnished, the dates they were furnished, and the charges therefor as follows:

"DATE	TICKET	ITEMS	CHARGES	CREDITS	BALANCE
Jan 8 69	30065	Cement Pipe	24.72		24.72
Jan 23 69	30324	Brixment, Vents, Etc.	48.93		73.65
Feb 12 69	30665	Framing	313.45		
Feb 12 69	30666	Plywood, Etc.	446.73		
Feb 12 69	30670	Framing, Shtg.	783.86		
Feb 13 69	30680	Felt	18.03		
Feb 14 69	30690	Studs	74.16		
Feb 14 69	30702	Trusses	433.84		2,143.72"

The case was tried by the court without a jury. Before judgment was entered the priority of the lien of a deed of trust from Hiatt to defendant Carruthers, Trustee for defendant Savings & Loan Association, was stipulated. Hiatt admitted through its answer and through the testimony of its president that it was indebted to plaintiff for the balance due for materials, plus interest. This left in dispute only the questions of whether plaintiff

was entitled to a lien, and if so, whether the lien was superior to that of a deed of trust given by Hiatt to defendant Boone, Trustee, to secure a note to E. H. Tucker in the sum of $3,800.00.

Plaintiff's evidence tended to show that deliveries of materials were made to the lot as specified in its notice and on the dates therein set forth. Defendants offered evidence tending to show that Hiatt negotiated the purchase of the lot in question in December of 1968. A deed to Hiatt for the property, dated 9 December 1968, was executed and delivered on 16 January 1969, and was recorded in the office of the Guilford County Register of Deeds on 17 January 1969. On 27 January 1969 a deed of trust, dated 16 January 1969, from Hiatt to defendant Boone, was recorded.

The court entered findings of fact, made conclusions of law, and rendered judgment for plaintiff against Hiatt. The court further declared the judgment to be a lien upon the lot, and superior to the lien of the deed of trust to defendant Boone. Defendant Boone appealed.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., for plaintiff appellee.

Hoyle, Hoyle & Boone by John T. Weigel, Jr., for defendant appellant.

GRAHAM, Judge.

Appellant's first two exceptions, which are grouped under his first assignment of error, appear in the record as follows:

> "At the end of the plaintiff's evidence all defendants moved that the case be dismissed, motion denied, to which all the defendants took exception.
>
> (EXCEPTION # 1)
>
> "At the close of all the evidence all defendants moved for a dismissal. Motion denied to which all defendants took exception.
>
> (EXCEPTION # 2)"

[1] Appellee argues that these exceptions are ineffectual in that they fail to point out specifically and distinctly the alleged error of which review is sought. The point is well taken. All of

the evidence was to the effect plaintiff had delivered materials to Hiatt for the construction of a residence on the subject lot. There was no evidence payment had been made and defendant Hiatt admitted in its answer and at the trial that it was indebted to plaintiff. G.S. 1A-1, Rule 41 (b) provides that a defendant may move for a dismissal on the ground that upon the facts and law the plaintiff has shown *no right to relief*. No one disputes the fact that the plaintiff here was entitled to a money judgment at least, so it was certainly not error for the court to refuse to dismiss the case.

[2] Rather than simply joining with the other defendants in general motions to dismiss the case, defendant should have made separate motions specifying the particular relief which he was seeking and the grounds therefor. Nevertheless, we treat the motions as having sufficiently raised the question of whether the evidence was sufficient to establish plaintiff's right to the particular relief sought against appellant; that is, to have the judgment declared a lien and to have the lien declared superior to the lien of appellant's deed of trust.

We hold that the evidence was sufficient.

G.S. 44-1, in effect at the time of the transactions in question, provided in pertinent part: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated . . . shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished." (The sections of Chapter 44 dealing with liens on real property have been replaced by G.S. 44A-8, *et seq.*, effective 1 January 1970.)

[3] Where a lien claimant properly files notice of lien within six months of the last date on which materials were furnished and commences an action to enforce the lien within six months from the date of filing the notice of lien in the county where the property is situated, the lien relates back to the time when the lien claimant began the furnishing of materials, and takes precedence over the lien of a deed of trust on the property recorded after the first materials were furnished. *Heating Co. v. Realty Co.*, 263 N.C. 641, 140 S.E. 2d 330, and cases therein cited.

[4] Here plaintiff's evidence was that the first materials were delivered to the lot on 8 January 1969 and the last delivery was

made 14 February 1969. There was also evidence that the footings to the house were poured before 13 January 1969. Notice of claim of lien, specifying in detail the materials furnished and the dates thereof, was filed on 20 June 1969, which was well within the time required. G.S. 44-39. Suit to enforce the lien was filed 19 December 1969, which was within six months of the filing of the notice of claim of lien. G.S. 44-43. Thus there was sufficient evidence to show that plaintiff was entitled to a valid lien which under the relation back doctrine would relate back and become effective before 27 January 1969, the date on which appellant's deed of trust was recorded.

[5] Appellant argues that since Hiatt did not record his deed to the property until 16 January 1969, no lien for material furnished could attach before that date. Even so, this would not benefit appellant, because his deed of trust was not recorded until 27 January 1969, eleven days after the recordation of Hiatt's deed. Materials were delivered on 23 January after the deed was recorded and before the deed of trust was recorded.

Appellant contends that the case of *Supply Co. v. Rivenbark*, 231 N.C. 213, 56 S.E. 2d 431, is controlling here. There materials were furnished to the purchasers of a lot before title to the lot passed to them. The purchasers executed a deed of trust to secure the purchase price of the lot simultaneously with the execution and delivery to them of a deed to the lot. The instruments were recorded simultaneously. In holding the lien of the deed of trust to be superior to that of the materialman, the court employed the well established principle that no lien against a vendee can attach to the title of property superior to that of the holder of the purchase money mortgage. The rule, generally known as the doctrine of instantaneous seisin, and the theory behind it are set forth in *Chemical Co. v. Walston*, 187 N.C. 817, 825, 123 S.E. 196, 200:

> "It is generally held that when a vendor conveys property and simultaneously takes back a mortgage to secure the payment of all or a part of the purchase price, and such mortgage is at once registered, the title to the property conveyed does not *rest* in the purchaser for any appreciable length of time, but merely passes through his hands, without stopping, and *vests* in the mortgagee. During such instantaneous passage no lien of any character held against

the purchaser . . . can attach to the *title,* superior to the right of the holder of the purchase-money mortgage."

"[T]his rule is equally applicable where a third party loans the purchase price and takes a deed of trust to a trustee to secure the amount so loaned." *Supply Co. v. Rivenbark, supra,* at 214, 56 S.E. 2d at 432.

[6] There was evidence here that appellant's deed of trust was given by Hiatt to secure the purchase price which was loaned by E. H. Tucker, holder of the secured note. There was also evidence that the deed of trust in question was executed by Hiatt on the same date that he obtained a deed to the lot in question. However, the deed of trust was not recorded until eleven days after the recordation of the deed. In order for appellant to benefit from the doctrine of instantaneous seisin it must appear not only that his deed of trust and the deed to the property were executed and delivered as part of the same transaction, but that they were also recorded as part of the same transaction. "These cases [*Supply Co. & Chemical Co.*] hold that when a deed to the vendee and his mortgage to the vendor for the unpaid purchase price—or to a third party for money loaned to pay the vendee the purchase price—are delivered *and recorded* as a part of the same transaction, no lien against the vendee can take precedence over 'the purchase money mortgage.'" (Emphasis added.) *Childers v. Parker's, Inc.,* 274 N.C. 256, 162 S.E. 2d 481.

[7] Since the instruments here were not recorded as a part of the same transaction the doctrine of instantaneous seisin is not applicable.

[8, 9] Plaintiff argues that several of the court's findings of fact are unsupported by the evidence. However, no exceptions were taken to any of the court's findings and they are therefore presumed to be supported by competent evidence and are binding on appeal. *Heating Co. v. Realty Co., supra; Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590; Rule 21, Rules of Practice in the Court of Appeals of North Carolina. A motion to dismiss under G.S. 1A-1, Rule 41, challenges the sufficiency of the evidence to permit a recovery. *Knitting, Inc. v. Yarn Co.,* 11 N.C. App. 162, 180 S.E. 2d 611. "[M]otion under Rule 41(b) . . . challenges the sufficiency of the plaintiff's evidence to establish his right to relief." *Wells v. Insurance Co.,* 10 N.C. App. 584, 588, 179 S.E. 2d 806, 809. Such a motion does not raise the question of

whether the particular findings made by the court are supported by the evidence, but only the question of whether any findings could be made from the evidence which would support a recovery.

We have nevertheless reviewed the findings of fact made in this case and conclude that they are supported by competent evidence. The findings of fact support the court's conclusion which in turn supports the judgment.

Appellant's final assignments of error are formal and raise no questions of substance. We overrule them without discussion.

No error.

Judges BROCK and VAUGHN concur.

PEGGY M. HORTON v. ROBERT BRODIE HORTON

No. 7115DC522

(Filed 20 October 1971)

1. **Infants § 9; Divorce and Alimony § 24— mother's petition for visitation rights with daughter — denial of petition — sufficiency of findings**

In a 1971 hearing on a motion by a divorced mother, who resides in Florida, to be granted visitation rights with her daughter, who lives in North Carolina with the father, and to be purged of contempt of court for having taken the daughter to Florida in 1964 in violation of a court order, the trial judge, in his order denying the mother's motion, properly found that "since 1964 the mother has made no effort to visit or see her child in accordance with the visitation rights set forth" in the court order, notwithstanding the mother's testimony that (1) fear of contempt proceedings arising out of her violation of the court order inhibited her from exercising her visitation rights; (2) she wrote the daughter several times and tried unsuccessfully to contact her by telephone; and (3) she employed an attorney to look into the matter in 1965 or 1967.

2. **Infants § 9; Divorce and Alimony § 24— proceeding to establish visitation rights — private examination of the child — consent by mother**

A mother who consented to the private examination of her daughter by the trial judge in a proceeding to establish visitation rights may not complain on appeal that the examination was made in the absence of the parties and their attorneys.

3. **Appeal and Error §§ 2, 57— jurisdiction of Court of Appeals — findings of fact of trial court — scope of review**

The Court of Appeals had no jurisdiction to make findings of fact in an appeal from a proceeding for child custody and visitation rights, and the trial court's own findings in the proceeding were conclusive on appeal. G.S. 7A-26.

4. **Infants § 9— awarding of exclusive child custody to the father — denial of visitation rights to the mother — findings of fact**

A 1971 judgment awarding exclusive custody of a daughter to the divorced father and denying the mother any visitation rights with the daughter *is held* supported by findings that (1) the mother had made no effort to see or visit with her daughter since a court order awarded her visitation rights in 1964 and (2) the mother was in contempt of court when she carried her daughter out of the State in 1964 in violation of the 1964 order.

APPEAL by plaintiff from order of *Horton, Chief District Judge,* entered 22 February 1971 in the District Court held in ORANGE County.

Plaintiff and defendant were formerly married and had one child, Sherrie Lynn Horton, born 22 August 1959. In 1963 they separated and plaintiff brought this action in the Superior Court of Orange County seeking custody of the child, alimony, and child support. Defendant denied material allegations in the complaint and alleged that plaintiff had willfully abandoned him. On 18 February 1964 Judge Leo Carr, after hearing, entered an order awarding custody of the child to defendant-father and granting plaintiff-mother visitation rights. In violation of this order, plaintiff-mother took the child with her to Florida, and on 2 March 1964 Judge James F. Latham ordered a *capias* issued for plaintiff and that she be required to show cause why she should not be punished for contempt. Shortly thereafter, defendant-father followed plaintiff-mother to Florida, found his daughter, and brought her back to North Carolina, where she has continued to reside in his custody. Plaintiff remained in Florida where, on 1 September 1965, she obtained an absolute divorce from defendant. On 25 September 1965 plaintiff married George Allen Wolsfelt, with whom she has since resided in Florida.

On 8 December 1970 plaintiff filed a motion in the cause, praying that the court find she had purged herself of any contempt, that the court determine whether under present circumstances the best interests of Sherrie Lynn Horton are served

by continuation of custody in defendant, and that, if custody be continued in defendant, plaintiff be granted visitation rights and be permitted to exercise the same within and without North Carolina. In support of her motion plaintiff alleged that she had not seen or visited Sherrie since the child was returned to defendant's custody in 1964; that during plaintiff's residence in Florida she had led an exemplary life and been active in numerous civic affairs; and that since her marriage to Mr. Wolsfelt, she had been an exemplary homemaker, wife, and mother to the child born of her marriage to Mr. Wolsfelt.

The cause was transferred to the District Court and was heard before Chief District Judge Harry Horton, presiding at a session of District Court held in Orange County on 7 January 1971. The parties were present in person and were represented by counsel, and the child, Sherrie Lynn Horton, was also present. At the conclusion of the hearing, at which both parties presented evidence, the parties agreed that judgment might be rendered out of session. On 22 February 1971 the court rendered judgment making findings of fact, awarding exclusive custody to defendant-father, denying plaintiff-mother any visitation rights, and adjudging plaintiff in contempt of court by reason of violating the order of Judge Carr dated 18 February 1964. Plaintiff appealed.

Hoyle, Hoyle & Boone by E. E. Boone, Jr., and Timothy G. Warner for plaintiff appellant.

Robert L. Satterfield and Charles B. Hodson for defendant appellee.

PARKER, Judge.

[1] Appellant contends that the court erred in finding as a fact that "since 1964 the plaintiff has made no effort to visit or see her minor child in accordance with the visitation rights set forth in the Order of the Honorable Leo Carr, dated February 18, 1964." This finding was fully supported by competent evidence. Plaintiff's testimony that fear of contempt or possible criminal proceedings against her inhibited exercise of her visitation rights may explain, but does not negate, the finding to which she now excepts. Nor is the finding inconsistent with her testimony that she wrote to her daughter "several times" and tried, but failed, to contact her by telephone; that she con-

sulted an attorney in Florida; and that she employed an attorney in North Carolina who "looked into this matter for me in 1965 or 1967." In any event, inconsistencies in the evidence, if any, were for the trial court to resolve; its findings of fact based on competent evidence are conclusive on this appeal. *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871.

[2] Appellant excepts to certain of the court's findings of fact which were made on the basis of information obtained as result of a private examination of the child made by the trial judge in the absence of the parties and their attorneys. Had this been done without consent, it would have been error. *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782. However, the court's order finds as a fact, and on this appeal counsel for appellant admit, that the examination was made with consent of the parties and their attorneys. Having given consent to the court's action at the trial, appellant may not be heard to complain concerning it on this appeal.

[3] Attached to the record on appeal is an affidavit of one of the attorneys who represented plaintiff at the trial. From the argument contained in their brief, it would appear that appellant's counsel desire this Court to make a factual finding from this affidavit to the effect that the trial judge had had additional interviews with the minor child, to which appellant had not consented, and that pending his decision he had "discussed the matter" with the court investigator. From their argument, appellant's counsel apparently desire us to make the additional factual finding, or to draw the inference, that the trial judge's findings of fact were based at least in part on information obtained by him in a manner which violated appellant's rights, citing *In re Custody of Gupton,* 238 N.C. 303, 77 S.E. 2d 716. However, the Court of Appeals has jurisdiction to review upon appeal the decisions of the several courts of the General Court of Justice, "upon matters of law or legal inference," G.S. 7A-26, and it is not the function of this Court to make findings of fact. Therefore, we cannot make the factual findings concerning the actions of the trial judge for which appellant's counsel now contend. Evidence properly in the record fully supports the findings of fact which the trial court made, and the record itself does not disclose that these findings were based even in part on information obtained by the trial judge in a manner

violative of plaintiff's rights. The trial court's findings are conclusive on this appeal.

[4] "Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare." *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324. This Court has held that a parent's right of visitation should not be denied "unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *In re Custody of Stancil,* 10 N.C. App. 545, 179 S.E. 2d 844. In the case now before us, the trial judge has found on competent evidence that appellant was in contempt of court by reason of violating the order of 18 February 1964, in which she had been granted visitation rights. He has also found it to be for the best interest and general welfare of the child, that defendant be awarded exclusive custody. These findings are adequate to support the judgment.

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOE BRYANT, JOHN KNOLL, DON CHILDS AND B. R. QUEEN

No. 7110SC660

(Filed 20 October 1971)

1. **Criminal Law § 148; Obscenity— appeal from interlocutory order — preliminary determination of obscenity**

An order entered at the conclusion of a preliminary adversary hearing to determine whether materials seized from defendants were obscene and lawfully retained by the State as evidence pending trial of defendants for disseminating obscenity is an interlocutory order which is not appealable. G.S. 7A-27(d); G.S. 15-180.

2. **Criminal Law § 84; Obscenity— preliminary determination of obscenity — constitutionality**

Defendants' rights under the First and Fourteenth Amendments to the United States Constitution were not violated by an adversary hearing to determine preliminarily which materials seized from defendants were obscene and should be retained by the State as evidence

pending trial of defendants for disseminating obscenity and which materials were not obscene and should be returned to defendants.

APPEAL by defendants from *Clark, Judge,* May 1971 Session of Superior Court of WAKE County.

On 18 May 1971 officers of the Raleigh City Police Department served the defendants Joe Bryant, John Knoll, Don Childs, and B. R. Queen with arrest warrants charging the sale of certain named magazines and books alleged to be obscene in violation of G.S. 14-189.1. In making service of the arrest warrants, materials on the premises of three Raleigh bookstores were seized. No search warrant was issued in connection with said seizure, but the seizure was carried out in connection with the arrest of defendants pursuant to the arrest warrants.

The State moved that an adversary proceeding to determine preliminarily the obscenity of the materials held was necessary in order to afford the defendants due process in the further retention of the seized materials. This preliminary judicial determination, *vel non,* of whether the books, magazines, film and materials seized were obscene and whether they were lawfully seized and retained pending trial on the merits was scheduled for 24 May 1971. For the convenience of the defendants and at their request, the hearing was continued until 25 May 1971 when all parties were present with counsel, and the court heard and saw evidence offered by both parties, heard oral argument and considered briefs submitted by counsel. The formal hearing was then recessed to give Judge Clark an opportunity to examine the alleged obscene materials which had been seized. On 2 June 1971 the court made certain findings of fact including a finding that the court had jurisdiction of the parties and the subject matter and concluded as a matter of law:

"1. That the seizure of all the books, magazines, film and materials from the stores as indicated was proper, lawful and not unconstitutional.

2. That all items marked with an 'X' preceding the title or name on the attached inventory lists are obscene, and the dominant theme of such items taken as a whole appeals to prurient interest in sex of the average person, applying contemporary community standards, and is utterly without redeeming social values.

3. That the items marked with the word 'Return' following the title or name are not obscene."

The court ordered that the materials determined to be obscene "be securely held and retained by the City of Raleigh Police Department as evidence in the trial or trials of the defendants on the charge or charges of possession of obscene materials for the purpose of sale and pending final determination thereof" and that "the items above referred to and marked with 'Return' following the title or name shall be returned by said Department to the proper defendant operator or operators, either to the store from which taken or delivered to the operator or operators at the Municipal Building, as the defendant operators may elect."

All four defendants excepted to the order entered by the court on 2 June 1971 and appealed.

Attorney General Morgan by Assistant Attorney General Denson for the State.

Smith and Patterson, by Norman B. Smith and Michael K. Curtis, for defendant appellants Joe Bryant, John Knoll and Don Childs.

Earl R. Purser for defendant appellant B. R. Queen.

MORRIS, Judge.

From the outset it should be noted that the present prosecution was under North Carolina's old obscenity statutes G.S. 14-189 and G.S. 14-189.1 which were repealed by the General Assembly 1 July 1971 and replaced by G.S. 14-190.1, *et seq.* In *State v. McCluney,* 11 N.C. App. 11, 180 S.E. 2d 419 (1971), this Court held that G.S. 14-189.1 was free from constitutional defect.

[1] G.S. 15-180 provides that "In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal." There has been no conviction in the present case. Therefore, the appeal is premature. The order entered at the conclusion of the preliminary adversary hearing to determine whether the materials seized were obscene and lawfully retained as evidence pending trial is not binding on the trial judge and is not appealable.

In this respect, the order entered in this case is analogous to and has the same effect as a ruling on a motion to suppress evidence. The materials found by Judge Clark to be obscene were retained as evidence to be used in the pending trial on the merits, and all other material was ordered returned to its owner. Just as a motion to change venue [*State v. Henry,* 1 N.C. App. 409, 161 S.E. 2d 622 (1968)], and a motion to dismiss charges [*State v. Black,* 7 N.C. App. 324, 172 S.E. 2d 217 (1970)] are interlocutory orders, a denial of a motion to suppress evidence is not a final judgment. See *State v. Fowler,* 3 N.C. App. 17, 164 S.E. 2d 14 (1968). G.S. 7A-27(d) makes no provision for an appeal as a matter of right from an interlocutory order in a criminal action. The United States Supreme Court in *DiBella v. United States,* 369 U.S. 121, 7 L. Ed. 2d 614, 82 S.Ct. 654 (1962), held that orders granting or denying pretrial motions to suppress the evidentiary use in a federal criminal trial of material allegedly procured through an unreasonable search and seizure are not appealable even if the motion is filed before the return of the indictment. The Court relied upon the dominant rule of criminal appellate practice that a judgment must be final before it may be appealed.

> "Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof.' *Cogen v. United States,* 278 U.S. 221, 227, 73 L. ed. 275, 282, 49 S.Ct. 118." 369 U.S. at 131.

[2] In *Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925 (1949), the North Carolina Supreme Court said:

> "As a general rule an appeal will not lie until there is a final determination of the whole case. (Citations omitted.) It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant."

This rule was quoted with approval in *State v. Childs,* 265 N.C. 575, 144 S.E. 2d 653 (1965). The defendant appellants in this

case contend that the order entered affects substantial constitutional rights and thus may be appealed though interlocutory. Even if this appeal were not premature and it could be heard, we are of the opinion that the defendant appellants' constitutional rights under the First and Fourteenth Amendments to the United States Constitution were not violated by this adversary hearing. There was a seizure of a large number of allegedly obscene books incident to the arrest. The adversary hearing afforded the defendants their constitutional rights under the First and Fourteenth Amendments by preliminarily determining which materials were obscene and should be retained as evidence in the pending trial and which materials were not obscene and should be returned. It does not appear from the record that all the inventory from all three bookstores was seized; nor does it appear that any of the three bookstores closed as a result of the seizure of the materials, which might have effectively deprived the defendant appellants of substantial income. We conclude that defendant appellants' allegedly obscene property was seized in accordance with the due process clause of the Fourteenth Amendment. By the return of their property preliminarily found not to be obscene, the defendant appellants were left free to exercise their right to expression under the First Amendment.

Since the trial on the merits is still pending and inasmuch as we find this appeal premature, the court's interlocutory order does not put an end to the action. As noted in *State v. Childs, supra,* the interlocutory order does not "destroy or impair or seriously imperil any substantial right" of the defendant appellants since they have noted an exception to the entry of the order which may "be considered on appeal from a final judgment adverse to defendant, if there is one."

Appeal dismissed.

Judges BRITT and PARKER concur.

LOUVINIA CLARK, EMPLOYEE v. WAVERLY MILLS, INC., EMPLOYER; AND HARDWARE MUTUAL CASUALTY COMPANY, CARRIER

No. 7116IC676

(Filed 20 October 1971)

1. **Master and Servant §§ 54, 55— workmen's compensation — employees excluded from benefits**

For an employee to be excluded from benefits under the Workmen's Compensation Act, his employment must be casual and not in the course of the trade, business, profession or occupation of his employer. G.S. 97-2(2).

2. **Master and Servant § 54— workmen's compensation — casual employment — preparation for annual picnic**

Plaintiff's employment for a period of only two days to help prepare for the annual company picnic was casual employment.

3. **Master and Servant § 55— workmen's compensation — preparation of food for annual picnic — course of employer's business**

Plaintiff's employment to help prepare food for the annual company picnic was not employment within the course of the employer's usual business of manufacturing.

APPEAL by plaintiff from order of Industrial Commission filed 16 March 1971.

Plaintiff seeks compensation for an injury to her left hand sustained on 28 June 1969 while she was preparing slaw for defendant employer's annual July 4th picnic. Commissioner Stephenson filed an order 7 October 1970 in which he denied Workmen's Compensation benefits after finding and concluding that at the time of the injury plaintiff was a casual employee and was not employed in the regular course of her employer's business. Plaintiff appealed to the Full Commission and on 16 March 1971 the Full Commission filed its order adopting the findings and conclusions made by Mr. Stephenson and affirming the denial of benefits. Plaintiff appealed to this Court.

Lindsey, Schrimsher, Erwin and Bernhardt by Fenton T. Erwin, Jr., for plaintiff appellant.

Craighill, Rendleman & Clarkson by Francis O. Clarkson, Jr., for defendant appellees.

GRAHAM, Judge.

[1] For an employee to be excluded from benefits under the Workmen's Compensation Act his employment must be casual,

and in addition thereto, not in the course of the trade, business, profession or occupation of his employer. G.S. 97-2(2); *Johnson v. Hosiery Company,* 199 N.C. 38, 153 S.E. 591.

Plaintiff contends the Commission erred in finding and concluding that her employment was casual and not in the course of defendant employer's business. The following facts found in the Commission's order are not in dispute:

Defendant employer is in the business of manufacturing synthetic yarn and cotton goods in the Town of Laurinburg and is not in the food service or restaurant business. For approximately thirty years on each July 4th, the employer has held a picnic and field day to promote goodwill and better employee relations. A free barbecue lunch is served to everyone having a ticket. Tickets are distributed free to all employees, their families, area municipal and county officials, physicians and others selected by the employer. The barbecue is prepared by employees under the direction of the employer's maintenance foreman and records clerk.

During the week of 23 June 1969 plaintiff was on vacation from her full-time employment at Woonsocket Mills in Charlotte and was visiting her mother in Laurinburg. On 26 June 1969 the employer's maintenance foreman asked plaintiff to assist in preparing food for the annual picnic. Plaintiff agreed to help. Nothing was said about the rate of pay but it was understood that plaintiff was to be employed only two days and that she would return to her regular employment with Woonsocket Mills at the end of her vacation period. While engaged in food preparation on 28 June 1969 plaintiff sustained the injury for which she now seeks compensation.

The first question is whether the facts support the Commission's finding and conclusion that plaintiff's employment was casual and not within the course of the employer's business.

"Employment is 'casual' when it is irregular, unpredictable, sporadic and brief in nature." 1A Larson, Workmen's Compensation Law, § 51.00, p. 909. Casual employment is defined in Black's Law Dictionary, Rev. 4th Ed., p. 275, as "[e]mployment at uncertain times or irregular intervals . . . by chance, fortuitously, and for no fixed time . . . not in usual course of trade, business, occupation or profession of employer . . . for short time . . . occasional, irregular or incidental employment. . . . "

[2] Plaintiff's employment for a period of only two days to help prepare for the annual company picnic was strictly a chance employment for a brief period of time. It was not the sort of work that plaintiff could rely upon as a regular source of income. There was no reasonable probability that she would be employed in future years to assist in preparing for the annual picnics. Thus, plaintiff's employment was not even periodically regular. We hold that under these circumstances, the Commission correctly determined plaintiff's employment to have been "casual" within the meaning of G.S. 97-2(2).

[3] Whether plaintiff's employment was in the course of the employer's business presents a more difficult question. "When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person . . . who would not understand that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain." *Marsh v. Groner,* 258 Pa. 473, 478, 102 A. 127, 129.

Certainly sponsoring and paying for a picnic for the optional pleasure of its employees and selected community citizens is not an essential part of the employer's habitual and regular business of manufacturing yarn and cotton goods.

Plaintiff contends, however, that since the purpose of the picnic is to promote goodwill and improve employee relations, employment connected with the picnic should be considered employment within the course of the employer's business. While it is undoubtedly true that sponsoring an annual picnic results in some incidental benefits to the employer in the form of improved public relations and employee relations, it can hardly be said, at least from this record, that it is calculated to further the employer's business to such an appreciable extent as to make it an expectable, common, routine or inherent part of carrying on that business.

Plaintiff relies strongly on the case of *Johnson v. Hosiery Company, supra.* There an employee was injured while temporarily employed to paint the ceiling of the employer's machine room a light color in order to add to the safety and facility of operation. An official of the employer, when asked whether he considered painting the mill as incidental to operation, testified: "Yes, sir, it would be a part of the maintenance of the mill the

same as it is necessary to keep the roof repaired." The Supreme Court affirmed an award of compensation based upon a finding that the employee was engaged in the course of the employer's business. The distinction in that case lies in the fact that general acts of maintenance, repair, painting, cleaning, and the like are " 'in the course' of business because the business could not be carried on without them, and because they are an expectable, routine, and inherent part of carrying on any enterprise." 1A Larson, Workmen's Compensation Law, § 51.23, p. 919. Preparing food for an annual employee outing, unlike plant maintenance activities, simply does not constitute engaging in a function inherent in the employer's usual business of manufacturing.

The findings by the Commission with respect to the crucial questions involved are supported by the evidence and the findings support the Commission's determination that plaintiff's employment was not covered by the Workmen's Compensation Act.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOE WALTER LOWERY AND BOBBY GRAHAM

No. 7112SC571

(Filed 20 October 1971)

Criminal Law §§ 99, 170— conduct of trial judge — questioning of defendants — expression of opinion on defendants' credibility

In a prosecution of two defendants for discharging firearms into an occupied building, the trial judge's questioning of the defendants amounted to cross-examination and constituted an expression of opinion on the credibility of defendants' testimony, where the questions included the following: (1) "At the time you fired your shotgun you knew there was someone in the Bertha Leslie's Club, didn't you?"; (2) "If you thought there was trouble brewing outside, why didn't you stay in your house rather than get your gun and go out and get in it?"; and (3) "What have you been tried and convicted for?". G.S. 1-180.

APPEAL by defendants from *Cooper, Judge,* 26 April 1971 Session of Superior Court held in HOKE County.

The defendants Joe Walter Lowery (Lowery) and Bobby Graham (Graham) were charged in separate bills of indictment with discharging firearms into an occupied building; to wit, Bertha Leslie's Club, in violation of G.S. 14-34.1. Upon the defendants' pleas of not guilty, the State offered evidence tending to show the following: At about 10:15 p.m. on 24 October 1970 Jimmy McMillian and Nathaniel Lesley were shooting pool in the Bertha Leslie Club which is located across the highway from the Hollywood Grill in Hoke County. McMillian was shot in the back of the head and was taken to Cape Fear Valley Hospital where shotgun pellets were removed from the back of his head. Lesley was hit in the chest by a .22 caliber rifle bullet.

Deputy Sheriff Harvey Young who investigated the incident testified that he observed holes in the cinder blocks on the outside of Bertha Leslie's Club and windows were broken. He testified that the damage he observed could have been caused by either rifle bullets or buckshot.

At about 9:30 or 10:00 p.m. on 24 October 1970 John Wayne Locklear, accompanied by his brother, Jimmy Locklear, and one Nelson Tyler went to the Hollywood Grill where he heard the defendant Graham tell the defendant Lowery "that if there was going to be any shooting they were going to do it," and the defendant Lowery said something to the defendant Graham about "a little white building and wanting to blow it off the map."

The witness John Wayne Locklear testified:

> " . . . That Joe Walter Lowery at that time had a shotgun and Bobby Graham had a shotgun. That after Tyler got the rifle Bobby Graham went to the left of the car, Nelson went around in the dark somewhere which he did not see and Lowery walked out on the road in sight of the building. That thereafter he saw Bobby Graham and Joe Walter Lowery fire their guns. That the guns were pointed toward the building but could have been shooting over it. That he did see fire coming out of the gun that Bobby Graham had and after hearing shotgun blasts heard the automatic rifle go off several times. That after the shots were fired he and Jimmy Locklear got out and went in the Hollywood Grill."

The defendant Lowery testified that he saw Nelson Tyler fire the automatic rifle at the feet of an individual coming out

of the Bertha Leslie Club, and that when Nelson Tyler pointed the rifle at him he fired his shotgun into the air, but at no time did he fire his gun at the Club. He also testified that he heard other weapons being discharged.

The defendant Graham testified that on the evening in question he saw the defendant Lowery at the Hollywood Grill and heard guns being discharged and that he had his shotgun but that at no time did he fire the weapon. The defendant Graham denied that he made any statement to the defendant Lowery that if any shooting was going to be done they were going to do it.

The jury found both defendants guilty as charged. Each defendant was sentenced to prison for three years. The defendants appealed.

Attorney General Robert Morgan and Assistant Attorney General William F. Briley for the State.

Philip A. Diehl for Joe Walter Lowery and Assistant Public Defender William S. Geimer for Bobby Graham, defendant appellants.

HEDRICK, Judge.

By appropriate assignments of error the defendants contend the court expressed an opinion as to the credibility of the defendants and their other witnesses, in violation of the provisions of G.S. 1-180.

In *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481 (1956), Justice Branch quoted with approval from *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951), as follows:

> " 'The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180.' "

In *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971), Justice Huskins said:

" 'It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. . . . ' *State v. Horne,* 171 N.C. 787, 88 S.E. 433 (1916). Even so, the law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. 'If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error.' *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). *Accord State v. Lea,* 259 N.C. 398, 130 S.E. 2d 688 (1963); *State v. Peters,* 253 N.C. 331, 116 S.E. 2d 787 (1960); *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180 (1956); *State v. McRae,* 240 N.C. 334, 82 S.E. 2d 67 (1954)."

In North Carolina it is improper for a trial judge to question a witness for the purpose of impeaching his testimony. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950). However, it is a well settled rule in this State that a trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781 (1961); *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264 (1954); *State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409 (1956); *State v. Furley,* 245 N.C. 219, 95 S.E. 2d 448 (1956).

After the defendant Lowery had testified on both direct and cross-examination, the record reveals that the judge asked the defendant the following question:

"Mr. Lowery, at the time you fired your shotgun you knew there was someone in the Bertha Leslie Club, didn't you?"

After the defendant Graham had testified on direct and cross-examination, the record reveals that the following occurred between the judge and the defendant Graham:

"Q. Just a minute please, Mr. Graham, if you thought there was trouble brewing outside, why didn't you stay in your house rather than get your gun and go out and get in it?

A. See, the last time they had an incident, people standing around next to it, went the only way they could go, and to

go down to get the police crawled out the backdoor. And my children sleep in the front. The last time the majority of the people ran in there and it is the first place would be shooting; and that is when I told my wife I was going to get the gun.

Q. You knew there was trouble going on and you got your gun and went out to get in it?

A. No, sir, I went to stop it, keep it from going around my house.

Q. What have you been tried and convicted for?

A. Accessory after the fact to auto larceny and worthless check.

Q. What else?

A. That is about all.

Q. About all?

A. That is it."

We have carefully examined all of the questions put to the defendants by the judge in the light of their testimony and all the attendant facts and circumstances of the case, and we cannot say the questions were calculated to clarify the defendants' testimony. The questions propounded by the judge were in the nature of cross-examination, and could have indicated to the jury that the court was not impartial. Whatever the purpose of the questions was, the cumulative effect surely tended to impeach the defendants and the credibility of their testimony.

It is our opinion that the judge committed prejudicial error by inadvertently expressing an opinion as to the credibility of the defendants as witnesses, in violation of G.S. 1-180.

The defendants have additional assignments of error which we do not discuss here since they are not likely to occur on a new trial.

For the reasons stated, each defendant is entitled to a

New trial.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION, TRIANGLE TELECASTERS, INC. AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY v. CHAPEL HILL TELEPHONE COMPANY AND GENERAL TELEPHONE COMPANY OF THE SOUTHEAST

No. 7110UC658

(Filed 20 October 1971)

Telephone and Telegraph Companies § 1; Utilities Commission § 2— telephone company operated by U.N.C. — jurisdiction of Utilities Commission

The Utilities Commission did not have jurisdiction to enter a regulatory order applicable to the telephone company operated by the University of North Carolina at Chapel Hill. G.S. 116-41.2(3).

APPEAL by defendants from the Order of the North Carolina Utilities Commission in Docket No. P-89, Sub. 2 dated 21 April 1971.

On March 23, 1970, Triangle Telecasters, Inc., (Telecasters) a corporation located in the Research Triangle Park between Raleigh, Durham and Chapel Hill, North Carolina, petitioned the North Carolina Utilities Commission to require the defendants, Chapel Hill Telephone Company, (Chapel Hill), General Telephone Company of the Southeast, (General), and Southern Bell Telephone and Telegraph Company, (Southern Bell), to initiate toll free extended area service between the communities of Raleigh, Durham and Chapel Hill and such other communities as the Commission in its discretion may order. On 8 April 1970, the Commission notified the defendants of the petition and ordered them to file answers thereto. The defendants answered and on 18 May 1970, the Commission ordered the answers served on the complainant. The complainant advised the Commission on 25 May 1970, that it desired the matter set for hearing. A hearing on the matter was set for 14 October 1970. On 30 September 1970, defendant, Chapel Hill, filed a motion to substitute answer and the substituted answer was allowed.

On 14 October 1970, defendant, Chapel Hill, filed a motion styled a Demurrer and Motion to Dismiss on the grounds that the Commission did not have jurisdiction to regulate service rendered or rates charged by Chapel Hill. In its motion, Chapel Hill requested that it be allowed to participate in the hearing

solely for the purpose of imparting and receiving information on the matters under consideration and reserved its right to object to and deny the application to it of any order entered by the Commission. The Commission ruled that it did not have jurisdiction over Chapel Hill and allowed the Demurrer but did not dismiss the petition. The Commission ruled that Chapel Hill would be allowed to participate in the hearing in the manner requested in the Motion.

The hearing was held and findings of fact made by the Commission. The Commission found as fact that there was sufficient traffic between Durham and Chapel Hill to require toll free extended area service between those cities and that there was not sufficient traffic between Raleigh and Durham and between Raleigh and Chapel Hill to require that Raleigh be included in the extended service at this time. Based on these findings, the Commission ordered defendants General and Chapel Hill to provide extended area service between Durham and Chapel Hill at the earliest practical and feasible time. The two companies were ordered to file planning and engineering schedules and cost data with the Commission. The docket was ordered held open for filing of reports and motions on the possibility of including Raleigh in the extended service in the future and on revisions in the method of computing the additional monthly rate required for the toll free extended area service. Petitioner's request that Raleigh be included in the extended area service was deferred, without prejudice, until there was sufficient traffic between Raleigh and the two other communities to justify such service.

From this order Chapel Hill and General appeal to the North Carolina Court of Appeals.

Edward B. Hipp, Maurice W. Horne, William E. Anderson for North Carolina Utilities Commission, plaintiff appellee.

William A. Creech; Clark C. Havighurst for Triangle Telecasters, Inc., plaintiff appellee.

Newsom, Graham, Strayhorn, Hedrick & Murray by A. H. Graham, Jr., for General Telephone Company of the Southeast, defendant appellant.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., for Chapel Hill Telephone Company, defendant appellant.

CAMPBELL, Judge.

The appellants raise several issues on appeal to the Court. For the purposes of this decision it is necessary to consider only the issue raised by appellant Chapel Hill that the North Carolina Utilities Commission was without jurisdiction to issue regulatory orders to it.

Chapel Hill is a component of the University Enterprises operated by the University of North Carolina in the Town of Chapel Hill. G.S. 116-41.1(9). The statute G.S. 116-41.2(3) provided that the Board of Trustees of the University of North Carolina in the operation of the University Enterprises shall have the power "(t)o establish, maintain, revise, charge and collect such service charges (free of any control or regulation by any State regulatory body) as will produce sufficient revenues . . . . " Chapel Hill relied on this statute as grounds for its objection to the assertion of jurisdiction over it by the Utilities Commission, and the Commission concurred and ruled that it did not have jurisdiction over Chapel Hill.

We are of the opinion that this ruling reflects a proper interpretation of the statute. The language of the statute is unequivocal.

The General Statutes, (G.S. 62-3(23)), in establishing the Utilities Commission, defined a public utility over which the Commission would have jurisdiction, and did not include in that definition the State or any agency, such as the University of the State. The General Assembly in the 1971 Session (Chapter 634 effective 21 June 1971) recognized that Chapter 62 of the General Statutes which establishes the Utilities Commission did not apply to utilities operated by the University of North Carolina and added the following paragraph to G.S. 62-3(23):

> "e. The term 'public utility' shall include The University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9)."

and by deleting in G.S. 116-41.2(3) the phrase "free of any control or regulation by any State regulatory body" and substituting in lieu thereof the phrase "free of any control or regulation by any State regulatory body until January 1, 1973, and

thereafter only by the North Carolina Utilities Commission." This statute was not in effect at the time of the hearing in this case nor on 21 April 1971 when the order appealed from was entered.

The fact that the appellant participated to a limited extent in the hearing does not confer jurisdiction on the Commission. The appellant expressly reserved its objection to the jurisdiction of the Commission. The appellant, even by its presence or consent, could not confer greater jurisdiction on the Commission than was conferred by the statutes establishing it.

> "No man can put himself in the place of the sovereign and make the adjudication of a court valid by ratifying an unauthorized exercise of power by its agent when the law of the land, which is the agent's power of attorney, declares that the court has no authority to render the judgment. . . . " *Springer v. Shavender,* 118 N.C. 33, 23 S.E. 976 (1896).

The order of the Commission in this case requires that General serving Durham, and Chapel Hill Telephone Company serving Chapel Hill provide extended area service between these two communities. The Order was based on the presumption that both companies would participate in providing the service. We have held that the order does not apply to Chapel Hill due to the absence of jurisdiction in the Commission. The practical question of whether this service can be provided by General, without the participation of Chapel Hill, is now presented. This is a question for the peculiar expertise of the Utilities Commission.

For the reasons stated above we order the Petition dismissed as to Chapel Hill and remand the case to the Utilities Commission for such action as may be appropriate.

Remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

MAVIE M. MANGUM, TRUSTEE FOR MARY B. MATTHEWS v. DERRY THOMAS SURLES AND WIFE, MINNIE MARIE MATTHEWS SURLES

No. 7111SC546

(Filed 20 October 1971)

1. **Cancellation and Rescission of Instruments § 2; Pleadings § 32— refusal to allow amendment to complaint**

In this action to set aside a deed on the ground of mental incapacity of the grantor, the trial court did not err in refusing to allow plaintiffs to amend their complaint to allege that defendants fraudulently induced the grantor to sign the deed by representing the instrument to be a note. G.S. 1A-1, Rule 15(b).

2. **Cancellation and Rescission of Instruments § 2— issues — fraud and undue influence**

In this action to set aside a deed, the evidence did not require the court to submit tendered issues of fraud and undue influence.

3. **Trial § 51— motion to set verdict aside — discretion of court**

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal absent a showing of abuse of discretion.

APPEAL by plaintiff from *Hall, Judge,* 29 March 1971 Session of Superior Court held in HARNETT County.

This is a civil action wherein plaintiff Mavie M. Mangum, trustee for Mary B. Matthews, seeks to have a deed allegedly executed by Mary B. Matthews conveying real property to defendants set aside on grounds of fraud, undue influence, and lack of mental capacity.

The record reveals that the parties to this action entered into the following stipulations:

"(a) That Mavie M. Mangum is the duly appointed, qualified and acting Trustee of the estate and person of Mary B. Matthews.

(b) That Mary B. Matthews was on April 3, 1970, declared incompetent by a jury of twelve people, said verdict entered in Harnett County, North Carolina.

(c) That, prior to March 25, 1969, Mary B. Matthews was possessed in her own right to a 165-acre tract of land in Cumberland County, North Carolina.

(d) That the defendants, Derry Thomas Surles and wife Minnie Marie Matthews Surles, are the step-grandchildren of Mary B. Matthews.

(e) That Mary B. Matthews executed a deed conveying to the defendants the properties herein described and that said deed was properly recorded in the Cumberland County Register of Deeds Office in Book 2150, page 341, on February 20, 1970.

(f) That there was no monetary consideration for the deed.

(g) That on March 25, 1969, Mary B. Matthews was 79 years old."

At trial plaintiff offered the testimony of an attorney, a banker, a real estate agent, the tenant on the farm in Cumberland County, and the trustee, all of whom stated that in their opinion as of March 1969 Mary B. Matthews did not have sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect.

The record reveals that "[b]efore the calling of any witnesses, the plaintiff offered into evidence the deed in question, recorded in Book 2150, page 341, Cumberland County Register of Deeds Office and signed by Mary Bell Hall Matthews to Derry Thomas Surles and wife, Minnie Marie Surles."

Mary Matthews testified as a witness for plaintiff in pertinent part as follows:

"That she knows what it is to tell the truth and that her name is Mrs. Mary Bell Hall Matthews; that she is 80 years old and living on the Mavie Mangum place. . . .

"That she owns some property in Cumberland County known as the Cain place; that they are trying to take it away from her, but she does not want Mr. Bryan to let them do it; that if she did execute a deed to the defendants on the 25th day of March, 1969, she don't remember it; she knows she didn't do it; if she signed the deed, she don't know it, for she did not do it; that D. T. Surles is no blood relationship to her; that she did not tell D. T. Surles she was going to deed him any property; that she didn't say she was going to give them her land because she didn't have enough.

" . . . that somebody had told her that D. T. and Marie Surles had the property in their names and that she wanted it taken out; that she didn't put it in their names and that it was her land. She didn't put it in D. T.'s name because she didn't want to; D. T. and Marie never asked me, as I know of; that the defendants asked her to ride around with them and that they went to Sammy Stephenson's law office; that she signed a note for D. T., and she didn't care for signing another note, and that she didn't know she was signing a deed; that D. T. knows that she signed about a $500 Note for him to get some money; that no one ever told her that she was signing a deed and that she signed no deed and, if she did, she doesn't remember it; she wouldn't have signed it for her daddy unless he told her to, and she knows he wouldn't do it.

" . . . that she did not hire anyone in Sammy Stephenson's law office, as she knows of. . . .

" . . . that when she went to Sammy Stephenson's office on March 25, 1969, that she did not remember what she did, only that she thought he said he wanted her to sign a note for him; that if she signed anything there, she didn't remember it; that she didn't intend to sign nothing; that she was plenty fed up with this matter, that this thing was about killing her; that D. T. Surles lives about a mile or maybe further from her.

* * *

"That D. T. Surles had always talked to her and that D. T. and Marie both acted like they would be a neighbor to her; that she did not rely on D. T. Surles any; that if he helped her out in things she didn't know it; that he asked her to sign a note; that they were always good to her, but that she didn't want anybody to say that she gave them her land; that she had never asked them for no help as she knew of, but they were always good to her. . . . "

The defendants offered the testimony of six witnesses who were friends, neighbors, and business acquaintances of Mary B. Matthews who testified that in their opinion in March 1969 Mary B. Matthews had the mental capacity to understand the nature and consequences of making a deed.

The court submitted the following issue to the jury which was answered as indicated:

"Did Mary B. Matthews, on March 25, 1969, have sufficient mental capacity to execute a valid deed?

ANSWER: Yes."

From a judgment entered on the verdict, plaintiff appealed.

Bryan, Jones, Johnson, Hunter & Greene by K. Edward Greene for plaintiff appellant.

Samuel S. Stephenson and D. K. Stewart for defendant appellees.

HEDRICK, Judge.

[1] Plaintiff first assigns as error the failure of the court to allow him to amend his complaint to conform to the evidence. The proposed amendment reads as follows:

"That the defendants, at the time Mary B. Matthews signed the deed alleged in the complaint, did with intent to deceive, practice a fraud upon the said Mary B. Matthews by inducing her to sign said instrument while representing the instrument to be a note and knowing the said Mary B. Matthews did not know what she was signing."

G.S. 1A-1, Rule 15(b), in pertinent part provides:

"When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion . . . but failure so to amend does not affect the result of the trial of these issues."

Under this rule the plaintiff could not have been prejudiced by the court's denial of the formal motion to amend the complaint. Moreover, a motion to amend the pleadings is addressed to the discretion of the trial judge, and is not reviewable on appeal in the absence of a showing of an abuse of discretion. *Service Co. v. Sales Co.*, 264 N.C. 79, 140 S.E. 2d 763 (1965). There is no evidence in this record tending to support the allegations in the proposed amendment to the complaint. This assignment of error is without merit.

[2] The plaintiff next assigns as error the refusal of the court to submit to the jury the following issues:

"2. Was the execution of the deed dated March 25, 1969, procured by undue influence on Mrs. Mary B. Matthews?

3. Was the execution of the deed dated March 25, 1969, procured by fraud on Mrs. Mary B. Matthews?"

The refusal to submit an issue tendered is not error when there is no evidence in support of such issue adduced at trial. *Hooper v. Glenn,* 230 N.C. 571, 53 S.E. 2d 843 (1949).

There is no evidence in this record tending to show that the defendants procured the execution of the deed dated 25 March 1969 by Mary B. Matthews by fraud or undue influence. This assignment of error is overruled.

Finally, the plaintiff assigns as error the court's denial of the following motion:

"Upon the coming in of the verdict the plaintiff, in open court, moves to set the verdict aside as being contrary to the weight of the evidence."

Although the record reveals that this motion was not made in conformity with G.S. 1A-1, Rule 7(b) (1), and Rule 6, General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, we have considered the motion as one to set aside the verdict and for a new trial under G.S. 1A-1, Rule 59(a).

[3] A motion to set aside the verdict and for a new trial is addressed to the sound discretion of the trial judge whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970); 6A Moore's Federal Practice, § 59.05(5), p. 3756.

Plaintiff has failed to show any abuse of discretion on the part of the trial judge.

We have considered all of the assignments of error brought forward and argued in this appeal, and we conclude that plaintiff had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

HELEN ROLAND PREVETTE v. HAROLD DEAN BULLIS

No. 7123SC499

(Filed 20 October 1971)

1. **Appeal and Error § 50— instructions — harmless error**

Error in the charge on an issue answered in appellant's favor is harmless.

2. **Automobiles §§ 10, 75— running out of gas — stopping on highway — evidence of negligence**

It may be negligence for a plaintiff to permit her car to run out of gas and stall on the traveled portion of the highway, and such conduct is properly considered by the jury on the issue of contributory negligence.

3. **Automobiles § 90— instructions — failure to charge on parking statute was in appellant's favor**

Appellant was benefited, and therefore could not complain on appeal, when the trial court failed to charge on the statute which prohibited the leaving of a vehicle on the traveled portion of the highway, since a jury finding that the plaintiff had violated the statute would have constituted negligence *per se.* G.S. 20-161.

4. **Appeal and Error § 47— ruling in appellant's favor — review on appeal**

An appellant may not complain of a trial court's ruling which is favorable to him.

5. **Rules of Civil Procedure § 51— instructions — request for more detailed charge**

If a party desires a more thorough or more detailed charge, it is incumbent upon him to request it. G.S. 1A-1, Rule 51(b).

APPEAL by plaintiff from *Exum, Judge,* 15 March 1971 Civil Session of Superior Court held in WILKES County.

Plaintiff seeks recovery for personal injuries allegedly sustained when her car was struck from the rear by defendant's car. Her evidence tended to show that at around 12:15 p.m. on 1 December 1968, she was driving west on Highway 421 in Wilkesboro when her car started sputtering. She pulled off the traveled portion of the highway where the car went completely dead. The gasoline gauge indicated the car was out of gasoline. Plaintiff had not looked at the gasoline gauge previously and had just driven past several service stations. The collision occurred while she was waiting in the car for her son to return with gasoline.

Defendant's evidence tended to show that immediately before the collision he was following another car in a westerly direction on Highway 421 at about 30 miles per hour. When the vehicles reached a point near plaintiff's vehicle, the car in front of defendant suddenly pulled out and around plaintiff's vehicle, revealing its presence as an obstruction in the highway to defendant for the first time. Defendant could not turn into the left lane because of approaching traffic. He tried to stop but slid into the rear of plaintiff's car, which, except for the right front wheel, was completely in the traveled portion of the lane for westbound traffic.

Issues of negligence, contributory negligence and damages were submitted to the jury. The jury answered the first two issues "yes" and from judgment entered upon the verdict plaintiff appealed.

Brewer & Bryan by Joe O. Brewer and Moore & Rousseau by Larry S. Moore for plaintiff appellant.

Hayes & Hayes by Kyle Hayes for defendant appellee.

GRAHAM, Judge.

[1] Through her first assignment of error plaintiff contends that the court erroneously charged the jury on the doctrine of sudden emergency. The charge on sudden emergency related only to the issue of defendant's negligence. That issue was answered in plaintiff's favor. Consequently, error, if any, in portions of the charge pertinent only to that issue is harmless. *Key v. Welding Supplies,* 273 N.C. 609, 160 S.E. 2d 687; *Wooten v. Cagle,* 268 N.C. 366, 150 S.E. 2d 738.

[2] Plaintiff next contends that the fact she permitted her car to stall for lack of gasoline did not constitute evidence of negligence on her part. She therefore says it was error for the court to charge the jury with respect to this evidence and as to defendant's contentions relating thereto.

It is the duty of a motorist operating a motor vehicle on a public highway to exercise reasonable care to see that it is in reasonably good condition and properly equipped, so that it may not become a source of danger to its occupants or to other travelers. *Scott v. Clark,* 261 N.C. 102, 134 S.E. 2d 181; Huddy, The Law of Automobiles, Vol. 3-4, § 71, p. 127. A disabled vehicle stalled on the traveled portion of a public highway is a well

recognized hazard to the motoring public. Certainly it cannot be held, as a matter of law, that the plaintiff here was under no duty to anticipate and provide against the contingency that her car would stall for lack of gasoline and thereby become a dangerous obstruction to traffic. See: *Keller v. Breneman,* 153 Wash. 208, 279 P. 588, 67 A.L.R. 92; *Chapin v. Stickel,* 173 Wash. 174, 22 P. 2d 290; *Casey v. Gritsch,* 1 Cal. App. 2d 206, 36 P. 2d 696.

We hold that the court properly permitted the jury to consider the evidence that plaintiff permitted her car to run out of gasoline and stall on the highway in determining the issue of contributory negligence.

[3, 4] In her third assignment of error plaintiff questions the court's failure to charge on the essential elements of G.S. 20-161. That statute prohibits parking or leaving a vehicle standing, under certain specified circumstances, on the traveled portion of a highway. It is applicable only to highways "outside of a business or residence district." Here there was no evidence that the collision, which occurred inside the Town of Wilkesboro, occurred outside of a business or residential district. The trial judge therefore correctly did not apply any of the provisions of that statute to the facts of this case. This would seem to have inured to plaintiff's benefit because a violation of the statute is negligence *per se, Hughes v. Vestal,* 264 N.C. 500, 142 S.E. 2d 361, and defendant had pleaded plaintiff's violation of the statute as a bar to her claim. An appellant may not complain of a trial court's ruling which is favorable to him. *Simpson v. Wood,* 260 N.C. 157, 132 S.E. 2d 369; *Midgett v. Midgett,* 5 N.C. App. 74, 168 S.E. 2d 53.

[5] Plaintiff asserts that the court failed to explain the law arising on the evidence as required by G.S. 1A-1, Rule 51. A review of the charge in its entirety fails to disclose any prejudicial error in this respect. If a more thorough or more detailed charge was desired it was incumbent upon plaintiff to request it. G.S. 1A-1, Rule 51(b); *Woods v. Roadway Express, Inc.,* 223 N.C. 269, 25 S.E. 2d 856; *Jackson v. Jones,* 2 N.C. App. 441, 163 S.E. 2d 31.

Plaintiff's final assignments of error are directed to the court's refusal to grant her motions for judgment N.O.V. and

to set aside the verdict as contrary to the weight of the evidence. These assignments of error are overruled.

No error.

Judges BROCK and VAUGHN concur.

RICKY WARD, BY HIS GUARDIAN AD LITEM, CECIL WARD v. MORRIS WORLEY, BY HIS GUARDIAN AD LITEM, EDNA WORLEY

No. 7113DC498

(Filed 20 October 1971)

Negligence § 40— instruction on proximate cause — foreseeability

Failure of the trial court to charge that foreseeability is an element of proximate cause is reversible error.

APPEAL by defendant from *Walton, District Judge,* 15 February 1971 Session of District Court held in COLUMBUS County.

Plaintiff filed a complaint against defendant on 13 March 1970 charging him with negligence in operating a motor vehicle at a speed greater than was reasonable and prudent under existing conditions; operating a motor vehicle at a rate of speed in excess of the posted speed limit; operating a motor vehicle without keeping a proper lookout; operating a motor vehicle without keeping it under proper control; and that through this negligent operation plaintiff suffered shoulder, back and chest injuries. Plaintiff sought damages in the amount of $5,000.00. Defendant answered and alleged that plaintiff was guilty of contributory negligence in knowingly riding with defendant after defendant had consumed an excessive amount of alcoholic beverages.

At approximately 10:30 p.m. on the evening of 12 December 1969 plaintiff entered defendant's car in Whiteville, North Carolina. At approximately 1:00 a.m. on the morning of 13 December 1969 the vehicle containing plaintiff and defendant was involved in an accident as defendant driver attempted to make a turn off Highway 130. Plaintiff sustained certain injuries in the accident. Plaintiff and defendant had been riding around in defendant's car from 10:30 p.m. until the time of the accident.

Plaintiff's testimony, in addition to that tending to show the careless manner in which defendant was operating the vehicle, was to the effect that plaintiff had merely accepted an invitation from defendant to ride around for a little while and only after entering the car did he discover that defendant had been drinking. He warned defendant about his driving and requested that defendant take him home, which defendant was doing at the time of the accident. Plaintiff was not drinking. Defendant's testimony, on the other hand, tended to show that, although defendant was under the influence of alcohol, plaintiff was a willing passenger as they drove around to various taverns and that plaintiff was also drinking that night. Defendant testified that plaintiff never commented about his driving. The court denied defendant's motions for a directed verdict and for judgment notwithstanding the verdict. The jury found that defendant's negligence caused plaintiff's injuries, plaintiff was not contributorily negligent, and awarded plaintiff $2,000.00 in damages. From this judgment, defendant appeals.

D. F. McGougan, Jr., for plaintiff appellee.

Smith and Spivey by James K. Larrick for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court below erred in denying his motions for directed verdict and for judgment notwithstanding the verdict by failing to find plaintiff contributorily negligent as a matter of law. "Whether a motion for judgment as of nonsuit should be sustained on the ground that the plaintiff is guilty of contributory negligence as a matter of law, presents in many cases a very difficult question. However, the decision on such motion must be made in light of the facts in each particular case." *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108. "Where conflicting inferences may be drawn from the circumstances, whether the failure of the passenger to avail himself of opportunity for affirmative action for his own safety should constitute contributory negligence is a matter for the jury." *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787. This problem is also dealt with in *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305:

> "Justice Lake in *Douglas v. W. C. Mallison and Son,* 265 N.C. 362, 144 S.E. 2d 138, has accurately and concisely

stated the rule governing nonsuit on the ground of plaintiff's contributory negligence. 'A judgment of nonsuit on the ground of contributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. [Citations omitted.]' "

We hold that the issue of plaintiff's contributory negligence was properly submitted to the jury and that the trial judge did not err in failing to allow defendant's motions for directed verdict and judgment notwithstanding the verdict.

Defendant further contends that the court below committed error in its charge to the jury by failing to refer to foreseeability in its definiton of proximate cause. Judge Walton, in the trial below, defined proximate cause as " . . . the real, the efficient, the dominant cause. A cause without which the injury would not have been sustained. An act is said to be a proximate cause of an injury or damage when in a natural and continuous sequence unbroken by any new or independent cause, it produces the results complained of and without which the injury or damage would not have occurred."

The Supreme Court in *Mattingly v. R. R.*, 253 N.C. 746, 117 S.E. 2d 844 stated its definition of proximate cause as " . . . 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." (Emphasis added.) *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24; *Keener v. Litsinger,* 11 N.C. App. 590, 181 S.E. 2d 781. Furthermore, in *Pittman v. Swanson,* 255 N.C. 681, 122 S.E. 2d 814 the Court stated: "The court's definition of proximate cause is inadequate, in that, *inter alia,* it made no reference to foreseeable injury, which is a requisite of proximate cause." This Court in *Keener v. Litsinger, supra,* said, "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."

For the reasons stated, defendant is entitled to a new trial.

New trial.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM HACKNEY, JR.

No. 7114SC486

(Filed 20 October 1971)

1. **Forgery § 2; Indictment and Warrant § 9— forgery indictment — allegation of forged instrument**

In an indictment charging defendant in separate counts with forgery and uttering a forged check, the failure of the forgery count to set forth a copy of the forged check or facts pertaining to it renders the forgery count fatally defective, even though the full text of the check is set forth in the uttering count.

2. **Indictment and Warrant § 9— several counts — necessity for completeness of each count**

Each count of an indictment containing several counts should be complete within itself.

APPEAL by defendant from *Bowman, Judge*, 8 March 1971 Session of DURHAM Superior Court.

The bill of indictment against defendant purports to charge him with (1) forgery and (2) uttering a check drawn on the Central Carolina Bank & Trust Company in the amount of $37.00. Upon a plea of guilty to both charges, defendant was sentenced to prison for not less than three nor more than five years with recommendation that upon entry of defendant into the prison system that he be given a thorough physical and psychological examination, particularly with regard to alcoholism, and such treatment as may be indicated following said examination and evaluation. The court further recommended that if defendant is eligible that he be permitted the option of serving his sentence under the work release program as provided by law. Defendant appealed from the judgment.

Attorney General Robert Morgan by Edward L. Eatman, Staff Attorney, for the State.

Kenneth B. Spaulding for defendant appellant.

BRITT, Judge.

Defendant, through his court appointed counsel, contends that the court erred in sentencing the defendant to prison (1) "since it is clear from the evidence that the defendant was truly an alcoholic and thus a man of sickness . . . ", and (2) said sentence "violated the federal constitution in imposing a

cruel and unusual punishment." We find no merit in either of the contentions and the assignments of error to which they relate are overruled.

[1] However, an examination of the bill of indictment impels us to conclude that it is fatally defective on the forgery count. The forgery count of the indictment is as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That WILLIAM HACKNEY, JR., late of the County of Durham on the 6th day of October 1970, 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.

As was said by us in *State v. Able,* 11 N.C. App. 141, 180 S.E. 2d 333 (1971), "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." Even though the offense of forgery be charged in statutory language, "the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." *State v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742 (1960). If the false and fraudulent nature of the instrument alleged to have been forged appears upon its face, then setting forth an exact copy of it in the indictment will be sufficient, otherwise, the necessary facts must be averred. *State v. Able, supra.*

[2] In the instant case, in the forgery count a copy of the instrument is not set forth and facts pertaining to it are not averred. It is true that the full text of the check allegedly forged and uttered is set forth in the uttering count of the indictment, but it is settled law that each count of an indictment containing several counts should be complete in itself. *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. McKoy,* 265 N.C.

380, 144 S.E. 2d 46 (1965); *State v. McCollum,* 181 N.C. 584, 107 S.E. 309 (1921); *State v. Cleary,* 9 N.C. App. 189, 175 S.E. 2d 749 (1970).

We hold that the indictment is sufficient on the count of uttering and will support a judgment based on the defendant's plea of guilty on that count.

The record discloses that defendant pleaded guilty to both counts and his sentence was based on the guilty plea to both counts in the indictment. Therefore, this court, *ex mero motu,* vacates the judgment and remands the case to the superior court where the defendant will be sentenced on the uttering charge only.

Error and remanded.

Judges MORRIS and PARKER concur.

A. D. COLLINS, JESSIE H. LUFFMAN, AND W. L. BILLINGS, TRUSTEES OF SHADY GROVE BAPTIST CHURCH, OF IREDELL COUNTY, NORTH CAROLINA v. FRANK FREELAND AND WIFE, MAGGIE FREELAND, I. T. BARKLEY AND WIFE, BETTY SUE BARKLEY, HENRY SOWERS AND WIFE, MRS. HENRY SOWERS, WILLIAM SOWERS AND WIFE, MRS. WILLIAM SOWERS, DAVID SOWERS, NELLIE MOOSE, CAROLYN MOOSE, MRS. ROSS BRAWLEY, RED UPRIGHT, GEORGE AARON BENFIELD, ARTHUR BEAVER, AND OTHERS ACTING IN CONCERT

No. 7122SC504

(Filed 20 October 1971)

1. **Injunctions § 12; Rules of Civil Procedure § 65— motion for preliminary injunction — prayer for relief in complaint**

A prayer for relief in the complaint may constitute a sufficient motion for a preliminary injunction under G.S. 1A-1, Rule 65(b), a separate or additional motion not being necessarily required.

2. **Injunctions § 7— restraint of continuous trespass**

An injunction is a proper remedy to restrain repeated or continuous trespass where there is no dispute as to title or right to possession and the remedy at law is inadequate because of the necessity of a multiplicity of actions to obtain redress at law.

APPEAL by defendants from *Exum, Judge,* 16 November 1970 Session of Superior Court held in IREDELL County.

Plaintiffs bring this action to permanently enjoin defendants, a group which is alleged to have been dismissed from the fellowship of the Shady Grove Baptist Church, from the continued use of the old church building. It is alleged that defendants went upon the church property, tore down the no trespassing signs, broke the padlock from the door, and were continuing to use the old building against the express instructions of the majority fellowship of the church.

After notice and a hearing at which defendants offered no testimony or affidavits, Judge Exum issued a preliminary injunction enjoining defendants, pending the final hearing on the merits, from going in or using the old church building. Defendants appealed.

Collier, Harris & Homesley, by Richard M. Pearman, Jr., for plaintiffs.

Pope, McMillan & Bender, by Harold J. Bender, for defendants.

BROCK, Judge.

Defendants bring forward three assignments of error. They challenge the denial by the trial judge of three motions made by defendants. The record on appeal discloses that at the close of plaintiffs' evidence defendants made three motions as follows:

(1) " . . . to dismiss the action on the grounds that the plaintiffs failed to move for a preliminary injunction as required by Rule 65(b)."

(2) " . . . to dismiss the action for lack of jurisdiction since the Temporary Restraining Order had been dissolved."

(3) " . . . to dismiss the action for failure to state a claim for relief."

G.S. 1A-1, Rule 65(b) provides in part as follows: " . . . In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not

do so, the judge shall dissolve the temporary restraining order."

[1] It seems clear from the quoted portion of the rule that the prayer for relief in the complaint may constitute a sufficient motion for a preliminary injunction, and that a separate or additional motion is not necessarily required. In their verified complaint, which was used as an affidavit at the hearing for the preliminary injunction, plaintiffs prayed for a temporary restraining order and for a permanent injunction. In addition, defendants were notified by order to appear and show cause why the temporary restraining order should not be continued to the trial on the merits.

The wording of the prayer for relief in the complaint and the wording in the notice to show cause did not technically follow the language of Rule 65; however, the meaning was clear and unambiguous. Defendants do not contend that they were in any way prejudiced by technical deviation.

The second motion was without merit, and requires no discussion.

The third motion argues that injunctive relief is not available against a continuing trespass. In this case the trial judge made findings of intended future continuous trespass by defendants upon plaintiffs' property and intended future continuous interference by defendants with plaintiffs' present and future right of possession. Defendants do not challenge these findings. There is no dispute as to the title or the present right to possession of the real estate in question.

[2] Unless defendants are enjoined, it will be necessary for plaintiffs to resort to a multiplicity of actions to obtain redress at law. Where equitable relief is not barred upon the grounds of a disputed title or disputed right to possession, the majority rule is that an injunction is a proper remedy to restrain repeated or continuing trespasses where the remedy at law is inadequate because of the necessity of a multiplicity of actions to obtain redress at law. Annot., 60 A.L.R. 2d 310. North Carolina is in accord. *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551; 47 N.C.L. Rev. 334, 359.

The order appealed from is

Affirmed.

Judges VAUGHN and GRAHAM concur.

ROBERT F. ZAJICEK v. BRENDA A. ZAJICEK

No. 7122DC600

(Filed 20 October 1971)

1. **Appeal and Error § 9— moot question**

Assignment of error to order awarding temporary custody of a child to its father without notice to the mother presents a moot question where the order was never enforced and the mother retained custody until the hearing.

2. **Divorce and Alimony § 24; Infants § 9— child custody pending service of process**

In appropriate cases the court may enter an order for the temporary custody of a child pending the service of process. G.S. 50-13.5(d)(2).

3. **Constitutional Law § 26— foreign custody decree — failure to show jurisdiction**

Duly authenticated child custody orders entered by a Florida court were properly admitted in custody hearing in this State, notwithstanding there was no showing that the Florida court had jurisdiction, since jurisdiction is presumed and the burden is on the opposing party to show lack of jurisdiction.

4. **Appeal and Error § 57— evidence not in record — findings of fact — presumption**

Where the evidence is not brought forward in the record on appeal, it is presumed that there was sufficient evidence to support the court's findings of fact.

APPEAL by defendant from *Cornelius, District Judge,* 30 April 1971 Session of District Court held in IREDELL County.

Plaintiff instituted this action on 20 April 1971. The complaint in pertinent part is as follows:

"III. That the plaintiff and defendant were married and were later divorced on June 13, 1968, and to this marriage was born one child, namely, Robert F. Zajicek, Jr.

IV. That the defendant instituted an action for the custody and support of the minor child, namely, Robert F. Zajicek, Jr., in the Domestic Relations Court of Palm Beach County, Florida; that the defendant [*sic*] counterclaimed for custody; that a hearing was held in this matter in the Domestic Relations Court of Palm Beach County, Florida, in December, 1970; that, in said hearing, the defendant and the plaintiff appeared; the witnesses for each party ap-

peared, and the counsel for each party appeared. By Order dated January 7, 1971, the Court ordered that the plaintiff should be given custody of the minor child born of this marriage.

V. That on April 13, 1971, a further hearing was held in this matter in the Domestic Relations Court of Palm Beach County, Florida, and the Court again ordered that the plaintiff be given custody of the minor child born of this marriage. The Court further found that the defendant was unfit to have custody of the minor child, namely, Robert F. Zajicek, Jr.; and further ordered that the defendant deliver the child to the plaintiff. A copy of the said Order is attached hereto and is marked Exhibit A.

VI. That the defendant has fled the State of Florida in order to avoid enforcement of the forementioned Orders, and that she is believed to be residing in Iredell County, North Carolina. That the defendant has refused to deliver custody to the plaintiff and has threatened that if the plaintiff attempts to take custody of the child, she will kill the child and commit suicide.

WHEREFORE, the plaintiff prays the Court:

1. That an Order issue directing the defendant to deliver custody of the said minor child to the plaintiff, pursuant to the North Carolina General Statutes 50-13.5(d)(2).

2. That the Sheriff of Iredell County be ordered to serve this aforementioned Order on the defendant.

3. That an Order issue awarding permanent custody of the said minor child, namely, Robert F. Zajicek, Jr., to the plaintiff.

4. For such other and further relief as to the Court may seem just and proper."

The case was heard on 30 April 1971. Both parties were present and represented by counsel. From an order awarding custody of the child to the plaintiff, defendant appealed.

Pope, McMillan and Bender by William H. McMillan for plaintiff appellee.

Sowers, Avery and Crosswhite by W. E. Crosswhite for defendant appellant.

VAUGHN, Judge.

[1, 2] Defendant's first assignment of error is that on the day the action was filed, without prior notice to defendant, the court entered an order directing defendant to deliver custody of the child to plaintiff. The record discloses that the order was never enforced and that defendant retained custody of the child until the hearing on 30 April 1971. The questions defendant attempts to raise by this assignment of error are therefore moot. *Brandon v. Brandon,* 10 N.C. App. 457, 179 S.E. 2d 177. In appropriate cases the court may enter orders for the temporary custody of a child pending the service of process. G.S. 50-13.5(d) (2). This assignment of error is overruled.

[3] Defendant next assigns as error the admission into evidence of the duly authenticated orders of the Juvenile and Domestic Relations Court of Palm Beach, Florida, arguing that there was no showing that the Florida court had jurisdiction. The defendant in this action was plaintiff in the Florida suit. "However, a duly authenticated transcript imports verity and validity with the presumption in favor of jurisdiction, and the burden is upon defendant to avoid the judgment by showing lack of jurisdiction or other vitiating matters." 2 Strong, N.C. Index 2d, Constitutional Law, § 26, p. 244. This assignment of error is without merit.

[4] In defendant's remaining assignments of error she contends that the evidence does not support the court's findings of fact and that the court's findings of fact were inadequate. The evidence taken at the trial is not brought forward in this record on appeal. It is therefore presumed that there was evidence to support the findings of fact. *In re Warrick,* 1 N.C. App. 387, 161 S.E. 2d 630. The facts found are sufficient to support the order and the same is hereby affirmed.

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. CHARLES ALPHONSE JACKSON

No. 7110SC577

(Filed 20 October 1971)

Criminal Law § 75— confession by indigent defendant — absence of counsel — written waiver of counsel

A defendant's in-custody confession in the absence of counsel is inadmissible where the defendant was indigent and had not signed a written waiver of counsel. G.S. 7A-451.

APPEAL by defendant from *Brewer, Judge,* at the 3 March 1971 Regular Criminal Session of WAKE County Superior Court.

Defendant was charged in a bill of indictment with the crime of felonious breaking and entering and felonious larceny.

The State's evidence tended to show that on the morning of 18 February 1971 at 12:57 a.m. Officers D. L. Gupton and F. L. Benson of the Raleigh Police Department responded to a burglar alarm call from Thorne's Hardware. When they arrived at the hardware store, a man jumped off the roof and ran. The officers gave chase and apprehended Charles Alphonse Jackson, the defendant.

The defendant was taken to the police station and informed of his right to remain silent and his right to counsel. He was then questioned and, according to testimony by the police officers, signed a written confession. He was then taken to a hospital and treated for injuries received when he was apprehended.

The following morning the defendant was questioned by Officer Heath of the Raleigh Police Department and made a verbal confession.

On 19 February 1971 the defendant was found to be an indigent and counsel was appointed to represent him.

At trial the defendant objected to admission of evidence of his confessions. The judge conducted a *voir dire* examination and found that the statement signed by the defendant and the verbal confession made to Officer Heath were made understandingly and voluntarily and were therefore competent and admissible.

The jury returned a verdict of guilty on both counts and a prison sentence was invoked.

From the verdict and judgment, the defendant appeals.

Attorney General Robert Morgan by Associate Attorney General James E. Magner for the State.

Sanford, Cannon, Adams & McCullough by John H. Parker for defendant appellant.

CAMPBELL, Judge.

The defendant, appellant has raised the issue of the admissibility of the confessions.

The right of an indigent defendant, charged with a crime for which the punishment exceeds six months' imprisonment or a five hundred dollar fine, to representation by counsel is established by statute in North Carolina. G.S. 7A-451. The entitlement to counsel begins as soon as possible after the defendant is taken into custody and continues through any critical stage of the proceeding including an in-custody interrogation. G.S. 7A-451. The indigent defendant may waive his right to counsel, but such a waiver must be in writing. G.S. 7A-457.

The North Carolina Supreme Court in the case of *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), has ruled on the admissibility of confessions obtained without a waiver of counsel in writing. The court pointed out that the North Carolina statutory requirement that the waiver be in writing is more stringent than the rule in the Federal Courts. The court also distinguished confessions which are voluntarily offered by the defendant as compared to those confessions which result from in-custody interrogation. In the instant case the record discloses that the confessions here involved resulted from in-custody interrogations. The defendant, not having waived his right to counsel in writing, the confession obtained was clearly inadmissible under the rule set forth in *Lynch, supra.* The able trial judge conducted a full and complete *voir dire* examination, and his findings were fully supported by the evidence. This case was tried before the *Lynch* decision was published. Nevertheless, the admission of the confession was error, since there

was no finding that the defendant was not an indigent and the waiver of counsel was not in writing.

New trial.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. GENE ELWOOD KING

No. 7110SC651

(Filed 20 October 1971)

Automobiles § 129— drunken driving offense — instructions on "under the influence"

In a drunken driving prosecution, trial court's instruction on "under the influence" complied substantially with the test laid down in *State v. Carroll*, 226 N.C. 237, and was without error.

APPEAL by defendant from *Braswell, Judge*, at the 2nd May 1971 Criminal Session, WAKE Superior Court.

Defendant was charged in one warrant with speeding 100 m.p.h. in a 60 m.p.h. zone and in a second warrant with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor or narcotic drugs. He was convicted of both charges in Wake District Court and appealed to the superior court where he was tried on pleas of not guilty. The jury found him guilty of both charges and from prison sentences imposed, defendant appealed, assigning errors in the court's instructions to the jury.

Attorney General Robert Morgan by William W. Melvin and William B. Ray, Assistant Attorneys General, for the State.

William T. McCuiston for defendant appellant.

BRITT, Judge.

Defendant's first assignment of error relates to that portion of the jury charge in which the court summarized the State's evidence. Introductory to the summarization, the court said: "There is evidence in this case which tends to show," etc. The court then very briefly reviewed the highway patrolman's

testimony with respect to defendant's speeding 100 m.p.h. and being under the influence of intoxicants following which the court said: "Now what the evidence does show in any respect is solely for you the jury to say and determine." Defendant contends the failure of the court to provide the latter quoted instruction after the summarization of testimony pertaining to speeding violated the expression of opinion proviso of G.S. 1-180. We disagree with this contention and hold that the instructions to which this assignment of error relates are free from error.

Defendant's other assignment of error is to the following jury instruction: "I instruct you that the defendant was under the influence of an intoxicating liquor, if by reason of having drunk any intoxicating beverage he was appreciably affected thereby in that he lost the normal control of the powers or functions of his body or mind or both, so that such loss could be estimated or recognized."

Defendant contends that the trial court's definition of "under the influence" is not consistent with the definition set forth in *State v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688 (1946) and subsequent decisions based thereon including *State v. Green,* 251 N.C. 141, 110 S.E. 2d 805 (1959). In *Carroll,* the Supreme Court said: "When a person drinks a sufficient quantity of liquor or other intoxicating beverage to cause him to lose the normal control of his bodily and mental faculties to such an extent that such loss of the normal control of these faculties is appreciable, then such person is under the influence of liquor within the meaning of the statute. And until there is some appreciable impairment of the mental or physical faculties, or both, the person is neither drunk nor under the influence of liquor within the meaning of the statute."

We hold that the test for "under the influence" stated by the trial court in the instant case is consistent with the test declared in *Carroll.*

In *State v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740 (1946) the use of the words "materially impaired" instead of "appreciably impaired" were held to be without error. In *State v. Lee,* 237 N.C. 263, 74 S.E. 2d 654 (1953) the words "perceptibily" instead of "appreciably" was approved. In Webster's Third New International Dictionary appreciable is defined as

"capable of being perceived and recognized or of being weighed and appraised."

Although we think it would have been better for the trial court in the instant case to have adhered strictly to the definition laid down in *Carroll,* we cannot say that there is an inconsistency, therefore, the assignment of error is overruled.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT EDWARD HARRIS

No. 7114SC562

(Filed 20 October 1971)

Criminal Law § 23— voluntariness of guilty plea

The record on appeal from a housebreaking conviction affirmatively showed that the defendant voluntarily and understandingly pleaded guilty to the indictment.

APPEAL by defendant from *Hobgood, Judge,* 5 April 1971 Session of Superior Court held in DURHAM County.

Attorney General Robert Morgan and Associate Attorney Ralf F. Haskell for the State.

Kenneth B. Spaulding for defendant appellant.

HEDRICK, Judge.

The defendant Robert Edward Harris was charged in a bill of indictment, proper in form, with housebreaking.

The defendant, by two assignments of error, contends that his plea of guilty was not freely, understandingly and voluntarily entered.

The record reveals that the defendant, an indigent, represented by court-appointed counsel, Kenneth B. Spaulding, in open court entered a plea of guilty to the charge set out in the bill of indictment, and that the defendant signed the transcript of plea. The record further reveals that the court made the following adjudication:

"ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, Robert E. Harris, 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. That this defendant, was represented by attorney, Kenneth Spaulding, who was court appointed and the defendant through his attorney, in open Court, plead guilty to Housebreaking as charged in the bill of indictment and in open Court, under oath, further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;

2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads guilty;

3. He is guilty of the offense(s) to which he pleads guilty;

4. He authorizes his attorney to enter a plea of guilty 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 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 be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This 8 day of April, 1971.

/s/ HAMILTON H. HOBGOOD
Judge Presiding"

It affirmatively appears in the record that the defendant voluntarily and understandingly pleaded guilty to a valid bill of indictment, and that the prison sentence imposed is within the limits prescribed by the applicable statute. We hold the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

JOHN EARL CUMMINGS, ADMINISTRATOR OF THE ESTATE OF JOYCE DIMERY LOCKLEAR, DECEASED v. JOSEPHEUS LOCKLEAR

No. 7116SC572

(Filed 20 October 1971)

1. **Parent and Child § 2; Death § 3— wrongful death of wife — action against the husband — children as beneficiaries of the recovery — parental immunity**

   The administrator of a wife's estate may maintain a wrongful death action against the husband for the death of the wife in an automobile accident in which the husband was a driver, even though the ultimate beneficiaries of the action are the minor, unemancipated children of the marriage. G.S. 28-173.

2. **Death § 9; Actions § 5—wrongful death of wife — administrator's action against husband — husband precluded from recovery**

   A husband whose negligence in an automobile accident resulted in his wife's death may not share in any wrongful death recovery obtained against him.

APPEAL by plaintiff from *Canaday, Judge,* 17 May 1971 Session of Superior Court held in ROBESON County.

Defendant and plaintiff's intestate were husband and wife at the time of the accident involved in this lawsuit and at the time of the wife's death by reason of injuries received in said accident. There are presently surviving four unemancipated, minor, natural children of defendant and plaintiff's intestate.

On 28 November 1969 defendant was the owner and operator of an automobile in which plaintiff's intestate was riding as a passenger. On that date, by reason of the alleged negligence of defendant, the automobile was involved in a collision which produced injuries resulting in the death of plaintiff's intestate.

Plaintiff as the duly qualified administrator of the estate of Joyce Dimery Locklear instituted this action to recover damages for her wrongful death. Defendant filed a motion for summary judgment and supported it with an affidavit setting out the facts that defendant and plaintiff's intestate were husband and wife; that there are presently surviving four unemancipated, minor, natural children of defendant and plaintiff's intestate; and that the four children are living in the home with defendant. Plaintiff does not contest the truthfulness of the statements in the affidavit.

On 24 May 1971 the trial judge, "being of the opinion that the doctrine of immunity applies to the facts in this case" granted summary judgment for defendant. Plaintiff appealed.

Johnson, Hedgpeth, Biggs & Campbell, by John W. Campbell, for plaintiff.

W. Earl Britt for defendant.

BROCK, Judge.

[1] If the wife had survived, she would have had a cause of action against her husband for damages for personal injury. G.S. 52-5. Therefore, under the provisions of G.S. 28-173 the administrator of her estate may maintain an action for wrongful death. The right to sue granted by this statute is not conditioned upon who may be the ultimate beneficiary or beneficiaries of a recovery. This proposition could hardly be more clearly stated than in *Bank v. Hackney,* 266 N.C. 17, 145 S.E. 2d 352, where it is said: "The fortuitous circumstance that those entitled to the recovery under the Intestate Succession Act happened to be the children rather than collateral kin of the decedent is not germane to the administrator's right of action."

We are aware of the factual difference between *Hackney, supra,* and the case here under consideration. In *Hackney* the husband also died of injuries received in the accident, and therefore both parents were deceased. However, we do not view this

factual difference as changing the right granted to the administrator by G.S. 28-173 to maintain this action against the husband-father for the wrongful death of the wife-mother.

[2] In this case if the wife-mother had died intestate of a natural cause her personal estate would have descended one-third to the surviving husband (G.S. 29-14(2)), and two-thirds divided equally among the four surviving children (G.S. 29-15(2) and G.S. 29-16(1)). However, since it was the husband's wrongful act which caused the death of plaintiff's intestate, he may not share in a recovery; therefore, should the jury return a verdict in plaintiff's favor, the Court will enter judgment for only two-thirds of the amount of the verdict. See *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676.

In our opinion summary judgment for defendant was error.

Reversed.

Judges VAUGHN and GRAHAM concur.

ERIC ANTHONY HODGE v. GLENN I. HODGE AND IDA M. HODGE

No. 7110SC521

(Filed 20 October 1971)

Husband and Wife § 15— entirety property — attachment of rental income to pay debt of the husband

Rental income from entirety property may be placed in receivership and applied against the debts of the husband alone. G.S. 1-352 through G.S. 1-368.

APPEAL by defendant, Glenn I. Hodge, from *Clark, Judge,* 13 April 1971 Session of WAKE County Superior Court.

In November 1965 the plaintiff brought a civil action against the defendants, Glenn I. Hodge and Ida M. Hodge, in the Wake County Superior Court. The case was tried and resulted in a judgment in favor of the plaintiff against the defendant, Glenn I. Hodge, in the amount of $3,184.00. The defendant, Ida M. Hodge, was found not indebted to the plaintiff. Execution on the judgment was issued and returned unsatisfied.

Supplemental proceedings under G.S. 1-352 were conducted on January 11, 1969, and September 29, 1969, requiring defendants to appear and be examined as to assets of the judgment debtor, Glenn I. Hodge. On February 11, 1970, plaintiff filed a motion for appointment of a receiver. The motion was heard by Judge Preston at the March 31, 1970 Session of Wake County District Court and a receiver was appointed to receive the rental income of property held by defendants as tenants by the entirety and apply said income toward satisfaction on the judgment against defendant Glenn I. Hodge.

This Court, by opinion filed 21 October 1970, 9 N. C. App. 601, 176 S.E. 2d 795 (1970), vacated the order of receivorship and remanded the case to the Superior Court of Wake County for that the case had not been properly transferred to the District Court.

At the April 13, 1971 Session of Wake County Superior Court, Judge Clark appointed a receiver to take over the assets of Glenn I. Hodge, including all rental income in excess of an exemption of $500.00 per month from entirety property held by defendants and apply such income to the satisfaction of the judgment against Glenn I. Hodge.

From the order appointing the receiver, the defendant, Glenn I. Hodge, appealed.

Yarborough, Blanchard, Tucker & Denson by Alexander B. Denson for plaintiff appellee.

William T. McCuiston for defendant appellants.

CAMPBELL, Judge.

The sole question raised by this appeal is whether it was error to appoint a receiver for rental income from realty held as tenants by the entirety and apply the excess thereof, above the personal property exemption, to satisfy a judgment against the husband. The realty itself was not placed in the hands of the receiver but only the rental income therefrom.

The appellant contends that the rents from entirety property are not subject to such a receivership. This contention is not sound. Property held by the entirety is not subject to execution to satisfy judgments against one spouse. *Hood v. Mercer,* 150 N.C. 699, 64 S.E. 897 (1909); *Johnson v. Leavitt,* 188 N.C.

682, 125 S.E. 490 (1924). However, *proceeds* of entirety property are the property of the husband as against the wife and such proceeds may be applied against debts of the husband alone. *Lewis v. Pate,* 212 N.C. 253, 193 S.E. 20 (1937). The income from rental property held by the entirety is not protected from attachment to satisfy the debts of the husband merely because it is derived from entirety property. The procedure followed in the instant case is provided for in G.S. 1-352 through G.S. 1-368.

The appellant relies on the case of *Finance Co. v. Putnam,* 229 N.C. 555, 50 S.E. 2d 670 (1948). This case is clearly distinguishable.

There was no error in the appointment of the receiver in the instant case.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT EDWARD HARRIS

No. 7114SC563

(Filed 20 October 1971)

Criminal Law § 23— validity of guilty plea — trial judge's incorrect statement of the punishment

Although the trial judge, prior to accepting defendant's guilty plea to several offenses, stated incorrectly the maximum terms of imprisonment and failed to inform defendant that he could receive a fine, defendant's plea of guilty was not thereby rendered invalid.

ON *certiorari* to review order of *Martin (Robert M.), Judge,* at the 26 April 1971 Session of Superior Court held in DURHAM County.

When his cases were called for trial, the defendant pleaded guilty to driving a motor vehicle on the highways on 12 July 1970 while his driver's license was permanently revoked; to driving a motor vehicle on the highways on 14 June 1970 while his driver's license was permanently revoked; to driving a vehicle on the highways on 12 June 1970 while under the influence of intoxicating liquor (this being a second offense); to driving a

vehicle on the highways on 14 June 1970 while under the influence of intoxicating liquor (this being a second offense); to an assault on Joe Ashby on 28 February 1971 with a deadly weapon, *per se,* with the felonious intent to kill and murder, inflicting serious injury not resulting in death; and to the misdemeanor of wilful and wanton injury to real property on 21 February 1971. The pleas of guilty were adjudged to be freely, understandingly and voluntarily entered.

From the judgments imposed, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Byrd for the State.

Kenneth B. Spaulding for defendant appellant.

MALLARD, Chief Judge.

The defendant contends that the trial judge did not inform him "of all the consequences of his guilty plea" because the record does not reveal that he was informed by the trial judge that he could also be fined as well as imprisoned upon his pleas of guilty.

The two cases in which the defendant was charged with operating a motor vehicle on the public highways while his license was permanently revoked, and the two cases in which the defendant was charged with the second offense of operating a motor vehicle on the public highways while under the influence of intoxicating liquor, have been to this court previously, and a new trial was awarded. See *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971).

Upon being called to plead, at the new trial the defendant entered pleas of guilty in all four of these cases and, in addition, pleaded guilty to the two other charges.

The original of the transcript of plea affirmatively shows that the judge advised the defendant that he could be imprisoned for eight years on these four charges involving the operation of a vehicle on the highways. Later, as appears in an addendum to the record, the judge informed the defendant he could receive four years imprisonment but did not mention that he could be fined. The defendant was not fined or taxed with the costs, how-

ever. He was sentenced to a total of three years in prison on these four charges—which was less than the maximum that the judge informed him could have been imposed and less than the maximum allowed by the statutes. Although the trial judge incorrectly stated the maximum imprisonment and failed to inform the defendant that he could also be fined, the defendant has failed to show how he was prejudiced by such failure. See *State v. Griffin,* 5 N.C. App. 226, 167 S.E. 2d 824 (1969).

The record affirmatively shows that before the imposition of the sentences and after questioning the defendant under oath, the trial judge found as a fact, among other things, that the defendant had informed the court that he had been fully advised of the maximum punishment for the offenses charged and that he was guilty of the offenses charged. The record also shows that the court then further examined the defendant and after finding facts, adjudged that his pleas of guilty were freely, understandingly and voluntarily made. We hold that the requirements of *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), were complied with.

The defendant also contends that the trial judge committed error in grouping all of the "driving offenses" together, in accepting his guilty pleas, and in questioning him. It is further contended that it was error to fail to question him at a separate time about each charge. We hold these contentions to be without merit.

In the trial we find no error.

No error.

Judges CAMPBELL and HEDRICK concur.

CHARLES ELTON UPTON v. MARY ROBERTS UPTON

No. 7116DC615

(Filed 20 October 1971)

Contempt of Court § 7— child support violation — imposition of punishment

The trial court ordered a father to deliver his truck to a court-appointed commissioner so that the truck might be sold and the proceeds applied to the father's child support obligations. The father refused to deliver the truck, contending that his attorney told him not to and that he needed the truck to make a living. *Held:* The sentencing of the father to ten days in jail for contempt of court was proper.

APPEAL by plaintiff from *Gardner, District Judge,* 26 April 1971 Session of District Court held in ROBESON County.

On 28 August 1967 a judgment was entered granting the plaintiff a divorce from defendant. On the same date an order was entered requiring him to pay defendant certain sums for the support of two minor children born of the marriage. On several occasions thereafter orders were entered requiring the plaintiff to show cause why he should not be punished for contempt for failure to comply with the judgment. On 16 March 1971 the court found that: Plaintiff's arrears amounted to $2,225.00 and that plaintiff owned a truck in which he had an equity of more than $1,000.00. The court appointed a commissioner to sell the truck and apply the net proceeds to the sum due by plaintiff. Plaintiff was ordered to pay $800.00 or deliver possession of the truck to the commissioner on or before 29 March 1971. On 29 March 1971 plaintiff filed a motion seeking a reduction in the amounts required to be paid under the order of 28 August 1967. After a hearing on 23 April 1971 the court, on 26 April, entered orders: (1) Reducing the monthly payments of plaintiff for a period of one year, after which period the original amount would be reinstated unless otherwise ordered by further orders of the court; and (2) sentencing plaintiff to ten days in jail for contempt by reason of his wilful failure to deliver possession of the truck. Plaintiff appealed from both orders.

Ottway Burton for plaintiff appellant.

McLean, Stacy, Henry and McLean by William S. McLean for defendant appellee.

VAUGHN, Judge.

The court's finding that plaintiff wilfully failed to deliver possession of the truck as ordered is supported by the evidence. Plaintiff's explanation of his refusal to surrender the truck was as follows:

> " . . . As to why I didn't turn that truck over to Mr. McLean as the Court ordered me to do, on the advice of counsel, first of all. And I could not afford to in order to continue on working, to make a living for myself and do what I can. My lawyer advised me not to turn it over to Mr. McLean."

Plaintiff's assignments of error directed to the order sentencing him to ten days in jail are overruled.

Plaintiff's other assignments of error have been duly considered and are overruled. The orders from which plaintiff appealed are affirmed.

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. RAYMOND A. CAZARRES

No. 7112SC580

(Filed 20 October 1971)

Narcotics § 4.5— instructions — review of evidence concerning nonsuited charge

Where law officers arrested defendant in a park for transportation of marijuana, and thereafter charged defendant with possession of marijuana upon finding marijuana in defendant's residence, and in a trial for both crimes the transportation charge was nonsuited, the trial court did not commit prejudicial error in reviewing in the charge evidence of the observation and arrest of defendant upon the transportation charge.

APPEAL by defendant from *Cooper, Judge,* 8 February 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was brought to trial upon a bill of indictment which charged (1) that defendant used a certain motor vehicle

to facilitate the transportation, conveyance, concealment and possession of marijuana (G.S. 90-111.2(a)(3)); and (2) that defendant did transport, carry and convey a quantity of marijuana by means of a certain motor vehicle (G.S. 90-111.2(a)(1)). Defendant, at the same time, was brought to trial upon an information charging that he had in his possession and under his control marijuana in excess of one gram (G.S. 90-88 and 90-111(a)). Waiver of indictment by the grand jury upon this latter charge was duly executed.

The State's evidence tended to show: On 8 September 1970 a group of law enforcement officers entered Rowan Street Park in Fayetteville and encountered the defendant and other persons under circumstances which gave the officers reason to suspect that defendant was dealing in narcotics from defendant's van-type motor vehicle. The officers placed defendant and his companions under arrest and took them to the Inter-Agency Bureau of Narcotics office in the Cumberland County Courthouse. Defendant was advised of his rights and consented to a search of his residence at 200 Sedberry Street. The officers conducted a search of defendant's residence and found in excess of one gram of marijuana.

At the close of the State's evidence defendant's motions to nonsuit the two charges contained in the bill of indictment were allowed. The jury returned a verdict of guilty of possession as charged in the information. Defendant appealed.

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

Assistant Public Defender Taylor for the defendant.

BROCK, Judge.

Defendant assigns as error that the trial judge, in charging the jury, reviewed the evidence of the observation and arrest of defendant in the Park. Defendant contends this was error because the charges in connection with his arrest in the Park were nonsuited.

This assignment of error is without merit. Evidence of the observation and arrest in the Park served to explain why defendant was in custody when he consented to a search of his residence. The evidence was plenary and clear that more than

one gram of marijuana was found during the search of defendant's residence, and it is not conceivable that the jury could have been confused.

No error.

Judges VAUGHN and GRAHAM concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA
v. GARY LYNN RAMSEY

No. 7110DC520

(Filed 20 October 1971)

APPEAL by defendant from *Preston, District Judge,* at the 10 May 1971 Civil Session of District Court held in WAKE County.

Plaintiff alleged, and defendant admitted in his answer, that the defendant executed and delivered to plaintiff on or about the 5th day of September 1968 an "Instrument and Security Agreement" (note and chattel mortgage or chattel deed of trust); that a copy of the security agreement was attached to the complaint and incorporated therein by reference; that plaintiff has demanded payment of the claim for $131.09 and has been refused payment. The plaintiff alleged, and defendant denied in his answer, that after a foreclosure disposing of the collateral in the security agreement, there was due plaintiff the sum of $131.09. The defendant in a further answer and defense alleged that the plaintiff undermines or weakens "the agency relationship that exist *(sic)* between itself and its depositors or customers"; that plaintiff acts "to justify its own acts of bad faith with respect to performance of these same contracts or security agreements by its depositors or customers"; and that plaintiff uses "the courts or court system to promote the exploitation of the layman's lack of knowledge of how to compute the present value of an interest bearing debt."

From a judgment dated 12 May 1971 entered by Judge Preston, awarding the plaintiff judgment in the sum of $131.09 and interest from 15 July 1970 and the costs of this action, the defendant appealed to the Court of Appeals.

No counsel for plaintiff appellee.

Gary Lynn Ramsey, Pro se, for defendant appellant.

MALLARD, Chief Judge.

In his brief defendant states that "(t)his appeal arises from the signing of the judgment prepared by the trial judge and from the refusal of the trial judge to accept the evidence presented by the defendant to defeat the plaintiff's claim."

We have examined and considered the record proper and the assignments of error that have been properly presented. No prejudicial error appears.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. KENNETH R. GREENWOOD

No. 7128SC519

(Filed 17 November 1971)

1. **Criminal Law § 149— right of State to appeal — quashal of warrant in superior court**

The State, which had appealed the quashal of a warrant from the district court to the superior court, could likewise appeal the superior court's quashal of the warrant to the Court of Appeals. N. C. Constitution, Art. IV, § 12(6); G.S. 15-179.

2. **Municipal Corporations § 32— regulation of billiard halls — hours of operation — Sunday closing**

The City of Asheville had statutory authority to enact an ordinance providing that billiard halls shall not be open between the hours of 12:00 midnight and 8:00 a.m. or at any time on Sunday. G.S. 160-200(33).

3. **Constitutional Law § 20; Municipal Corporations § 32— regulation of billiard halls — validity of statute and ordinance — failure to include bowling alleys**

A statute and a municipal ordinance which regulate the operation of billiard halls are not rendered invalid on the ground that bowling alleys and snooker pool rooms are not also included therein.

4. **Constitutional Law § 12— regulation of billiard hall — rights of operator**

The operator of a billiard hall has no vested constitutional right to engage in his business free from statutory regulation.

5. **Statutes § 4— presumption of constitutionality**

The presumption is that an act of the General Assembly is constitutional.

6. **Statutes § 4— constitutionality of statute — burden of proof**

The burden of establishing the unconstitutionality of a statute is upon him who assails it.

7. **Municipal Corporations § 32— ordinance regulating billiard halls — hours of operation — constitutionality**

An ordinance of the City of Asheville providing that billiard halls shall not be open between the hours of 12:00 midnight and 8:00 a.m. or at any time on Sunday, *held* constitutional.

APPEAL by the State of North Carolina from *Ervin, Judge,* 25 January 1971 Session of Superior Court held in BUNCOMBE County.

Defendant was charged in a warrant, the affidavit portion of which reads as follows:

"The undersigned, E. F. Edwards, being duly sworn, complains and says that at and in the County named above and on or about the 13th day of Dec., 1970, the defendant named above did unlawfully, wilfully, Operate (as an employee of) the Family Recreatiln (sic) Center, (a licensee) at 85 Tunnel Road on Sunday The said family Recreation Center being a Billiard Hall consisting of 16 billiard tables in violation of City Ordance (sic) Chapter 7 Section 7-7. [Motion to amend allowed—Judge D.J.W.]

The offense charged here was committed against the peace and dignity of the State and in violation of law."

When the case was called for trial in the district court, the defendant made a motion to quash the warrant "on the grounds that the ordinance of which violation alleged, is unconstitutional and otherwise unlawful." The judge of the district court allowed the motion and dismissed the case. The State appealed to the superior Court.

The following judgment was entered by Judge Ervin in superior court:

"THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding at the January 25, 1971 Criminal Session of the Superior Court of Buncombe County, North Carolina, upon the appeal of the State from the judgment entered by his Honor Dennis J. Winner, Judge of the District Court of Buncombe County, quashing the warrant issued in this action; and

The Court, after reviewing the warrant and the written Opinion of Judge Winner, and briefs filed by the parties, and hearing argument of counsel, being of the opinion that the Judgment entered by Judge Winner quashing the warrant issued in this cause should be affirmed.

IT IS, THEREFORE, ORDERED that the Judgment entered in the District Court Division of Buncombe County, dated December 22, 1970, is hereby affirmed."

The State of North Carolina objected and excepted to the judgment entered in the superior court and appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Baxter for the State, appellant.

Uzzell & Dumont by Harry Dumont for defendant appellee.

MALLARD, Chief Judge.

[1] The defendant challenges the right of the State to appeal from the judgment of the superior court.

The Constitution of North Carolina, Art. IV, § 12(6), provides that the General Assembly shall provide by general law a proper system of appeals. The General Assembly has provided a proper system of appeals for both the State and the defendant in criminal cases.

In criminal cases, it is provided in G.S. 7A-290 that any defendant who is convicted in the district court may appeal to the superior court where the trial is de novo. This statute relates solely to the right to appeal of a convicted defendant. In the superior court, the defendant, upon appeal, is entitled to a trial de novo by jury. G.S. 7A-196.

The State's right to appeal is limited. The General Assembly has provided in G.S. 15-179:

> "WHEN STATE MAY APPEAL.—An appeal to the appellate division or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—
>
> * * *
>
> (3) Upon a motion to quash.
>
> * * *
>
> (6) Upon declaring a statute unconstitutional."

Under this statute, if the State's right to appeal arises in the district court, the appeal is to the superior court; if it arises in the superior court, the appeal is to the appellate division. In this case, therefore, the State had the right to appeal from the district court to the superior court and from the superior court to the Appellate Division of the General Court of Justice.

The defendant further contends that when the State appealed from the district court to the superior court, the trial was de novo. In his brief, he moves that we dismiss the State's

appeal and cites in support of his contention the case of *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). In *Sparrow*, however, the factual situation is distinguishable: There, the defendant appealed, not the State. G.S. 7A-290 specifically provides that upon a *defendant's* appeal from the district court to the superior court, the trial shall be de novo. G.S. 15-179 permits the *State* to appeal under the limited circumstances enumerated but does not specify that the trial must be de novo.

We think that the judgment of the superior court, the only one we are concerned with on this appeal, is sufficient to constitute a judgment given for the defendant upon a motion to quash. This permits the State to appeal to this court. The motion of the defendant to dismiss this appeal is denied.

[2] The defendant made certain exceptions to the case on appeal, but none of them concerned the actual contents of the ordinance in question; therefore, the authenticity of the ordinance is not in dispute. The ordinance appears on page 5 of the record and reads as follows:

> "Sec. 7-7. OPERATION BETWEEN CERTAIN HOURS AND ON SUNDAY PROHIBITED.
>
> It shall be unlawful for any billiard hall licensee or his employee to keep such billiard hall open or to operate the same between the hours of 12:00 midnight and 8:00 a.m., or at any time on Sunday. (Code 1945, § 185)"

The General Assembly, by enacting G.S. 160-200(33), gave to cities the power "(t)o license, prohibit, and *regulate* pool and billiard rooms and dance halls, and in the interest of public morals provide for the revocation of such licenses." (Emphasis added.)

The language of the statute indicates that the General Assembly recognized that the regulation and operation of pool and billiard rooms and of dance halls have a peculiar relation to public morals.

> "The police power rests in the individual states, and in the exercise thereof the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society. *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731; *State v. Whitaker, supra.* The General Assembly may delegate to a

municipality, as an agency of the State, authority to enact ordinances in the exercise of the police power. *State v. Scoggins,* 236 N.C. 1, 72 S.E. 2d 97. However, the municipality has only such powers as are delegated to it, and such powers are, of course, subject to the same constitutional limitations as are police powers exercised directly by the State. *Winston-Salem v. Southern Ry., supra.* In reviewing the exercise of the police power, it is the sole duty of the court to ascertain whether the act violates any constitutional limitation, the question of public policy being solely within the province of the legislature. *State v. Whitaker, supra.* Generally, the police power can only be exercised by a body possessing legislative power, 16 C.J.S., Constitutional Law § 177 (1956), and it is generally accepted that the police powers of a municipality are to be carried into effect and discharged through provisions of ordinances or resolutions enacted by the Council or other governing authority at a meeting legally called. 37 Am. Jur. Municipal Corporations § 52 (1941); 2 McQuillin, Municipal Corporations § 10.30, at 816 (3d ed. 1966 rev. vol.)" *City of Raleigh v. R.R. Co.,* 275 N.C. 454, 168 S.E. 2d 389 (1969).

The State contends that the trial judge in the superior court committed error in affirming the order of the district court quashing the warrant.

The parties do not question the sufficiency of the warrant, as amended, to charge a violation of the ordinance. Nor is there any contention that the procedure used by the City of Asheville in adopting the ordinance was unlawful.

The defendant contends, however, that the statute does not specifically delegate the power to the cities to control the hours and days of operation of the places of business embraced therein. This contention is without merit. The clear language of the statute is sufficient to authorize the City of Asheville to adopt the ordinance in question.

[3] Defendant further argues that the statute and ordinance are void because bowling alleys and snooker pool rooms are not included therein. This contention is also without merit. In *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469 (1924), it is stated:

"A statute enacted within the police power will not be adjudged invalid because an omitted subject . . . might have been properly included."

In *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198 (1949), Justice Barnhill (later Chief Justice) said:

"Legislative bodies may distinguish, select, and classify objects of legislation. It sufficies if the classification is practical. *Magoin v. Bank,* 170 U.S. 283, 42 L. Ed. 1037; *S. v. Davis, supra.* They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. *Smith v. Wilkins,* 164 N.C. 135, 80 S.E. 168.

The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. *Bickett v. Tax Commission,* 177 N.C. 433, 99 S.E. 415; *R. R. v. Matthews,* 174 U.S. 96, 43 L. Ed. 909. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. *City of Springfield v. Smith,* 322 Mo. 1129.

Only those ordinances which discriminate between those of a particular group or class who are similarly situated with reference to the subject matter of the legislation come within the constitutional inhibitions."

See also *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783 (1953); *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860 (1948); *State v. Denson,* 189 N.C. 173, 126 S.E. 517 (1925).

The desirability of, and constitutional authority for, having some statutory regulation of pool and billiard rooms have been recognized for many years. See *Murphy v. California,* 225 U.S. 623, 56 L. Ed. 1229 (1911); *Brunswick-Balke Co. v. Mecklenburg,* 181 N.C. 386, 107 S.E. 317 (1921).

In 4 Am. Jur. 2d, Amusements and Exhibitions, § 24, it is stated:

"Although the playing of pool or billiards is a lawful amusement, public pool and billiard rooms and tables, because of their harmful and vicious tendencies, may be regulated by the state in the exercise of its police power,

acting either directly or under a grant of power to municipalities or other political subdivisions, or absolutely prohibited, and such a prohibition will be upheld if not discriminatory."

In 86 C.J.S., Theaters & Shows, § 4, it is stated:

"In the exercise of the regulatory power, public places of amusement may be required to open and close at reasonable hours. Accordingly, a political subdivision of the state may, within reasonable limits, regulate or prescribe the opening and closing hours of dance halls, or of pool and billiard halls, but not so as to impair rights granted under state license."

In 6 McQuillin, Municipal Corporations (3rd ed. 1969) Rev. Vol.), § 24.149, it is stated:

"Pool and billiard rooms and tables for public use may be subject to municipal regulation, prohibition, or suppression, and licensing. An ordinance forbidding the conducting of a snooker hall is within statutory authority to prohibit pool and billiard halls. * * * (I)t has been held that a municipal corporation may forbid the keeping of public places for billiard playing apart from any gambling feature, because of the tendency of such places to attract youth to associate with and become idlers and otherwise to disturb the public welfare."

In *State v. Vanhook,* 182 N.C. 831, 109 S.E. 65 (1921), the Supreme Court held that a statute, identical in language to G.S. 160-200(33), and an ordinance adopted pursuant thereto, relating to the licensing of dance halls, were clearly a valid exercise of the police power of the State. In so holding, the Court said:

"Instances of a similar exercise of the police power may be found in ordinances which prohibit disorderly conduct, or abusive or indecent language, or the entrance of an unmarried minor into a saloon, or the pursuit of one's ordinary business on Sunday; or which regulate the weighing of cotton, or the running at large of bird dogs during the closed season for quail, or vaccination for the public health, or which deal with various other situations affecting the health, comfort, morals, and safety of the people."

[4] The defendant has no vested constitutional right to engage in the business of operating a pool and billiard room free from statutory regulation. 16 C.J.S., Constitutional Law, § 224.

[5, 6] The presumption is that an act of the General Assembly is constitutional. *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660 (1960); *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659 (1964). The burden of establishing the unconstitutionality of a statute is upon him who assails it. *Mobile Home Sales v. Tomlinson,* 276 N.C. 661, 174 S.E. 2d 542 (1970).

The General Assembly, in enacting the statute in question [G.S. 160-200(33)], selected and classified pool and billiard rooms as objects of legislation. The ordinance enacted by the City of Asheville under the authority granted by the statute affects all persons who operate a billiard hall within the city. Our research does not reveal that the Supreme Court has changed its holding that an ordinance adopted pursuant to the statute in question is within the police power of the State. *State v. Vanhook, supra.*

[7] We hold that the statute is authority for the adoption of the ordinance; that the statute and the ordinance enacted pursuant thereto are not unreasonable, capricious or arbitrary; do not create a constitutionally prohibited discrimination between businesses of the same type; are not a denial of the equal protection of the laws; do not violate any constitutional limitation; and therefore are not unconstitutional.

The judge of the superior court committed error in allowing the defendant's motion to quash.

Reversed.

Judges HEDRICK and GRAHAM concur.

W. W. HORTON v. ANNIE E. DAVIS, ROBERT R. DAVIS, PAUL DAVIS AND WIFE, MRS. PAUL DAVIS

No. 7118SC256

(Filed 17 November 1971)

Judgments §§ 30, 32; Taxation § 44— attack on tax foreclosure judgment — collateral attack

Where the record in a tax foreclosure proceeding shows on its face that service of process was lawfully had on the delinquent property owner, it is improper, in a subsequent action in ejectment in which the property owner is not a party, to attack the foreclosure judgment collaterally on the ground that service of process was not had on the property owner.

HEARD upon order for rehearing entered 23 August 1971. The appeal was from *Martin, Robert M., Judge,* September and October 1970 Sessions, Superior Court of GUILFORD County. Opinion dismissing the appeal is reported in 11 N.C. App. 592. Plaintiff petitioned for rehearing, and the petition was allowed.

This action was brought on 2 February 1968 as an action in ejectment. The complaint alleges that defendants Annie E. Davis and Robert R. Davis are in possession of certain described property owned by plaintiff. It further alleges that defendant Paul Davis "is claiming some interest in said property though plaintiff avers that said defendant Paul Davis and his wife have no claim whatsoever to the property described hereinbefore." The prayer was for possession of the property and for the court to require defendants to post a reasonable bond.

No answers were filed, and on 25 April 1968, the Assistant Clerk of Superior Court signed and entered a judgment by default final. The judgment found as facts that defendants Annie E. Davis and Robert R. Davis were served with process on 5 February 1968; that alias summons, issued on 27 February 1968, was, with copy of summons and complaint, served on Paul Davis and Mrs. Paul Davis; that on 2 April 1968, defendants were granted an extension of time to 12 April 1968 to answer; that no answers had been filed and time had expired. The order further found that plaintiff was the owner of the lands, that defendants Annie E. Davis and Robert Davis were in wrongful possession of the premises, and that plaintiff was entitled to rents at the rate of $60 per month. On these facts it was adjudged that plaintiff is entitled to possession and that

defendants Annie E. Davis and Robert R. Davis be removed from the premises and plaintiff put in possession, that title to the property "is free from all claims of the defendants, their heirs and assigns", and that plaintiff have and recover of defendants Annie E. Davis and Robert R. Davis the sum of $262.50.

On 23 December 1968, an order was entered by the Clerk of Superior Court, upon motion of Annie E. Davis, Robert R. Davis, and Paul Davis to set aside the judgment. In this order the court recited a hearing on 12 December 1968, and from the sworn testimony offered and affidavits submitted, the court found as facts that at the time of service of process on them Robert Davis and Annie Davis were *non compos mentis* and "the defendant, Paul Davis, has not been served with process and was not represented by counsel at the time the two orders extending the time to file answer were filed in this cause." Upon the facts found, the court ordered "that defendant, Paul Davis, be stricken from the judgment heretofore entered for lack of proper service of process" and that a guardian ad litem be appointed for Annie Davis and Robert Davis and "that the judgment heretofore entered be opened for the purpose of allowing said guardian ad litem to take said action; that execution be stayed under said judgment until final disposition of this cause by the Court." No exception was taken to any findings of fact or to the signing and entry of the order.

Guardian ad litem was subsequently appointed and was served with process. He filed answer on 20 March 1969 denying plaintiff's title and by way of further answer averring that the property is owned by Paul Davis. The answer admits that plaintiff has a deed but avers that the deed does not convey title because it was acquired by a tax foreclosure action which is void and that Annie Davis and Robert Davis are tenants of Paul Davis by agreement with him.

When the case came on for trial, plaintiff introduced deed from the commissioner in the tax foreclosure suit to him and showed that it had been recorded. He introduced further tax receipts for the years since the tax foreclosure suit and testified that he had paid the bid at foreclosure suit for back taxes in the amount of something over $1200. He testified that he had not been able to get the Davises out of the property, and that he had brought this suit to quiet title and recover possession.

He further identified and introduced into evidence deed from the City of High Point to Paul Davis and deed from Baumgardner, Commissioner, to the City of High Point. Paul Davis had purchased the property from the City of High Point in 1941, the City having acquired it in a tax foreclosure suit in 1940. The plaintiff further introduced into evidence the court file in the foreclosure action, including the complaint, summons, return on the summons showing Paul Davis not to be found in Wake County, affidavit of the attorney for service by publication, the clerk's order ordering publication, the clerk's certificate that Paul Davis had been mailed a copy of the notice of publication at his post office box in Raleigh, which was not returned to the sender, the News and Observer proof of publication, order appointing the commissioner to sell the property, order for sale, commissioner's sale notice, proof of publication of the sale, the commissioner's report of the sale, order confirming the sale, and the commissioner's report of disbursements.

Plaintiff then had the Guilford County attorney testify who handled the foreclosure. He testified that he inquired of Robert Davis the address of Paul Davis, and that he gave him a post office box number but no street address. The attorney wrote to Mr. Davis at that address and asked for his street address. His answer gave him only the post office box address. Summons in the foreclosure sale was sent to the sheriff, and was returned marked "After due diligence and search Paul Davis not to be found." The attorney testified that he went to Raleigh, called the utilities companies, checked the tax books, called Carolina Power and Light Company, and checked the telephone directory, and did not find any street address for this Paul Davis. On cross-examination he was shown the city directory for Raleigh and admitted that for the years 1966, 1967 and 1968 Paul Davis was listed at 529 North Person Street, Apartment 1.

Following this evidence, the court entered a judgment in which it found the facts to be as recited above. Based on these findings of fact and as a matter of law, the judge ordered:

(1) That the judgment and the commissioner's deed to the plaintiff in the tax foreclosure suit are invalid for want of proper service on the owner and defendant, Paul Davis, and the same are hereby declared null and void;

(2) That the plaintiff does not have title to the real property described in the complaint and is therefore not entitled to possession of the same;

(3) That the plaintiff be charged with costs to be assessed by the clerk; and

(4) That this judgment be recorded in the office of the Register of Deeds for Guilford County, North Carolina, and that the said Register of Deeds make the proper entry of cancellation upon the pages of Deed Book 2358, at page 690, and upon the cross index of the deed records of Guilford County, North Carolina.

On rehearing, Guilford County Board of Commissioners requested permission to file a brief *amicus curiae,* and the request was granted.

Julian C. Franklin for plaintiff appellant.

Morgan, Byerly, Post and Herring, by J. V. Morgan and J. W. Clontz, for defendant appellees.

W. B. Trevorrow and Ralph A. Walker for Guilford County Board of County Commissioners.

MORRIS, Judge.

This is, of course, an action in ejectment. Paul Davis, never having been served, is not a party thereto. Plaintiff and Guilford County strenuously contend that valid service was had upon Paul Davis in the tax foreclosure suit. Defendants just as strenuously contend that the service was not valid and the judgment, therefore, void. In our view of the case, this question is not before us.

In our opinion this is obviously an attempted collateral attack on a voidable judgment. The record in the tax foreclosure suit is, on its face, in order, and this precludes a collateral attack on the judgment. In *Jordan v. McKenzie,* 199 N.C. 750, 752, 155 S.E. 868 (1930), Justice Connor said:

> "Where it appears on the record, as in the instant case, that the summons in an action was duly served, and the defendant alleges that in truth and in fact the summons was not served, as appears by the return thereon, and on this ground the defendant prays that a judgment by default

be set aside and vacated, his remedy is by a motion in the cause, and not by an independent action; it is otherwise, where it appears on the record that no summons was ever served on the defendant. In the latter case the judgment is subject to collateral attack, whereas in the former case the attack must be direct, and made by motion in the action in which judgment was rendered."

The same principle was reiterated in *Davis v. Brigman,* 204 N.C. 680, 169 S.E. 421 (1933). There the plaintiffs alleged that in 1931 Madison County instituted an action against plaintiffs to foreclose a tax certificate issued to the county pursuant to a sale of the land in controversy. No answer was filed and an order was entered appointing a commissioner to sell the land. Defendant in the action is the assignee of the high bidder at the sale. Afterwards a final decree was entered, and the commissioners, as directed by the court, executed and delivered a fee simple deed to the assignee. The complaint further alleged that the summons in the foreclosure proceedings was purportedly issued by the clerk and served on the plaintiffs but that in fact it was never served and the return of the officer was incorrect. Defendant moved to dismiss for that plaintiffs' only remedy was by motion in the cause. Justice Adams, writing for a unanimous Court, said:

"This action cannot be treated as a motion in the foreclosure proceedings for the reason that all the parties to the foreclosure are not parties to the present action. The remaining question is whether the relief sought by the plaintiffs can be administered in an independent action. The plaintiffs claim that the relief sought is the removal of a cloud on the title of (sic) their land; but in order to remove the alleged cloud it is necessary to vacate the judgment rendered when the tax certificate was foreclosed. This Court has repeatedly held that when it appears from the officer's return that a summons has been served as required by law, when in fact it has not been served, the remedy is a motion in the cause to set aside the judgment and not an independent action. In such event the judgment cannot be collaterally attacked; relief must be sought in a direct proceeding to have the judgment set aside. (Citations omitted.)"

Appellees rely on *Galer v. Auburn-Asheville Co.*, 204 N.C. 683, 169 S.E. 642 (1933), which they say is exactly in point, and is authority for their position that the judgment before us is void because of defective service. It is true that the circumstances surrounding the service of process are strikingly similar. However, there the facts were these: The land in litigation was owned by Katherine Williamson prior to September 1928. She conveyed it to Alice Morris free from encumbrance except 1928 taxes. Alice Morris conveyed it to plaintiff free from encumbrance and agreed to pay the 1928 taxes. The taxes were not paid. In 1930 Buncombe County instituted suit against Katherine Williamson for the 1928 taxes. Summons was returned and stamped by the sheriff "Due search made, defendant not to be found in my county." Thereafter, upon proper affidavit and order, notice of service by publication was published in a newspaper for the statutory time. Judgment was entered against Katherine Williamson and the property sold. Buncombe County bid the property in and assigned its bid to defendant, and deed was duly delivered to him and recorded. Plaintiff, in 1932, discovered that defendant had a deed for the property, and tendered the amount of taxes and costs to defendant, which tender was refused. *Plaintiff then caused notice to be given to defendant to show cause why the judgment entered in the tax foreclosure action should not be set aside.* In that proceeding it was made to appear that Katherine Williamson was, at the time of the issuance of the summons and had been continuously since that time, present in the City of Asheville and in Buncombe County. The judgment was set aside. *Plaintiff then instituted action to set aside and cancel the deed made to defendant which had been recorded contending that the recorded deed constituted a cloud on her title.* The trial court's judgment ordered cancellation of the deed, and it was from that judgment that defendant appealed. It is that appeal which is reported in 204 N.C. at 683. In affirming the trial court, Justice Clarkson noted that plaintiff by moving in the cause in the tax foreclosure action to have the judgment set aside and then bringing action to remove cloud had followed the proper procedure citing *Davis v. Brigman,* supra.

For the reasons set out herein the judgment of the trial tribunal is reversed and a new trial is ordered.

New trial.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, AND ROBERT MORGAN, ATTORNEY GENERAL, APPELLEES v. GENERAL TELEPHONE COMPANY OF THE SOUTHEAST, AND CITY OF DURHAM, APPELLANTS

No. 7110UC668

(Filed 17 November 1971)

1. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — original cost**

In determining rates for a telephone company pursuant to G.S. 62-133(b), the reasonable original cost of the company's property is simply evidence to be considered by the Utilities Commission together with other evidence in determining the fair value of the property.

2. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — prices paid to affiliated company**

In this telephone rate case, the Utilities Commission had authority to inquire into the reasonableness of the prices paid by the telephone company for its equipment and supplies purchased from an affiliated company, and, to the extent it found such prices unreasonable, to reduce the cost basis of the telephone company's intrastate telephone plant accordingly.

3. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — prices paid to affiliated company — reasonableness — return on common equity**

Where the prices paid by a telephone company to an affiliated manufacturing company are the same as those which the manufacturing company charges other affiliated companies to which it makes a majority of its sales, the Utilities Commission could properly determine the reasonableness of the prices charged by the manufacturing company by comparing its rate of return on common equity with the rates of return experienced by other manufacturing companies operating in similar fields.

4. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— prices paid to affiliated company — reasonableness — prices paid by unaffiliated company**

The fact that prices charged by a manufacturing company on its sales to an affiliated telephone company's North Carolina division were the same, or in some instances lower, than the prices which it charged an unaffiliated company in this State is not conclusive on the reasonableness of the prices charged to the affiliated telephone company.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— prices paid to affiliated company — unreasonableness**

The Utilities Commission did not err in determining that the prices paid by a telephone company to an affiliated company for equipment and supplies were unreasonably high to the extent requiring

a reduction of $978,000 in the cost basis of the telephone company's North Carolina telephone plant as of the end of the test period.

6. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — excess margin in office equipment**

In this telephone rate case, the Utilities Commission erred in reducing the telephone company's investment in North Carolina telephone plant in the amount of $690,340 for "excess margin in central office equipment," where the equipment was in operation at the end of the test period, and nothing in the record suggests that the telephone company's management did not act in good faith in planning and building the additions to its equipment in anticipation of the future needs of the company.

7. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — plant under construction**

In this telephone rate case, the Utilities Commission did not err in excluding from the cost of the telephone company's property the sum of $747,264 for plant under construction at the end of the test period. G.S. 62-133(c).

8. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — fair value of property**

In this telephone rate case, the Utilities Commission's finding of the fair value of the telephone company's property by first determining original cost and then increasing that figure by 6% was unsupported by competent, material and substantial evidence in the record and was arrived at by a method which failed to comply with the directives contained in G.S. 62-133(b)(1).

9. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — replacement cost**

The Utilities Commission must consider replacement cost in determining the fair value of a telephone company's property, the weight to be accorded to evidence of replacement cost being for the Commission to determine.

10. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — quality of service — ambiguous finding of fact**

Finding by the Utilities Commission that "the overall quality of service afforded by the Applicant to its subscribers is on the low side of providing reasonably adequate service" is ambiguous in failing to show clearly whether the Commission found the utility's service to be reasonably adequate, but just barely so, or whether it found the utility's service to be slightly below being reasonably adequate.

11. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— inadequate service — effect on rates — findings of fact**

If the Utilities Commission finds that the quality of a telephone company's service falls short of the statutory requirement that it be "adequate, efficient and reasonable," the Commission should also make specific findings showing the effect of any such inadequacy upon its

decision fixing rates which are "fair both to the public utility and to the consumer." G.S. 62-131(b).

12. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— rate case — deficiencies in service**

Evidence of deficiencies in a telephone company's service was such as to provide "other material facts of record" which the Utilities Commission by statutory mandate was required to consider in making its determination as to what are just and reasonable rates for the quality of service which the telephone company is providing its customers. G.S. 62-133(d).

APPEAL by General Telephone Company of the Southeast and the City of Durham from order of the North Carolina Utilities Commission in Docket No. P-19, Sub 115 dated 11 May 1971.

On 14 July 1970 General Telephone Company of the Southeast (General, also sometimes referred to as Applicant) filed application with the North Carolina Utilities Commission (Commission) for adjustments of rates and charges for telephone service furnished by it in the State of North Carolina. General is a wholly-owned subsidiary of General Telephone and Electronics Corporation (GT&E) and is a public utility providing telephone service in North Carolina and five other southeastern states, furnishing local and long distance telephone service to its North Carolina customers through its Durham and Creedmoor exchanges. On 21 July 1970 the Commission entered an order declaring the proceeding to be a general rate case, suspending the effective date of the proposed rates, and setting the matter for hearing. On 7 August 1970 the City of Durham (City) filed application for leave to intervene, which was granted. In response to a letter from the Commission requesting greater details specifically on interstate-intrastate separations of investment, revenues and expenses, General filed an amended application on 11 August 1970, and on 18 January 1971 filed a supplemental application pursuant to Commission Rule R1-17(c) showing changes and conditions which had occurred subsequent to the filing of the amended application. On 22 January 1971 the Attorney General, pursuant to G.S. 62-20, filed notice of intervention on behalf of the using and consuming public.

In its amended application, General in summary (except where quoted) alleged: Its last general increase in rates took

effect on 1 February 1969. During the twelve months ending on 31 March 1970 its operating revenues from intrastate operations were $9,438,957.00, its intrastate operating expenses and taxes were $7,876,963.00, and with the addition of net miscellaneous income it had net income available for payment of interest costs and return to its equity holders of $1,649,261.00. Since 30 November 1967 it has increased its intrastate investment in telephone plant by over $13,000,000.00, for an increase of approximately 25%. Its net book cost of telephone plant used and useful in the rendition of intrastate telephone service in North Carolina was $33,467,015.00 on 31 March 1970. "Applying the net income available to Applicant for the twelve month period ending March 31, 1970, to a rate base consisting of net telephone plant investment plus material and supplies and cash working capital for a total of $34,531,781 results in a rate of return to Applicant of only 4.78 percent. Using net trended book cost, Applicant has a rate base of $43,480,850 and a resulting rate of return of 3.79 percent. Applicant says that such rate of return on its property does not produce a fair return for Applicant's stockholders, and does not allow the Applicant to compete in the market for capital funds on such terms as will enable Applicant to attract capital at a rate in the best interest of the customers and the stockholders of Applicant." Subsequent to the test period ending 31 March 1970 General made a public offering of $14,000,000.00 of its first mortgage bonds on 1 April 1970. In prior years such bonds had carried the equivalent of an A rating, but as a result of General's deteriorated financial position, its issue of bonds on 1 April 1970 was given a rating of only Baa, and General was required to market its bonds to the public at an annual cost to it of 9.60 percent, which was over 30 percent higher than its last previous bond issue. The total historic cost of General's long-term debt has been raised to an all time high of 6.37 percent. General is engaged in several programs of service improvement, which, together with customer growth, require it to market its bonds at frequent intervals to obtain capital. At its current level of return, General will be limited in the amount of capital it can raise by provisions of its indentures requiring net operating earnings equal to twice the interest costs on its debts. "To secure a reasonable rate of return on the fair value of its plant and property used and useful by Applicant in providing intrastate communication service in North Carolina," General proposed a schedule of

rates which would result in total annual revenue increase to it of $2,472,554.00.

Hearings were held in Raleigh on 2 February through 10 February 1971, at which witnesses presented by General, the Commission Staff, and the City were examined. On 11 February 1971 a day of public hearing was held in Durham, during which 50 customers testified to the poor quality of telephone service which they were receiving from General and expressed opposition to increased rates.

On 11 May 1971 the Commission entered its order, concurred in by three Commissioners, in which the Commission concluded that General's "overall level of service is on the low side of reasonably adequate service," required certain service improvements, and approved an increase in rates for General which the Commission concluded was sufficient to afford General an opportunity to earn approximately $1,445,003.00 additional annual gross revenues, being approximately 58.44 percent of the amount which had been requested by General. Commissioner Wells filed a dissenting opinion and Commissioner McDevitt filed an opinion dissenting in part and concurring in part. From this order General and the City of Durham appealed.

Newsom, Graham, Strayhorn, Hedrick & Murray, by A. H. Graham, Jr.; and Power, Jones & Schneider, by John Robert Jones and William R. White for General Telephone Company of the Southeast, appellant.

City Attorney Claude V. Jones for City of Durham, appellant.

Attorney General Robert Morgan, by Assistant Attorney General Jean A. Benoy for the Using and Consuming Public, appellee.

Commission Attorney Edward B. Hipp, and Assistant Commission Attorney Maurice W. Horne for North Carolina Utilities Commission.

PARKER, Judge.

The Commission having determined this to be a general rate case, the provisions of G.S. 62-133 became applicable and controlled the further proceedings in the case. Subsection (a) of G.S. 62-133 contains a general direction that in fixing rates

"the Commission shall fix such rates as shall be fair both to the public utility and to the consumer." Subsection (b) of G.S. 62-133 contains more specific directions as follows:

§ 62-133(b) "In fixing such rates, the Commission shall:

(1) Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to paragraph (3) of this subsection the rate of return fixed pursuant to paragraph (4) on the fair value of the public utility's property ascertained pursuant to paragraph (1)."

It is apparent that the first step prescribed by G.S. 62-133(b)(1), that of ascertaining the "fair value of the public utility's property used and useful in providing the service ren-

dered to the public within this State," becomes of critical importance in the rate making process, for only after the determination of this "rate base" can judgment be intelligently exercised fixing the rate of return which the utility is entitled to receive on the fair value of its property and fixing rates to be charged by the utility which are "fair both to the public utility and to the consumer." It is not surprising, therefore, that the first four of the six questions argued in the brief of the appellant, General, on this appeal relate to errors which it contends were made by the Commission in the course of making its determination as to the fair value of General's property "used and useful in providing the service rendered to the public in this State." The first three of the questions presented relate to deductions made by the Commission from the original cost investment made by General in its telephone plant, and the fourth question relates to the method followed by the Commission in finally arriving at its determination of fair value after the deductions were made.

[1] Before discussing the several deductions which the Commission made from General's cost investment in its telephone plant to which General takes exception on this appeal, it may be well to emphasize that the establishment of "the reasonable original cost of the property," as referred to in G.S. 62-133(b)(1), is of significance only because "reasonable original cost" is one of several figures and factors which the statute requires the Commission to consider in arriving at "fair value." As stated by Lake, J., speaking for our Supreme Court in *Utilities Comm. v. Morgan, Attorney General,* 277 N.C. 255, 268, 177 S.E. 2d 405, 414:

> "There is but one rate base—the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, which value the Commission must determine as of the end of the test period. G.S. 62-133. *The original cost of the properties is simply evidence to be considered in making this determination. The replacement cost, whether determined by use of trended cost indices or otherwise, is also but evidence of the fair value of the properties.*" (Emphasis added.)

Although original cost is simply evidence to be considered by the Commission together with other evidence in determining fair value, it was evidence of such importance and had such

a major impact upon the Commission's ultimate finding as to fair value in this case that any substantial error in arriving at original cost would necessarily be of crucial significance. We therefore consider the merits of General's several assignments of error which are directed to the action of the Commission in making the deductions from original cost of its intrastate telephone plant which are brought forward in General's brief on this appeal.

General contends the Commission erred in deducting from its plant investment the sum of $978,000.00 which the Commission, in Finding of Fact No. 7, found was "in regard to the excess profits which are reasonably attributed to its major supplier, Automatic Electric Company." Automatic Electric Company (AE), as is General, is a wholly-owned subsidiary of GT&E and is the major manufacturing and supply company for GT&E affiliated companies and for other non-Bell System telephone companies. Exhibits and testimony presented by the Commission Staff showed that during the period from 1957 through 1969 annual sales from AE to GT&E affiliated companies, including General, increased from approximately $87 million in 1957, which was 52.6% of AE's total sales for that year, to more than $418 million in 1969, which was 74% of AE's total sales for that year. During recent years General's North Carolina division has purchased approximately 85 to 90 percent of its equipment and supplies from AE, and during the twelve-month test period which ended on 31 March 1970, General's North Carolina division purchased 94.2% of its equipment and supplies from AE. Because of the close relationship between General and AE, because of the substantial percentage of its total equipment and supplies which General purchases from AE, and because of the dominant position occupied by AE as the leading manufacturer and supplier of telephone equipment to non-Bell System companies, the Commission, in the order appealed from, concluded that it was "reasonable to deal with Automatic Electric Company and the Applicant for rate making purposes as one company subject to regulation by this Commission." The Commission further concluded that it was "reasonable to subject AE to the same rates of return on common equity as are similar-type non-regulated companies," and that prices charged by AE to General were "unreasonable and excessive to the extent they produce a return higher than 15% on common equity." On the

basis of these conclusions the Commission reduced the cost of General's North Carolina telephone plant by $978,000.00, which amount it found to be "excess profits which are reasonably attributed to its dealings with its major supplier, Automatic Electric Company."

[2, 3] Without finding it necessary to pass on the correctness of the Commission's conclusion that AE and General should be dealt with "for rate making purposes as one company subject to regulation by this Commission," we hold that the Commission had ample authority to inquire into the reasonableness of the prices paid by General for its equipment and supplies purchased from General, and, to the extent it found such prices unreasonable, to reduce the cost basis of General's intrastate telephone plant accordingly. G.S. 62-133(b)(1) directs the Commission, in the process of ascertaining the fair value of a public utility's property, to consider, among other things, "the *reasonable* original cost of the property." (Emphasis added.) Where the property has been purchased from a stranger, ordinarily the price actually paid by the utility would be considered its reasonable cost, though it would not necessarily be so. Even in such a case the Commission may find that the management of the utility acted improvidently or carelessly and paid a price greater than reasonable. In cases such as the one now before us, in which a substantial portion of the utility's property was acquired by purchase from an affiliated company, it becomes obligatory upon the Commission to scrutinize the prices paid and, to the extent it finds such prices unreasonable, to make adjustments in the utility's figures accordingly. This is all the more true where, as here, the affiliated supplier so dominates the market that its pricing policies may not be sufficiently controlled by normal competition. The question, of course, is not so much whether the affiliated manufacturing company is earning "excess profits" on its overall operations, most of which involve transactions outside of North Carolina, as it is whether the prices which it charges the affiliated utility company in North Carolina are reasonable. Where such prices are the same as it charges other affiliated companies to which it makes a majority of its total sales, one method of determining the reasonableness of its prices is to compare its rate of return on common equity with the rates of return experienced by other manufacturing companies operating in similar fields. Essentially this was the method followed by the Commission in the present case, and in this we find no error.

[4, 5] The fact that the prices charged by AE on its sales to General's North Carolina division were the same, or in some instances lower, than prices which it charged Carolina Telephone and Telegraph Company (Carolina), an unaffiliated telephone company in North Carolina, is not, in our opinion, conclusive of the reasonableness of the prices charged to General. The Commission might reasonably find in a case involving Carolina that the prices paid by it were reasonable, since Carolina's management, dealing at arm's length with AE as the dominant supplier in the field, might have insufficient bargaining power to obtain better prices. At the same time the Commission could, in our opinion, also reasonably find these same prices, when paid by General to AE, to be unreasonable. In the one case (sales by AE to Carolina) AE's pricing may reflect some degree of exploitation of its dominant position in the market; in the other case (sales by AE to General) AE's prices are fixed in transactions between two companies, both of which are wholly owned and wholly controlled by the same parent; in neither case do normal competitive factors exert much influence. We find no error in the Commission's action in examining into the reasonableness of the prices paid by General to AE nor in the method which the Commission used in making its determination that such prices were unreasonably high to the extent requiring a reduction of $978,000.00 in the cost basis of General's North Carolina telephone plant as of the end of the test period on 31 March 1970.

[6] The Commission also reduced General's investment in its North Carolina telephone plant in the amount of $690,340.00 for "excess margin in central office equipment in relation to the test period." In this we find error. A public utility has an obligation to furnish reasonably adequate service to the public within the limits of its franchise. It does not fulfill this obligation simply by meeting present needs; its management must attempt to anticipate future needs. This necessarily involves the exercise of judgment and discretion in forecasting future rates of growth in the demand for the utility's services and in making decisions concerning how best to meet those anticipated future demands. Difficult advance planning must be undertaken involving intricate financial, engineering, personnel, and business problems. All of these problems must be solved and the solutions coordinated sufficiently in advance to permit completion of additions to the utility's facilities and plant required to meet the future

growth in demand as that demand develops. And all of this must be done while conditions are continuously and rapidly changing. For engineering and financial reasons, among others, it is only prudent that some types of facilities, among them the central office equipment of a telephone company, should be so designed as to provide capacity in excess of that required when it is first put into service. It is for the management of the utility, not for the Commission or the Courts, to do the difficult advance planning and to solve the intricate problems involved in expansion of the utility's facilities. Nor do we think it proper for the Commission or the Courts, by exercising the wisdom granted them by hindsight, to second-guess the utility's management when it acted in apparent good faith. Nothing in the record before us suggests that General's management did not act in perfect good faith in planning and building the additions to its central office equipment. While that equipment might have provided at the end of the test period capacity in excess of the amount needed at that moment, no question has been raised that it was not in operation at that time, and in our opinion, it was at that time property both "used and useful" by the utility in providing services to the public within this State. This being so, the Commission had no authority to deduct any portion of its costs in arriving at the "reasonable original cost of the property" for consideration by it in making its ultimate determination of fair value.

[7] The Commission also excluded from the cost of General's property the sum of $747,264.00 for plant under construction at the end of the test period on 31 March 1970. In this we find no error. Subsection (c) of G.S. 62-133 is as follows:

> "(c) The public utility's property and its fair value *shall be determined as of the end of the test period used in the hearing* and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time." (Emphasis added.)

This statute is controlling. "Until it is changed by the Legislature, both the Commission and this Court must follow the statute as presently written." *Utilities Comm. v. Morgan, Attorney General,* 278 N.C. 235, 179 S.E. 2d 419.

[8] The fourth question presented by the brief of the appellant, General, on this appeal relates to the method followed by the

Commission in finally arriving at its determination of the fair value of General's telephone plant after it had made the deductions discussed above from the original cost of the plant. In its order, under the heading of "Conclusions," the Commission referred to the method which it utilized in reaching its determination "in regard to Applicant's net investment in plant," referred to the deductions already discussed, and finally arrived at a figure for "Net Investment Plus w/c Adjusted" of $30,107,171.00. (This figure included an allowance for working capital, being materials, supplies, and one month's cash requirements less Federal Income Tax accruals, in the sum of $563,308.00.) In its order the Commission made no finding of fact or conclusion as to the replacement cost of General's telephone plant, which is one of the matters along with "reasonable original cost," and "any other factors relevant," which G.S. 62-133 (b) (1) directs it to consider in ascertaining fair value. It did, however, make a reference in the order to the testimony of Applicant's witness, McGrath, to the effect that during the week of 27 April 1970 he had made a visual inspection of Applicant's plant and equipment and had examined Applicant's books and records in order to arrive at what the witness believed was the replacement cost of Applicant's plant, properties and equipment. The Commission in its order simply noted that the witness, McGrath, testified that "the net trended book cost of plant of the Applicant as of the end of the test period was, in his opinion $49,409,698," and also referred to an exhibit introduced by the Applicant which showed the net trended book cost of the North Carolina intrastate portion of Applicant's plant on that date as $40,781,543.00. No further reference was made in the order to replacement cost except the passing reference in Finding of Fact No. 9, which is as follows:

> "(9) The Commission finds that the fair value of the Applicant's properties used and useful in rendering intrastate telephone service to its North Carolina subscribers, considering original cost less depreciation and considering replacement cost by trending original cost by current cost levels, is $31,913,601."

The order does not reveal how the Commission arrived at the figure of $31,913,601.00 as the fair value of General's properties except the statement in Finding of Fact 9 that it was arrived at "considering original cost less depreciation and con-

sidering replacement cost by trending original cost by current cost levels." We note, however, that as pointed out in General's brief, the fair value figure of $31,913,601.00 found by the Commission is exactly 106% of $30,107,171.00, which latter figure was the Commission's conclusion, as noted above, of General's "Net Investment Plus w/c Adjusted." It is apparent, therefore, that the Commission arrived at its ultimate determination as to the fair value of General's property by first determining original cost and then increasing that figure by 6%. Nothing in G.S. 62-133 supports this method of ascertaining fair value. Even if it did, nothing in the record supports the application of a 6% or any other percentage increment. Despite the Commission's statement in Finding of Fact 9 that it considered replacement cost, it is apparent that it did not do so, unless it assumed *sub silentio* that by increasing original cost exactly 6% it was adequately "considering" replacement cost. Such an assumption hardly seems justified in view of the fact that the only evidence in the record as to replacement cost yielded a figure of $40,781,543.00, which was approximately 35% higher than the Commission's determination as to original cost. We can only conclude, therefore, that the Commission's finding of fair value in this case was not supported by competent, material and substantial evidence in the record and was arrived at by a method which failed to comply with the directives contained in G.S. 62-133(b)(1).

[9] It was, of course, for the Commission to determine what weight to give to the evidence in the record as to replacement cost. "In these times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application." *Utilities Commission v. Gas Co.*, 254 N.C. 536, 550, 119 S.E. 2d 469, 479. The Commission's order in the case before us is silent as to what weight, if any, it gave to the evidence as to replacement cost, since it made no findings in this regard. It was, however, the duty of the Commission to weigh such evidence "fairly in balanced scales," *Utilities Commission v. Gas Co., supra,* and on the present record it does not appear that this was done.

[10-12] By statutory command, G.S. 62-131(b), "[e]very public utility shall furnish adequate, efficient and reasonable service." In the present case there was extensive testimony from

General's customers concerning deficiencies in its service. The Commission's Finding of Fact No. 14 contains the following:

> "The Commission finds that the overall quality of service afforded by the Applicant to its subscribers is on the low side of providing reasonably adequate service. The following specific service improvements are determined to be necessarily required to be completed on or before July 1, 1972:" (There then follows a list of eleven specific types of service improvements.)

The language employed by the Commission is ambiguous, and we cannot clearly determine whether the Commission's finding means that it found General's service to be reasonably adequate, but just barely so, or whether it found General's service to be slightly below being reasonably adequate. If the Commission's finding means that it found the quality of General's service to fall short of the statutory requirement that it be "adequate, efficient and reasonable," then the Commission should make specific findings showing the effect of any such inadequacy upon its decision fixing rates which are "fair both to the public utility and to the consumer." Subsection (d) of G.S. 62-133 directs that "[t]he Commission *shall* consider all other material facts of record that will enable it to determine what are reasonable and just rates." (Emphasis added.) Certainly the evidence of service deficiencies in the present record was such as to provide "other material facts of record" which the Commission by statutory mandate was required to consider in making its determination as to what are just and reasonable rates for the quality of service which the Applicant utility is providing its customers in the present case. As stated by Justice Lake, speaking for our Supreme Court in *Utilities Comm. v. Morgan, Attorney General,* 277 N.C. 255, 267, 177 S.E. 2d 405, 413:

> "The ultimate question for determination is, What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future? The determination of this question is for the Commission, in accordance with the direction of G.S. 62-133. Serious inadequacy of such service found by the Commission upon substantial evidence, is one of the facts which the Commission is required by that statute to take into account in making that determination."

Specific and unambiguous factual findings by the Commission are necessary to enable a reviewing court to determine whether the duty imposed by statute has been performed.

General also contends that the rate of return of 7.53% fixed by the Commission upon its finding of fair value of General's property was arbitrary and capricious and was insufficient to produce a fair profit for its stockholder. In view of the fact that the appropriate rate of return can only be determined after the fair value of the utility's property is correctly ascertained, and in view of our decision that this case should be remanded to the Commission for further consideration and fixing of fair value in accordance with the principles set forth above, we do not on this appeal pass upon the merits of General's contentions that the Commission committed error in fixing a rate of return of 7.53%.

We have examined the remaining assignments of error brought forward in the briefs of both appellants, General and the City of Durham, and find in them no prejudicial error.

The order of the Utilities Commission is reversed and this matter is remanded to the Utilities Commission for further consideration in accordance with the principles set forth in this opinion, such further consideration by the Commission to be either upon the present record or after such further hearing as the Commission shall deem proper.

Reversed and remanded.

Judges BRITT and MORRIS concur.

SANDRA BALLARD, A MINOR, BY HER NEXT FRIEND, MRS. FRANCES SMITH v. JACK H. HUNTER AND FLORENCE HUNTER; AND JOSEPH B. WILSON AND NORMA W. WILSON

No. 7126SC720

(Filed 17 November 1971)

1. **Infants § 5— protection of rights of minor plaintiffs — confession of judgment in favor of minor — approval by trial judge**

A purported "Confession of Judgment" whereby the defendants in an automobile accident case confessed the sum of $10,000 to a minor plaintiff in discharge of their obligations arising out of the accident *is held* a nullity where the judgment was not investigated and approved by a judge of the superior court; the judgment was not given validity by the trial judge's awarding of a fee to plaintiff's attorney out of the $10,000 or by the guardian's receipt of the balance of the $10,000.

2. **Torts § 7— rights of tort-feasors — satisfaction of confession of judgment in favor of one defendant**

An invalid "Confession of Judgment" entered by two defendants in an automobile accident case, and the acceptance of the proceeds of the judgment by the plaintiff's guardian, could not authorize the trial judge to enter summary judgment in favor of another defendant on the ground that the "Confession of Judgment" had been satisfied within the meaning of G.S. 1B-3(e), the Uniform Contribution Among Tort-Feasors Act.

3. **Infants § 5— judgment negotiated by guardian of minor — approval of court**

A judgment or compromise settlement negotiated by a next friend or guardian without the investigation and approval of the court is invalid.

APPEAL by plaintiff from *Thornburg, Judge,* 24 May 1971 Schedule "D" Session of Superior Court held in MECKLENBURG County.

This civil action was commenced 16 October 1969, by next friend, to recover damages for personal injuries sustained by the minor plaintiff, Sandra Ballard, in an automobile accident on 24 September 1967. It was alleged that the plaintiff's injuries were proximately caused by the negligence of all of the defendants while she was a passenger in an automobile owned by the defendants Hunter which collided with an automobile owned by the defendants Wilson. The plaintiff alleged damages in the amount of $50,000.

On 8 December 1969, the defendants Hunter and their insurance carrier, Hartford Accident and Indemnity Company, filed an instrument denominated a "Confession of Judgment," admitting liability to the plaintiff in the amount of $10,000 and stating:

> "At the date, place and time of the accident, the defendants, Jack H. Hunter and Florence Hunter, had in full force and effect policy number 220F397117 with Hartford Accident and Indemnity Company with a maximum limit of $10,000.00 recovery for any one person involved in an accident. Both the individual defendants, Jack H. Hunter and Florence Hunter, as well as the insurance carrier, Hartford Accident and Indemnity Company, believe *that the nature and extent of the injuries and damages sustained by the minor plaintiff far exceed the total liability insurance coverage of $10,000.00 as referred to above.* As these affiants are informed and believe and upon such information and belief allege, the sum of over $4,000.00 has been incurred to date for the hospital, medical, nursing and drug bills. As your affiants are further informed and believe and upon such information and belief allege, *the minor plaintiff received serious and disabling head injuries causing her to revert to childhood whereas the minor plaintiff is now 20 years of age.*
>
> * * *
>
> Pursuant to the provisions of North Carolina General Statute 1-248, this verified statement *is being submitted* so as to authorize the entry of a total judgment in the lump sum of $10,000.00 *in full and final discharge of any and all obligations on behalf of the individual defendants, Jack H. Hunter and Florence Hunter,* and their insurance carrier, Hartford Accident and Indemnity Company. The sum of $10,000.00 is confessed herein as the maximum and only amount for which there shall be an entry of judgment, and the sum of $10,000.00 is justly due and owing to the plaintiff arising out of and as a result of the accident referred to in paragraph 3 above." (Emphasis added.)

This "Confession of Judgment" was on 8 December 1969 "indorsed" by an assistant clerk of the Mecklenburg County Superior Court who stated in his "indorsement" that:

"Based upon the foregoing Confession of Judgment and pursuant to General Statute 1-248, it is therefore, ORDERED that the plaintiff, Sandra Ballard, a minor, by her next friend, Mrs. Frances Smith, *is entitled to have entered a judgment* against the defendants, Jack H. Hunter and Mrs. Florence Hunter, in the sum of $10,000.00 with $4.00 costs, together with disbursements." (Emphasis added.)

(We note that this "indorsement" does not of itself purport to be a judgment.)

On 18 December 1969, plaintiff's attorney filed a petition to request that attorney fees be paid to him, alleging that he had a contract with the plaintiff providing for a fee of one-fourth of any sum recovered prior to the actual trial of this action. It was further set out:

"2. That two of the defendants, Jack H. Hunter and Florence Hunter, pursuant to the provisions of North Carolina General Statute 1-248 submitted to the Clerk of Superior Court of Mecklenburg County and there was entered by the Clerk of said Court a Confession of Judgment on November 21, 1969.

3. By the terms of the Confession of Judgment, the defendants, Jack H. Hunter and Florence Hunter, by and with the consent of their insurer, Hartford Accident and Indemnity Company, tendered the sum of $10,000.00 in conformity with the Confession of Judgment. The sum of $10,000.00 is now on deposit in the office of the Clerk of Superior Court for Mecklenburg County, North Carolina."

In this petition, plaintiff's attorney prayed that "an Order be entered by a Judge of the Superior Court Division authorizing and empowering the Clerk of Superior Court for Mecklenburg County, North Carolina, to pay to Warren C. Stack, Attorney, the sum of $2,500.00 as the total fee to be received by said attorney out of the $10,000.00 now on deposit in the office of the Clerk of Superior Court."

The next friend joined in the petition of the attorney and consented to the following order entered by Judge Copeland on the same date:

"THIS CAUSE coming on to be heard and being heard before the undersigned Judge and it appearing to the Court

that a Confession of Judgment has been entered and that there is now on deposit the sum of $10,000.00 in the office of the Clerk of Superior Court for Mecklenburg County and it further appearing to the Court that the plaintiff's attorney had a contingent fee arrangement which provided for a one-fourth fee in the event of the settlement of the case before actual trial.

It is, therefore, ORDERED, ADJUDGED, AND DECREED as follows:

1. The Clerk of Superior Court for Mecklenburg County, North Carolina shall pay from the $10,000.00 now on deposit a fee in the sum of $2,500.00 to Warren C. Stack, Attorney of Record for the above named plaintiff. The payment as made by the Clerk shall constitute payment in full for that portion of the attorney's fee allocated to the present recovery of $10,000.00."

There also appears in the record on appeal under the heading "Certificate as to Records," the following:

"I, the undersigned Clerk of Superior Court of Mecklenburg County, do hereby certify that the following appears on Page 106 of Judgment Book 7 of the records of the Clerk of Superior Court of Mecklenburg County:

Attorneys	*Case*
Warren C. Stack	Sandra Ballard, Minor By n/f Mrs. Frances Smith
69-CVS-8543	Jack H. Hunter and Florence Hunter

Docketed at: 2:15 p.m. December 8, 1969

Abstract of Document
North Carolina, County of Mecklenburg

The liability of Jack H. Hunter, al, to Sandra Ballard bnf for $10,000.00 Dollars plus interest at ____% on $_____ from the _____ day of _____, 19_____, and costs, was

established by Confession of Judgment dated the 8 day of Dec., 1969.

Signed—Willie P. Gibson

$10,000.00	$30
Total Principal	Costs

Received of defendant $10,000.00 THE HARTFORD INSURANCE GROUP #445970 in full principal, interest and cost this judgment. This 8 day of DEC., 1969.

/s/ Martha McIlroy
Deputy Clerk Superior Court

Received of Robert M. Blackburn, CSC, $2,500.00, Atty. fee.

/s/ Warren C. Stack
Atty. for plaintiff

Witness:
Carolynne M. Henderson, D.C.

Received of Robert M. Blackburn, CSC, $7,492.50 in full principal, interest and cost this judgment and same is hereby satisfied and canceled. This 12th day of Jan., 1970.

/s/ Sandra Ballard Minor
/s/ Kenneth R. Downs Guardian"

On 19 March 1970, the defendants Wilson filed a "Motion for Summary Judgment Under Rule 56," setting out the purported "cancellation" of the confessed judgment on 12 January 1970 and alleging that plaintiff's claim against them was barred by the provisions of Section 1B-3(e) of the North Carolina General Statutes. The motion of the defendants Wilson was granted and judgment entered thereon by Judge Thornburg on 28 June 1971. The plaintiff excepted and appealed.

Warren C. Stack for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by John G. Golding for defendant appellee.

MALLARD, Chief Judge.

[1] G.S. 1B-3(e) of the Uniform Contribution among Tort-Feasors Act provides:

> "The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The *satisfaction of the judgment* discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution." (Emphasis added.)

The question for decision on appeal, therefore, is whether there was a valid judgment as to the defendants Hunter, accepted by the plaintiff and "satisfied" within the meaning of the statute. We hold that there was not.

Whether we view the instrument submitted by the defendants Hunter, and the subsequent clerical entries, as a "Confession of Judgment," "Offer of Judgment" or "Consent Judgment" under the statutes in effect at the time, or merely as an attempted compromise or settlement, the result is the same: It was in the nature of an *offer* by the defendants Hunter to the plaintiff to settle her claim for a lesser amount than was claimed to be due and could not bind the minor plaintiff unless accepted on her behalf by someone authorized and empowered by law to do so. See 2 McIntosh, N. C. Practice 2d, § 1684, wherein it is stated:

> "A *confession of judgment without action* is a consent judgment . . . . * * * The judgment depends upon the consent of the parties, and the court gives effect to it as the agreement of the parties. It would not be valid unless the parties consented, nor could it affect one who was not a party. Since its validity is based upon the contract of the parties, there must be the authority and capacity to contract. *In the case of infant parties, the next friend, guardian ad litem or guardian cannot consent to a judgment or compromise without the investigation and approval by the court.*" (Emphasis added.)

See also *The Lessee of Livingston, et al v. Moore, et al,* 7 Pet. (32 U.S.) 469, 8 L. Ed. 751 (1833) and 5 Strong, N. C. Index 2d, Judgments, § 8.

In the present case the record does not indicate that the "Confession of Judgment" by the defendants Hunter was pre-

sented to a judge of the superior court for approval, nor does an investigation or approval appear. It does appear that the minor plaintiff's attorney petitioned the court for and was granted an award of counsel fees from the amount deposited by the defendants Hunter and that the balance of the amount deposited, less certain costs, was paid to the minor's duly appointed guardian. Nevertheless, such transactions were improper, and the "Confession of Judgment" and subsequent clerical entries were ineffective to bind the minor plaintiff in the absence of the requisite investigation and approval by the court.

[2, 3] The provisions of G.S. 1-248 in effect at the time and under which the assistant clerk of the Superior Court of Mecklenburg County purported to act on 8 December 1969 did not authorize him to enter a judgment herein. The subsequent petition of plaintiff's attorney and her next friend for "attorney fees," the order of Judge Copeland awarding such fees, and the guardian's receipt of the balance of the money deposited by the Hunters in the clerk's office could not and did not ratify and give validity to the purported judgment. A judgment or compromise settlement negotiated by a next friend or guardian without the investigation and approval of the court is invalid. *Trust Company v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489 (1962); *Johnston County v. Ellis,* 226 N.C. 268, 38 S.E. 2d 31 (1946); *Butler v. Winston,* 223 N.C. 421, 27 S.E. 2d 124 (1943); *Ferrell v. Broadway,* 126 N.C. 258, 35 S.E. 467 (1900); *Hagins v. Phipps,* 1 N.C. App. 63, 159 S.E. 2d 601 (1968) and 4 Strong, N. C. Index 2d, Infants, § 5.

We do not deem it necessary to reiterate at length the familiar doctrine in this State that the courts are vigilant in the protection of the interest of infants.

In *Oates v. Texas Company,* 203 N.C. 474, 166 S.E. 317 (1932), the Supreme Court upheld the validity of a prior judgment in favor of a minor plaintiff specifically on the grounds that "(h)ere the judgment recites an investigation by the trial court and a finding that the settlement was just and reasonable." There is no such recital or finding in the present case. Due to the absence in the record on appeal of anything to disclose an "investigation and approval by the court," the purported judgment in favor of the minor plaintiff, Sandra Ballard, is a nullity and its purported "cancellation" by her guardian is of no effect. Where the prior judgment is invalid, there can be no effective

"satisfaction" of it within the meaning of G.S. 1B-3(e). Therefore, the trial judge committed error when he entered judgment in favor of the defendants Wilson, granting their motion for summary judgment on the grounds that the action against them was barred under the provisions of G.S. 1B-3(e).

Reversed.

Judges HEDRICK and GRAHAM concur.

JAMES H. LANGLEY AND WIFE, NELLIE LANGLEY v. WADE H. HELMS, T/A HELMS CONSTRUCTION COMPANY

No. 7126SC697

(Filed 17 November 1971)

1. **Contracts § 26— defects in home construction — testimony by contractor**

In this action for breach of a home construction contract, the trial court did not err in the admission of testimony by plaintiffs' witnesses, a general contractor, as to defects observed by him in plaintiffs' home and what, in his opinion, caused them and whether the work in a particular instance was done in a good and workmanlike manner.

2. **Contracts § 27— breach of construction contract — faulty workmanship**

Plaintiffs' evidence was sufficient to be submitted to the jury on the issue of defendant's breach of a home construction contract by failing to do some of the construction work in a good and workmanlike manner.

3. **Contracts § 23— construction contract — waiver of breach — latent defects**

An acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner is ignorant at the time of acceptance or which may appear thereafter.

4. **Contracts § 25— breach of contract — issues**

In this action for breach of a home construction contract, the trial court did not err in refusing to submit an issue tendered by defendant which was not determinative of the rights of the parties.

5. **Contracts § 21— construction contract — workmanlike manner**

An agreement to construct a building in a workmanlike manner extends to the materials used in the construction, not just to the work and labor in placing such materials.

APPEAL from *Thornburg, Special Judge,* 17 May 1971, Schedule D Session, MECKLENBURG Superior Court.

Plaintiffs seek to recover damages allegedly resulting from defendant's breach of contract. The complaint alleges, in substance except where quoted, that plaintiffs and defendant entered into a contract for the purchase of a house which defendant, a contractor, was then building. The contract provided "that the house has been and will be constructed in a good and workmanlike manner and in accordance with the plans and specifications under which construction was commenced . . ." Plaintiffs paid the contract price. "(I)n the construction of the home for the plaintiffs, the defendant wrongfully failed to follow the plans and specifications and did some of the construction work in a defective and unworkmanlike manner, which contract deficiencies are as follows:" There follow 19 separately alleged deficiencies.

By answer, defendant denied the material allegations of the complaint, averred that he fully complied with the terms of the contract and that plaintiffs were fully aware of construction progress and accepted the house upon completion having had sufficient opportunity for inspection. Defendant counterclaimed for $500 for extra materials and labor furnished not contemplated by the contract and for which plaintiffs had refused to pay. No evidence was offered on the counterclaim, and no issue thereon tendered by defendant.

The jury answered the issues submitted in favor of plaintiffs, and defendant appealed.

Farris and Mallard, by E. Lynwood Mallard, for plaintiff appellees.

O. W. Clayton and H. Parks Helms for defendant appellant.

MORRIS, Judge.

Plaintiff testified in substance, except where quoted, as follows: When he entered into the contract with defendant, the house was almost completed. After defendant quoted a price to them, they told him if he would build a driveway, panel the den, wallpaper the bathroom, put in a paved driveway turn around, and make a few other alterations which plaintiffs wanted, they would buy the house. Defendant subsequently had an agreement prepared stating the price as $26,500 and listing the changes to be made. This agreement was executed by the parties. It provided, among other things: "Builder agrees that the house has

been and will be constructed in a good and workmanlike manner and in accordance with the plans and specifications under which construction was commenced with the above modifications." Defendant, at the time the transaction was closed, agreed that he would grade the driveway so cars would not "drag" when they went in the drive. That was the only defect he mentioned at the closing and at that time the driveway was covered with dirt and straw. After plaintiffs moved in, they discovered that the driveway had big holes in it caused by its sinking after it was poured. After they had been in about a week washing machine water started coming up in the yard and about a week later small puddles of "stinking, stagnant" water appeared in the back yard. Defendant came and looked and had a man come to fix it. The man sent by defendant poured red dirt on top of the location of the septic tank and on the about 10-foot area of ponding which was about 30 feet from the septic tank. When the first rains came thereafter the same trouble reappeared. Defendant first said he would fix it and later refused to, so plaintiff had the necessary work done in accordance with directions of the Health Department. In the early spring they noticed that the furnace's coming on caused a couch in the den to "vibrate." Upon inspection, it appeared that the den floor had sunk about two inches at one end. Defendant said he would have to put steel posts or jack posts in to take the pressure off the furnace pipes and try to get the floor back up, but nothing has been done. At the other end of the den the wall between the kitchen and the den was bowing out into the kitchen and several of the inside doors in the bathroom and bedrooms were sticking. In the den where the sheetrock came together in the ceiling it was sinking. Sometime after moving in, when the family was cooking popcorn, an attempt was made to use the vent over the stove in the kitchen but it did not work. Upon inspection in the attic and by running a ruler up the vent, it was discovered that it wasn't vented at all. Shortly after they moved in some water was spilled on the kitchen cabinet and soaked into the wood. Defendant came over and said no sealer had been put on. Defendant had that done but did not afterwards refinish them and they are rough. The floor covering in the kitchen appeared to be all right when they moved in but later, upon closer inspection from a seated position, it appeared that the covering lacked half or three-quarters of an inch going to the molding, doors and heat registers. About a month after he moved in nail pops began to appear

on the walls and ceilings. On two different occasions, defendant sent someone to repair these, and they beat them down with a hammer and put a coat of some kind of sealer at the place where the nail pops were. There are four to eight on each two-by-four. By January of 1969 there was a two-by-four coming through the outside wall into the living room, it having broken through the wall and was sticking through about an inch. In the master bedroom, the ceiling has sagged or bowed, and this condition became noticeable about four months after they moved in. The ceilings on the front and back porch are in the same condition. The broken tile on the back porch is loose. The molding around the ceiling on the porches has "big globs" of paint all over it. Shortly after moving into the house, he noticed that rain water came down between the gutter and the house. All of these conditions developed within the first year after they moved in but have not gotten any worse. Defendant had told him that he made no money on the house and had done all he could do. Plaintiff had gotten Mr. Lamont Ervin to come and look at the defects and give him an estimate on what it would cost to repair these conditions.

[1] Assignments of error Nos. 1 through 12 and 14 through 24 are all addressed to the admission of certain testimony of Lamont Ervin who testified that he had been in the contracting business in Charlotte for some 21 years, had held a North Carolina State license since 1950, and was in the carpentry business before becoming a general contractor. He further testified that most of his contracting work was in Mecklenburg County. The witness testified that he had been to plaintiffs' house on two occasions at the request of plaintiffs "to look at his house and to check it out with him to see how the house was constructed." He stayed more than an hour each time. He was allowed to testify, over objection, as to defects observed by him and what, in his opinion caused them and whether, in his opinion, the work in a particular instance was done in a good and workmanlike manner. We think the evidence competent and admissible, and these assignments of error are overruled.

[2] By assignments of error Nos. 25, 26, and 27 defendant contends that the court erred in refusing to grant his motion for a directed verdict at the close of plaintiffs' evidence and renewed at the close of all the evidence, in refusing to grant defendant's motion for judgment n.o.v., and in refusing to grant

defendant's motion for a new trial. The grounds for defendant's motion were that plaintiffs had failed to show (1) a violation of the contract, (2) a failure of defendant to construct the house in accordance with the plans and specifications, and (3) that defendant failed to construct or complete the house in a workmanlike manner. While plaintiffs alleged breach of the contract in two respects; i.e., failure to follow the plans and specifications and also that defendant failed to do some of the construction work in a good and workmanlike manner, the only theory pursued at trial was the latter. This basis of the action at trial was the failure to construct, in some respects, in a good and workmanlike manner. In our opinion, the evidence is sufficient for submission of such an issue to the jury and would allow, but not compel, the jury to find that defendant did breach the contract. See *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E. 2d 476 (1968). These assignments of error are overruled.

[3] Assignment of error No. 33 challenges the correctness of the court's ruling on defendant's motions to dismiss plaintiffs' action with respect to the condition of the vent over the stove, the condition of the kitchen cabinets and the condition of the floor covering in the kitchen. These motions the court denied but allowed motions with respect to the condition of the gutters and downspout at the rear of the house and the condition of the molding on the porches. Plaintiffs admit acceptance of the house but contend the defects about which they complain were latent and not discoverable by inspection. We agree that the defects as to gutters, downspouts, and molding on the porches were discoverable. "An acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner was ignorant at the time, or which may appear thereafter." *Cantrell v. Woodhill Enterprises, Inc., supra,* at 496, quoting from *City of Seaside v. Randles* (Oregon), 180 P. 319. There was sufficient evidence upon which a jury could find that the three defects as to which motions were denied were latent defects not discoverable by reasonable inspection.

[4] Defendant tendered an issue as follows: "Did Helms Construction Company fail to construct the house of the plaintiffs in a good and workmanlike manner and in accordance with the plans and specifications under which construction was commenced with the modifications as agreed upon?" The court re-

fused to submit this issue, and submitted three issues: (1) Whether there was a contract, (2) If so, did defendant breach the contract, and (3) Damages. Plaintiffs did not pursue the allegation of breach by failure to follow the plans and specifications. Defendant assigns as error the refusal of the court to submit the tendered issue. The issues as submitted were so framed as to present the material matters in dispute upon instructions by the court as to what would constitute a breach. The issue tendered was not determinative of the rights of the parties, because the plans and specifications were not in evidence, nor was any evidence presented by plaintiffs with respect thereto, that theory having been abandoned by plaintiffs. This assignment of error is without merit.

[5] Defendant submitted to the court a requested instruction which was refused by the court. This refusal defendant assigns as error No. 29. This instruction, in substance, was that the obligation of the builder to construct the house in a good and workmanlike manner does not extend to the materials used in the construction of the building but applies only to the work and labor in the application and placing of such materials; that the plans and specifications are not in evidence; therefore, there is no guide to be used in determining the grade or standard of the materials used or to be used; and therefore, the jury would consider only the evidence pertaining to the manner in which the work was performed and not consider any evidence concerning the materials used in the construction of the building. While we agree with defendant that the builder is not an absolute insurer, we do not agree that an agreement to construct in a good and workmanlike manner would completely exclude the undertaking to protect the purchaser or owner against the use of bad and unsuitable material in doing the work undertaken. This assignment of error is overruled as are Nos. 31 and 32 which are closely akin, and are addressed to the failure of the court to declare and explain the law with reference to the contract provision that the house would be constructed in accordance with the plans and specifications.

Our examination of defendant's 33 assignments of error reveals no prejudicial error and, therefore, no reason for disturbing the verdict and judgment of the trial tribunal.

No error.

Judges PARKER and VAUGHN concur.

EUGENE C. BROOKS III v. ALICE M. BROOKS

No. 7114DC610

(Filed 17 November 1971)

1. **Appeal and Error § 57; Rules of Civil Procedure § 52— review of findings — sufficiency of evidence**

Where the trial court finds the facts, the question of the sufficiency of the evidence to support the findings may be raised on appeal. G.S. 1A-1, Rule 52.

2. **Appeal and Error § 57— findings of fact — appellate review**

The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been submitted.

3. **Divorce and Alimony § 19— increase in alimony — changed circumstances**

The trial court did not err in increasing the amount of permanent alimony payments per month to defendant upon finding substantial changes in the circumstances of defendant. G.S. 50-16.9(a).

4. **Divorce and Alimony § 23— child support — separate designation for each child**

The trial court is not required to designate separately the amount of support payments for each child rather than designating a total amount for all of the children for whom the payments are to be made. G.S. 50-13.4.

5. **Divorce and Alimony § 24; Infants § 9— child custody — discretion of court**

The decision to award custody of a minor is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

6. **Divorce and Alimony § 24; Infants § 9; Parent and Child § 6— child custody — father's common law right**

In awarding custody of a minor child, the welfare of the child is the paramount consideration to which all other factors, including the common law preferential rights of the father, must be deferred or subordinated.

7. **Divorce and Alimony § 24; Infants § 9— child custody — wishes of child**

The trial court did not err in awarding custody of a 16-year-old child to his mother, notwithstanding the child expressed a desire to be in the custody of his father, since the child's preference is only a factor for the court to consider and is not controlling.

8. **Divorce and Alimony § 24; Infants § 9— child custody — findings of fact — wishes of the child**

Failure of the court in a custody proceeding to include a finding of fact as to the preference of the child is insufficient to upset its order of award.

APPEAL by plaintiff from an Order of *Moore, District Judge,* filed on 18 March 1971, and from an Order of *Lee, District Judge,* filed 31 March 1971.

Plaintiff instituted this action on 23 January 1969 seeking an absolute divorce from defendant and seeking a determination of custody and support of the three children born of the marriage. Defendant answered seeking permanent alimony, alimony *pendente lite,* custody of the three children, support for the three children, and counsel fees.

The matter came on for initial hearing in the District Court on 8 October 1969 at which time a consent Order was entered requiring plaintiff to make monthly payments of $450.00 for the support of the three children and $150 for permanent alimony. The consent Order further provided that defendant would have custody of the two minor girls, and that the matter of the custody of Eugene Clyde Brooks IV should be left open for future determination. On 9 October 1969 plaintiff was awarded an absolute divorce.

Thereafter the matter remained dormant until 10 December 1970 at which time defendant filed a motion in the cause asking for an increase in the monthly payments of alimony and the monthly payments for support of the children. On 21 December 1970 a hearing was conducted upon defendant's motion by Judge Moore culminating in the Order filed on 18 March 1971. This Order filed 18 March 1971 modified the 8 October 1969 Order to the following extent: required an increase in permanent alimony payments from $150.00 monthly to $250.00 monthly; provided that the support payments for the three children should remain $450.00 per month; required payment by plaintiff of counsel fees to defendant's counsel; and adjudged plaintiff to be in contempt for failure to make payments as required by the 8 October 1969 Order; however, no punishment was prescribed for said contempt.

After the hearing on 21 December 1970, but before entry of the Order resulting therefrom, plaintiff filed a motion in the

cause seeking custody of Eugene Clyde Brooks IV and seeking a specific designation by the Court of the amount of the $450.00 per month custody payment attributed to each of the three children. A hearing was conducted upon plaintiff's motion on 19 March 1971 culminating in an Order filed on 31 March 1971. This Order filed on 31 March 1971 found that both plaintiff and defendant were fit and proper persons to have custody of Eugene Clyde Brooks IV; but, upon a finding that the best interest and welfare of said minor would be served thereby, awarded custody to defendant.

Plaintiff appealed from the Order filed 18 March 1971 and the Order filed 31 March 1971.

Claude V. Jones for plaintiff.

Brogden & Brogden, by Blackwell M. Brogden, for defendant.

BROCK, Judge.

Plaintiff-appellant brings forward six assignments of error from the Order of Judge Moore filed 18 March 1971 and the Order of Judge Lee filed 31 March 1971.

Plaintiff groups assignments of error Nos. 1, 2, 3, and 5 under the argument in his brief labeled No. 1 which is as follows: "Is Alice M. Brooks entitled to an increase in alimony payments as ordered by the court as per judgment of E. Lawson Moore dated December 21, 1970?"

In assignment of error No. 1, the plaintiff objects and excepts to the Order of Judge Moore dated 21 December 1970, but filed 18 March 1971, claiming that the Order is contrary to the evidence in the record and unsupported by law. In assignment of error No. 2, the plaintiff objects and makes the same attack on the Order of Judge Lee filed 31 March 1971.

[1, 2] After examining the record and the Orders of both Judge Moore and Judge Lee, these two assignments of error are without merit. It is the rule in North Carolina where the trial court finds the facts that the question of the sufficiency of the evidence to support the findings may be raised on appeal. See G.S. 1A-1, Rule 52 of the Rules of Civil Procedure. It is also a well-established rule in North Carolina that: "The court's findings of fact are conclusive if supported by any competent

evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been submitted. . . . " 1 Strong, N.C. Index 2d, Appeal and Error, § 57, pp. 223-224. In our opinion the evidence supports the findings of fact and the findings of fact support the Orders entered.

Appellant's assignment of error No. 3 is based on plaintiff's exceptions No. 2, No. 9 and No. 17 which are effectively directed to the Judgment dated 8 October 1969, from which there was no appeal. This assignment of error is feckless.

[3] Plaintiff-appellant's assignment of error No. 5 dealing with the increase in permanent alimony payments per month to the defendant is without merit. G.S. 50-16.9(a) authorizes a modification of an Order for permanent alimony even though entered by consent. In the Order filed 18 March 1971, Judge Moore found substantial changes in the circumstances of defendant.

[4] In the second argument of the plaintiff's brief, he asserts that the trial court erred in not segregating the support payments for the three children born of the marriage as the plaintiff is entitled to know exactly what amounts of money he is obligated to pay for the support of each of his minor children. He contends that G.S. 50-13.4 makes it mandatory upon the trial judge to allocate support payments for a child and not for the children as a group. We do not agree. G.S. 50-13.4(e) states in part: "In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance." The allowance to be separated in the order are the support payments for the minor child or children from the amount ordered for alimony or alimony *pendente lite* payments. The law does not require the trial court to designate the amount of support payments for each child; although, such designation may prove helpful to simplify any future adjustments or modifications. The plaintiff complains that he should know and is entitled to know the amount of support for each child in order that he may stop payment once any of his children reach majority. However, this is not a decision for the plaintiff, or one in his circumstances; rather it is a decision for the courts. The plaintiff's relief when this situation occurs is set out in G.S. 50-13.7(a).

The plaintiff's third and last contention is based on assignments of error No. 9 and No. 10. This contention is that the court erred in awarding the legal custody of Eugene C. Brooks IV to the defendant, Alice M. Brooks, under the facts appearing in the record. The plaintiff maintains that the father of a minor child is its natural guardian and his right of control over the child is superior to that of the mother.

There is no jurisdictional question raised about the court having jurisdiction over the child, Eugene C. Brooks IV. The matter of his custody had been left open. Therefore, G.S. 50-13.2(a) applies. This statute states: "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child."

[5] The guiding principle to be used by the court in a custody hearing is the welfare of the child or children involved. While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. *Greer v. Greer,* 5 N.C. App. 160, 167 S.E. 2d 782 (1969).

[6] Although at one time under the common law the father was generally entitled to the custody of his minor child or children as the plaintiff contends, this seems today to be a relic of the past. The courts at the present time almost invariably adhere to the principle that the welfare or best interest of the child is the paramount consideration. This was the rule adhered to by our Courts for many years, and is now prescribed by G.S. 50-13.2.

In *Griffith v. Griffith,* 240 N.C. 271, 278, 81 S.E. 2d 918, 923, (1954), our Supreme Court said that "the welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents, must be deferred or subordinated . . . "

[7] The plaintiff-appellant further contends that as a matter of law Eugene C. Brooks IV is entitled to have his wishes followed and abided by the court concerning the parent with whom he desires to live and to make his home. The record does

show that Eugene C. Brooks IV, who was 16 years old at that time, desired to be in the custody of his father and that this desire was corroborated by Rev. W. B. Pettaway. However in light of this fact, the awarding of custody of Eugene C. Brooks IV to his mother by the trial court is not error as a matter of law.

When the child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. *Harris v. Harris,* 115 N.C. 587, 20 S.E. 187. Although the preference of a child of discretion would seem to have its greatest weight when the controversy is between the parents and both are fit persons, the child's wishes are only entitled to consideration and are not controlling. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73.

[8] In other words, the child's wishes will be one factor considered by the court in determining its custody, usually not because of any legal right in the child to have its wishes granted, but because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child. Even the failure of the lower court to include a finding as to the preferences of the minor child, as the case at bar, is insufficient to upset its order of award. *Hinkle v. Hinkle, supra.*

In our opinion the findings of fact by Judge Moore and Judge Lee are based upon competent evidence, and are sufficiently detailed to support the two Orders as entered. Both of the Orders appealed from are

Affirmed.

Judges PARKER and GRAHAM concur.

ANNIE NEAL STEVENSON, SISTER; CURTIS DANIELS, BROTHER; ALFRED DANIELS, BROTHER; O'NEAL DANIELS, DECEASED EMPLOYEE v. CITY OF DURHAM, EMPLOYER; SELF-INSURER

No. 7114IC497

(Filed 17 November 1971)

Master and Servant § 79— workmen's compensation — death benefits — next of kin — brothers and sisters

The definition of "brother" and "sister" contained in G.S. 97-2(12) applies to those words as used in the definition of "next of kin" in G.S. 97-40 prior to its amendment effective 1 July 1971; consequently, two brothers and a sister of a deceased employee who were all over the age of 18 and married at the time of the employee's death were not entitled to "next of kin" compensation under the Workmen's Compensation Act.

Chief Judge MALLARD dissenting.

APPEAL by claimants from Opinion and Award of the North Carolina Industrial Commission filed 1 April 1970.

There was no dispute as to the facts, and the Commission adopted the stipulations of the parties which are summarized as follows:

At the time of the death of O'Neal Daniels, an employer-employee relationship existed between him and the defendant. The defendant was a self-insurer. The death resulted from an injury by accident arising out of and in the course of the employment on 18 September 1969. Defendant paid $500.00 for funeral expenses to the administratrix of the estate. Deceased left surviving no wife, children, parents or dependent of any kind. Deceased was survived by two brothers and one sister, all of whom were over the age of eighteen and married at the time of the death of deceased.

The Commission held that under the decision of *Jones v. Sutton,* 8 N.C. App. 302, 174 S.E. 2d 128 (1970), G.S. 97-40, should be construed in *pari materia* with G.S. 97-2(12), and when so construed the claimants were not next of kin and therefore no compensation was due or payable on account of the death of the deceased employee, O'Neal Daniels, except the burial expenses not exceeding $500.00 which had already been paid.

From this opinion and award the claimants appealed.

Mason H. Anderson for claimant-appellants.

C. V. Jones and S. F. Gantt by S. F. Gantt for employer-appellee.

CAMPBELL, Judge.

As stated in the record, "The question presented by the appeal is as follows: Does the definition of brothers and sisters set out in N.C. § 97-2(12) apply to the definition of 'next of kin' set out in N.C. § 97-40?"

A similar question was presented to this Court and decided in the case of *Jones v. Sutton,* 8 N.C. App. 302, 174 S.E. 2d 128 (1970), and this Court, speaking through Judge Britt, held that G.S. 97-2(12) defined a person over eighteen at the time of father's death as not a child and therefore is not "next of kin" as defined in G.S. 97-40. We think that case is controlling in the present matter.

The appellants, in a very persuasive brief, "urge this Court to reconsider its decision in the JONES case."

The *Jones* case was filed 27 May 1970. The 1971 amendment did not become effective until 1 July 1971 which was after the death in this case. We think the *Jones* case properly construed the Workmen's Compensation Act and correctly held that G.S. 97-40 should be construed in *pari materia* with G.S. 97-2(12). We feel strengthened in this view by the fact that the Supreme Court of North Carolina in *Horney v. Pool Co.,* 267 N.C. 521, 148 S.E. 2d 554 (1966), stated:

> " . . . It is noted that G.S. 97-40 was amended in 1965 (Session Laws of 1965, Chapter 419) so that, *under certain circumstances,* the father, mother or sister of a deceased employee, without reference to dependency, would be entitled to receive death benefits under the Workmen's Compensation Act. . . . " (Emphasis added.)

We are of the opinion that this is not one of the "certain circumstances" when brothers and sisters are entitled to receive death benefits. We adhere to our previous position in the *Jones* case and hold that G.S. 97-40 must be construed with G.S. 97-2(12).

Affirmed.

Judge HEDRICK concurs.

Chief Judge MALLARD dissents and files a dissenting opinion.

Chief Judge MALLARD dissenting.

In my opinion, the majority, by its literal and mechanical approach to the statutes in question in this case, has misinterpreted the legislative intent and purpose of G.S. 97-40, as rewritten by the General Assembly in 1965. I think that the terms "brother" and "sister," as used in the context of G.S. 97-40, were intended in their general and commonly-accepted sense and that no resort to the definitions contained in G.S. 97-2(12) is either required or permitted.

G.S. 97-2 provides, in part:

> *"When used in this article, unless the context otherwise requires—*
>
> * * *
>
> (12) * * * 'Brother' and 'sister' include stepbrothers and stepsisters . . . but does not include married brothers nor married sisters, unless wholly dependent on the employee. 'Child,' 'grandchild,' 'brother,' and 'sister' include only persons who at the time of death of the deceased employee are under eighteen years of age." (Emphasis added.)

G.S. 97-38, which was discussed in *Jones v. Sutton,* 8 N.C. App. 302, 174 S.E. 2d 128 (1970), establishes three priorities or methods of payment of compensation in cases under the Act where death proximately results from an accident, that is, for full dependents, partial dependents and for those who are partial dependents and "next of kin" as defined in G.S. 97-40. Thus, the language of G.S. 97-38 clearly requires the application of the definition of "next of kin" contained in G.S. 97-40 to its own provisions.

G.S. 97-40, prior to being rewritten in 1965, unmistakably excluded *any non-dependent* from receiving compensation—only wholly or partially dependent next of kin could take.

In rewriting G.S. 97-40 in 1965, it appears to me that the General Assembly clearly intended to change the former rule that no non-dependent was entitled to any compensation for the death of an employee. G.S. 97-40, as rewritten in 1965 (and applicable in this case), provided in part:

> " . . . (I)f the deceased employee *leaves neither whole nor partial dependents,* then the compensation . . . shall be . . . paid in a lump sum to the next of kin *as herein defined. For purposes of this section and G.S. 97-38,* 'next of kin' shall include only child, father, mother, *brother or sister* of the deceased employee. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section . . . .
>
> If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin *as hereinabove defined,* then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding five hundred dollars ($500.00) to the person or persons entitled thereto." (Emphasis added.)

In the statute it is stated that "next of kin" as defined in G.S. 97-40, *who are neither wholly nor partially dependent upon the deceased employee,* may now take. (This statute was again amended in 1971 to specifically include adult brothers and sisters.)

It appears to me that the statute was rewritten in 1965 to permit payment of compensation to non-dependent "next of kin," including brothers and sisters of the deceased employee, should such employee not be survived by any dependents. Therefore, the definitions contained in G.S. 97-2(12), which are obviously designed to provide arbitrary tests for dependency, are not pertinent to the correct construction of this portion of G.S. 97-40, and an application of them only serves to subvert or thwart the legislative intent. Inasmuch as dependency is no longer the key to interpreting this portion of G.S. 97-40, this is a legitimate instance where "the context otherwise requires"; that is, where G.S. 97-2(12) should not be applied. It is also one of those "certain circumstances," as referred to by the majority, where the context of the statute requires that the terms "brother" and "sister" be given their ordinary meanings

and not the limited and constricted ones found in G.S. 97-2(12). The doctrine of *pari materia* is not applicable here. To hold otherwise is to give to the statute a strained and unintended interpretation.

I do not agree that *Horney v. Pool Co.*, 267 N.C. 521, 148 S.E. 2d 554 (1966), strengthens the majority opinion.

There is no question in the present case but that the plaintiffs are the brothers and sister, as these words are generally used and defined, of the deceased employee. Where the deceased is survived by no actual dependents, G.S. 97-40 no longer requires that the "next of kin," as therein defined, be dependents in order to receive the benefits payable under the Act. Therefore, the requirement that in order to recover herein, these *non*-dependents be under eighteen years of age is not warranted when applied to the provision of G.S. 97-40 as amended in 1965 and prior to the 1971 amendment. I would reverse the decision of the Commission in this case.

CHARLES B. PRICE v. IRVIN CONLEY

No. 7127DC611

(Filed 17 November 1971)

1. **Landlord and Tenant § 18— default in payment of rent increase — action by landlord — instructions**

In a lessor's action to recover possession of the leased premises on the ground that the tenant had failed to pay the $5.00 monthly increase in the rent, portions of the charge which referred to an "option" to renew the lease, when in fact no such option existed, was misleading and therefore erroneous.

2. **Landlord and Tenant § 18— default in payment of rent increase — action by landlord — evidence relating to waiver of default — instructions — issues**

In a lessor's action to recover possession of the leased premises on the ground that the tenant had failed to pay the $5.00 monthly increase in the rent, the trial court's failure to explain and apply the law to evidence which showed (1) that the landlord continued to accept the old rent for 10 consecutive months and (2) that the lessee, upon being told of the arrears in the rent, tendered to the landlord the full amount by which he was in arrears, which amount the landlord accepted, *held* reversible error, since it required the issue of breach of the lease to be answered in favor of the landlord.

3. Rules of Civil Procedure § 51— instructions — application of law to the evidence

The trial judge is required to declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a).

4. Landlord and Tenant § 18— lessee's breach of rent obligation — waiver by landlord

A provision in a lease providing for termination at the option of the lessor upon breach of the lessee's obligation to pay rental is not self-executing and may be waived by the lessor.

APPEAL by defendant from *Mull, District Judge,* 12 April 1971 Session of District Court held in CLEVELAND County.

Action to recover possession of real property. In his complaint, filed 18 September 1970, plaintiff alleged that defendant was his tenant at will and that defendant had been given reasonable notice to vacate but had refused to do so. Defendant answered and alleged a recorded lease from plaintiff's predecessors in title, and in a further answer defendant alleged estoppel by reason of plaintiff's acceptance of sixteen monthly rental payments under the lease. A copy of the recorded lease, dated 26 July 1967, was introduced in evidence. By this instrument plaintiff's mother and her husband, who were then the owners, leased a store building in Shelby, N. C., then occupied by defendant, to defendant as lessee.

> " . . . for a period of two more years, same beginning the 26th day of July, 1967 and ending on August 10th, 1969, at a rent of $35.00 per month. Also the lessors agree to renew lease for an additional 10 years, beginning on August 10th, 1969 and ending on August 10th, 1979, for the rent of $40.00 per month. The lessee agrees to accept said additional 10 year lease.
>
> "Should the said monthly rental payment for any one month be as much as 15 days in arrears, the lessors shall have the right to terminate or end this lease and retake possession of the premises."

Plaintiff testified: After he acquired title as devisee under the will of his mother, who died 5 January 1969, he went by the store each month until June 1970 and picked up a monthly rental check in the amount of $35.00. He received no $40.00 checks, and on 1 June 1970 he informed defendant "that he was eight months behind on the new rent" and asked him to vacate,

but defendant refused to do so. Since 1 June 1970 he had not been by the store building to pick up any checks and had received no further checks from defendant.

Defendant testified: As a result of the lease he paid plaintiff's mother $35.00 on the first or second day of every month until she passed away. Thereafter he paid plaintiff $35.00 per month on the first or second day of every month until 1 June 1970. At the time the lease was drawn he knew that the rent was to be increased from $35.00 to $40.00 per month on 10 August 1969, but he later forgot that fact. Plaintiff never said anything about the amount of the rent until 1 June 1970, when plaintiff told defendant's son to vacate the premises. Plaintiff never told defendant directly to vacate, but did tell his son to do so. On 2 June 1970 he mailed plaintiff a check for $55.00, "the remainder he claimed I was behind in my rent." Since 1 June 1970 he had mailed plaintiff a check in the sum of $40.00 on the first or second day of each month, because plaintiff would not come and get them.

Defendant's son testified: He worked for his father in the store, kept books, and wrote checks. He addressed and mailed the checks in the amount of $40.00 to plaintiff after 1 June 1970, and none of the letters were ever returned. He did not have a canceled check showing that $40.00 had been paid plaintiff.

The following issues were submitted to the jury:

"1. Did the plaintiff and the defendant have a contract for the lease of the premises as alleged in the Complaint?

"ANSWER: _____.

"2. Did the defendant wrongfully breach said Contract as alleged in the Complaint?

"ANSWER: _____."

The parties stipulated that the answer to the first issue should be in the affirmative, and that if the jury should answer the second issue "yes," "then the plaintiff is entitled to possession of the premises as provided by law," but if the answer is "no," "that they go ahead and proceed under the contract as prior to this date." The jury answered both issues in the affirmative. From judgment that plaintiff recover possession of the property, defendant appealed.

Horn, West & Horn, by C. A. Horn for plaintiff appellee.

Yelton & Lamb, by Robert W. Yelton for defendant appellant.

PARKER, Judge.

[1] In his charge the judge instructed the jury that the plaintiff had alleged that defendant breached the lease contract "by failing to exercise his option to renew the lease." No such allegation appears in the complaint. Further, the recorded lease, copy of which was introduced in evidence, contains no *option* to renew. On the contrary, by its express terms the lessors "agree to renew" and the lessee "agrees to accept" the additional ten-year term which began on 10 August 1969. This gave no option to either party, but created an agreement binding upon both.

The judge also instructed the jury "that in cases where there is a lease with a renewal clause, nothing more appearing to be done other than to increase the amount of the rent, that if the amount of the rent is not increased at the time called for in the contract, then they have not complied with the terms of the contract." Thereafter, in the mandate portion of the charge, the judge instructed the jury as follows:

> "Finally, ladies and gentlemen, the Court instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that the plaintiff and defendant had a contract, which they agreed they had, and that the defendant has failed to comply with the terms of the contract by increasing the payments on August 10, 1969, it would be your duty to answer this second issue, 'Yes.' Otherwise, if the plaintiff has not so satisfied you, you would answer it 'No.' "

[1-3] Appellant's exceptions and assignments of error to the above-quoted portions of the charge must be sustained. It was misleading to refer to an "option" to renew the lease, when no such option existed and therefore exercise or failure to exercise a renewal option could not have been in any way involved in the litigation. Moreover, considering the charge as a whole, the judge failed properly to "declare and explain the law arising on the evidence given in the case," as he was required to do by G.S. 1A-1, Rule 51(a). Under the charge as given, the jury

could do nothing other than to answer the second issue in the affirmative, since all of the evidence established that defendant had failed to increase the amount of the monthly payment on 10 August 1969. However, there was also uncontradicted evidence from both parties that each month from August 1969, until June 1970, defendant had paid and plaintiff had quietly accepted a check for $35.00. Further, there was evidence, though contradicted, from which the jury could have found that promptly after the lease provision calling for the increase in the monthly rental was brought to defendant's attention, he had tendered to plaintiff his check for the full amount by which he was then in arrears and had thereafter tendered to plaintiff each month a check in the increased amount as called for by the recorded lease. The court's charge to the jury is completely devoid of any explanation of the law arising on this evidence.

[4] A provision in a lease for termination at the option of the lessor upon breach of the lessee's obligation to pay rental is not self-executing. Such a provision may be waived by the landlord, for whose benefit it was inserted, and he may elect to treat the lease as continuing in effect. Moreover, the purpose of such a provision is not to provide a forfeiture with which to surprise an unwary tenant, but to secure the landlord in his right to receive the rental called for in the lease. "Provisions for the forfeiture of a lease for nonpayment of rent, whether contractural or statutory, are considered in equity as securing the rent, and not as providing for the forfeiture of the lease where the tenant acts in good faith and pays promptly on demand." 49 Am. Jur. 2d, Landlord and Tenant, § 1034, p. 1002.

In the present case the plaintiff landlord, by quietly accepting monthly payments of rental in the amount of $35.00 for many months after August 1969, recognized the lease as continuing in effect and waived, not his right to collect monthly rental in the increased amount of $40.00 as called for in the lease, but his right to terminate the lease by reason of his lessee's past defaults. This waiver continued until the lessor made demand upon the lessee to pay the amount by which he was in arrears and until the lessee, after being given a reasonable opportunity to do so, should fail to make such payment. The trial court, by failing properly to declare and explain the law arising on the evidence presented in this case, committed prejudicial error entitling defendant to a new trial.

We note that the defendant's trial counsel made no objection to the form of the issues which were submitted to the jury and joined in a stipulation as to the type of judgment which should be entered depending upon the jury's answer to the second issue. Appellant was entitled, nevertheless, to have the issues decided by the jury under a charge from the court which correctly declared and explained the law arising on the evidence. For the errors above noted there must be a new trial, at which the case should be submitted to the jury upon such issues as shall arise upon the evidence then presented.

For errors in the charge, the judgment appealed from is reversed and defendant is entitled to a

New trial.

Judges MORRIS and GRAHAM concur.

WEST DURHAM LUMBER CO., INC. v. THE AETNA CASUALTY AND SURETY CO.
CAROLINA AIR CONDITIONING CO., INC. v. THE AETNA CASUALTY AND SURETY CO.
THE COMAN COMPANY v. THE AETNA CASUALTY AND SURETY CO.
DURHAM READY MIXED CONCRETE SUPPLY CO., INC. v. THE AETNA CASUALTY AND SURETY CO.

No. 7114SC530

(Filed 17 November 1971)

1. **Indemnity § 2— indemnity contract — third party beneficiaries**

The beneficiaries of an indemnity contract ordinarily can recover, though not named therein, when it appears by express stipulation or by fair and reasonable intendment that their rights and interests were being provided for and were in the contemplation of the parties at the time of the execution of the contract.

2. **Principal and Surety § 10— contractor's bond**

The obligation of a contractor's bond is ordinarily to be read in the light of the contract it is given to secure and the liability of the surety is to be measured by the terms of the principal's agreement.

3. **Principal and Surety § 10— contractor's bond — action by subcontractors, laborers, materialmen**

Subcontractors, laborers and materialmen cannot recover on the general contractor's bond to the owner where it appears from the terms of the bond that it was given solely for the protection of the owner.

APPEAL by plaintiffs in each of the four above-captioned cases from *Hobgood, Judge,* 17 May 1971 Session of Superior Court held in DURHAM County.

On or about 20 August 1968 Hutchins Construction Co., Inc., as general contractor, entered into a contract with Gamma Lambda House Corp., Inc., for the construction of a sorority house in Chapel Hill. West Durham Lumber Co., Inc., (a plaintiff) furnished supplies and materials to Hutchins for use in construction of the sorority house. Carolina Air Conditioning Co., Inc., (a plaintiff) installed the heating and air conditioning system in the sorority house. Each of these two plaintiffs has demanded payment from Hutchins, but neither has been paid. Apparently, neither of these two plaintiffs notified the owner of their claim before the owner made final payment to Hutchins (the general contractor).

The Aetna Casualty Co., Inc., is surety on the general contractor's bond, and each of these two plaintiffs brought an action to recover on the bond.

On or about 12 May 1969 Hutchins Construction Co., Inc., as general contractor, entered into a contract with Northgate Shopping Center, Inc., for the construction of a branch office building for First Union National Bank in Northgate Shopping Center in Durham. The Coman Co. (a plaintiff) furnished supplies and materials to Hutchins for use in construction of the branch office building. Durham Ready Mixed Concrete Supply Co., Inc., (a plaintiff) furnished materials to Hutchins for use in construction of the branch office building. Each of these two plaintiffs has demanded payment from Hutchins, but neither has been paid. Apparently, neither of these two plaintiffs notified the owner of their claim before the owner made final payment to Hutchins (the general contractor).

The Aetna Casualty Co., Inc., is surety on the general contractor's bond, and each of these two plaintiffs brought an action to recover on the bond.

The general contract for the construction of the sorority house in Chapel Hill and the general contract for the construction of the branch office building in Northgate Shopping Center, Durham, are sufficiently similar, and the surety's obligation on the general contractor's bond given with each of the two general contracts is sufficiently similar, that the parties agreed that the

four cases be consolidated for hearing and judgment upon the motion for summary judgment filed by The Aetna Casualty and Surety Co. in each case.

Judge Hobgood entered a single judgment granting summary judgment for defendant in each of the four cases. The four plaintiffs appealed.

Powe, Porter & Alphin, by James G. Billings, for plaintiffs.

Smith, Anderson, Dorsett, Blount & Ragsdale, by Samuel G. Thompson, for defendant.

BROCK, Judge.

We think, as did the trial judge and the attorneys, that the differences between the two general contracts and the two general contractor's bonds are differences without distinction as to the legal obligation of the defendant surety to pay claims by subcontractors, laborers, or materialmen against the general contractor. Nevertheless, the wording is somewhat different and we will set out the pertinent portions in order that the facts to which this opinion applies will be clear.

In the Chapel Hill contract the general contractor agrees: "The Contractor shall furnish all work, including labor, materials, and equipment necessary to complete all construction in accordance with the drawings and specifications entitled . . ." With respect to a bond the general contract provides: "The Owner may, at his own expense, secure a performance bond covering the work under this contract and assurance of its performance by this Contractor."

The bond issued by defendant surety upon the Chapel Hill contract provides in pertinent part:

> "NOW, THEREFORE, the condition of this obligation is such that if Principal shall, subject to the performance of Owner's obligations to Principal, perform Principal's obligations under said contract and keep the property free and clear of any and all mechanics' and materialmen's liens for labor or material furnished in connection therewith, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:"

* * *

"5. No right of action shall accrue on this bond to or for the use or benefit of any person or corporation other than the Owner . . . herein named; . . ."

In the Northgate Shopping Center contract the general contractor agrees: "Unless otherwise specifically noted, the Contractor shall provide and pay for all labor, materials, equipment, . . . and services necessary for the proper execution and completion of the Work." With respect to a bond the general contract provides: "The Owner shall have the right . . . to require the Contractor to furnish bonds covering the faithful performance of the Contract and the payment of all obligations arising thereunder in such form and amount as the Owner may prescribe . . ."

The bond issued by defendant surety upon the Northgate Shopping Center contract provides in pertinent part:

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

* * *

"No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of Owner."

[1, 2] The beneficiaries of an indemnity contract ordinarily can recover though not named therein, when it appears by express stipulation or by fair and reasonable intendment that their rights and interests were being provided for and were in the contemplation of the parties at the time of the execution of the bond. *Dixon v. Horne,* 180 N.C. 585, 105 S.E. 270; *Morton v. Water Co.,* 168 N.C. 582, 84 S.E. 1019. The obligation of the bond is ordinarily to be read in the light of the contract it is given to secure and the liability of the surety measured by the terms of the principal's agreement. *Manufacturing Co. v. Andrews,* 165 N.C. 285, 81 S.E. 418. However, in the cases presently before us the bonds are given solely for the protection of the owner, and it is so stated.

The general contracts in these cases do not require the owner to secure, or the general contractor to provide, a bond to secure payment to laborers, materialmen, or subcontractors. In

fact, the general contracts do not require a bond of any kind. In the Chapel Hill contract it is provided that the owner *may* secure a bond. In the Northgate Shopping Center contract it is provided that the owner *shall have the right* to require a bond. In either instance the owner was free to purchase or require a bond or not as he saw fit. Consequently, it cannot be said that plaintiffs in any way relied upon protection granted them by requirements for a bond in either of the two general contracts. In these cases the owners exercised the options granted under the general contracts and purchased or required bonds under terms suitable to the owner for his own protection.

[3] It is true that the Northgate Shopping Center general contract required the contractor to pay for all labor, materials, equipment, etc., but the obligation of the bond is not for the faithful performance of the contract as it relates to plaintiffs. The surety on each of the bonds agrees to protect the owner, and no one else, against failure of the general contractor to promptly and faithfully perform the contract; all other persons are expressly excluded from its protective provisions. *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Manufacturing Co. v. Andrews,* 165 N.C. 285, 81 S.E. 418.

Plaintiffs have filed an exhaustive and informative brief, and have ably argued their contentions. However, in our opinion, the cases cited and relied upon by plaintiffs are distinguishable. *Hartford Accident and Indemnity Co. v. Board of Education,* 15 F. 2d 317 (4th Cir. 1926) involved a contract for construction of a public building and was controlled by statute. *Hipwell v. National Surety Co.,* 130 Ia. 656, 105 N.W. 318, involved a contract for construction of a public building and was controlled by statute. For a similar statutory provision in North Carolina with respect to public buildings see G.S. 44-14. *Carl Weissman & Sons, Inc. v. The St. Paul Fire and Marine Insurance Co.,* 152 Mt. 291, 448 P. 2d 740, involved a bond which in itself provided for the payment of claims of all persons furnishing labor and materials. For further discussion of the question of the right of laborers and materialmen to sue on the contractor's bond to the owner, see 17 Am. Jur. 2d, Contractors' Bonds, §§ 16-23, pp. 201-208; and Annot. 77 ALR 21.

In our opinion summary judgment for defendant in each of the four cases was proper.

Affirmed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHNNY EUGENE RAY

No. 7126SC503

(Filed 17 November 1971)

1. **Burglary and Unlawful Breakings § 1— proof of intent to commit particular felony**

When a burglary indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged and that the defendant intended to commit that offense in the house broken and entered.

2. **Burglary and Unlawful Breakings § 5— intent to steal — sufficiency of evidence**

Evidence tending to show that at 3:00 a.m. defendant forced open a kitchen window and entered an apartment where he had no right to be, and that he walked around the apartment for at least five to ten minutes shining a flashlight and opened a desk drawer in the dining room, *held* sufficient for the jury to find that defendant entered the apartment with intent to commit larceny.

3. **Burglary and Unlawful Breakings § 6; Criminal Law § 115— instructions — indictment for burglary — trial for lesser offense**

The trial court did not err in instructing the jury that defendant was charged in the indictment with first degree burglary but that the State had elected to try him only for the lesser included offense of felonious breaking and entering.

4. **Criminal Law § 145.1— probation — length of sentence**

Provision of G.S. 15-200 that "the period of probation or suspension of sentence shall not exceed a period of five years" does not limit the length of a suspended sentence to five years but limits the period of time for which the sentence may be suspended.

APPEAL by defendant from *McLean, Judge,* 29 March 1971 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment with first degree burglary and in a warrant with carrying a concealed weapon. The cases were consolidated for trial. The State elected not to try defendant for first degree burglary but to seek a conviction under that bill of indictment for felonious breaking and entering.

The State's evidence tended to show: On 19 December 1970 Stephanie Wright Grant was living alone in a two-story duplex apartment in Charlotte and was sleeping in an upstairs bedroom. About 3:30 in the morning she was awakened by a noise. Mrs. Grant went to the top of the stairs to investigate

and saw the shadow or figure of a man against the wall. She then returned to her bedroom and after securing the door called the telephone operator and requested that the police be notified. Two officers arrived within five to ten minutes. From the outside of the apartment they observed a figure moving around the living room with a flashlight. The officers called for assistance and then went to the back of the apartment where they arrested defendant as he was coming out of the back door. Defendant had a loaded pistol and a large hunting knife in his pockets.

The kitchen window, which had been locked when Mrs. Grant went to bed, was found open. Potted plants, shampoo and medicine that had been on the windowsill were found on the ground outside the window and fingerprints lifted from the windowsill were identified as defendant's fingerprints. A drawer in a desk in the dining room had been opened.

Defendant testified in his own behalf that while walking past the apartment earlier in the night he had stopped in some bushes to answer a call of nature. Later he discovered that his wallet was missing so he returned to the vicinity of the apartment to look for it. When he saw an automobile coming down the street with its lights off defendant became frightened and ran to the back of the apartment. When he saw the officers coming toward him he backed up close to the back doorway. Defendant denied that he had opened the kitchen window or entered the apartment.

The jury returned verdicts of guilty of felonious breaking and entering and carrying a concealed weapon. After the return of the verdicts defendant was served with a bill of particulars charging that he violated the terms of a probationary judgment which had been entered 5 February 1970 upon his plea of guilty to a charge of larceny of an automobile. The court conducted a hearing and entered an order finding facts and ordering defendant's probation revoked and the sentence which had been suspended in that judgment placed into effect. Judgment was then entered on the breaking and entering conviction sentencing defendant to an eight year prison term to commence at the expiration of the sentence placed into effect on the larceny charge. Prayer for judgment was continued for two years on the charge of carrying a concealed weapon.

Attorney General Morgan by Assistant Attorney General Hafer and Associate Attorney Reed for the State.

Plumides & Plumides by Michael S. Shulimson for defendant appellant.

GRAHAM, Judge.

Defendant assigns as error the denial of his motion for judgment of nonsuit made at the close of the State's evidence and renewed at the close of all of the evidence. This assignment of error is overruled.

[1, 2] Defendant contends that while the evidence was sufficient to show a breaking or entering, it failed to establish that defendant entered the apartment with the intent to commit larceny therein as charged in the bill of indictment. When an indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged, and that the defendant intended to commit that offense in the house broken and entered. 2 Strong, N.C. Index 2d, Burglary and Unlawful Breakings, § 1, p. 46. However, intent is seldom subject to being proved by direct evidence. "It must ordinarily be left to the jury to determine, from all the facts and circumstances, whether or not the ulterior criminal intent existed at the time of the breaking and entry." *State v. Allen,* 186 N.C. 302, 307, 119 S.E. 504, 506. The evidence here tended to show that at 3:00 a.m. defendant forced open a kitchen window and entered an apartment where he had no right to be. He walked around in the apartment for at least five to ten minutes shining his flashlight and opened a desk drawer in the dining room. This constitutes plenary evidence from which the jury could find that defendant entered the apartment with the intent to commit larceny.

[3] The court instructed the jury: "[T]he defendant, Johnny Ray, is charged in the bill of indictment with first degree burglary. . . . Included in this charge is the lesser charge of felonious breaking and entering. . . . The State has elected to place the defendant on trial for felonious breaking and entering and not upon the count of burglary in the first degree, so you will not consider that. You will consider whether or not the defendant be guilty of felonious breaking and entering, whether he be guilty of nonfelonious breaking and entering, or not guilty of either offense."

The defendant contends that the above instructions constituted prejudicial error in that the court was in effect telling the jury that defendant had already been extended mercy by the State and the court and was deserving of no more. This argument is without merit. Defendant was being tried under a bill of indictment charging first degree burglary. The solicitor's election to try defendant on a lesser included offense amounted to a verdict of not guilty upon the specific offense charged in the bill of indictment and it was therefore important that the court instruct the jury that they consider only the lesser included offenses. See *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453; and *State v. Britt,* 270 N.C. 416, 154 S.E. 2d 519.

[4] Through his final assignment of error defendant contends the court erred in activating a previously imposed sentence for larceny of an automobile. The judgment in that case imposed a sentence of nine to ten years which was suspended for five years. Defendant contends that this sentence was contrary to the provision of G.S. 15-200 wherein it is stated "the period of probation or suspension of sentence shall not exceed a period of five years. . . . " Defendant interprets this provision as limiting the length of a suspended sentence to five years. The provision obviously has nothing to do with the length of a sentence that may be suspended but limits the period of time for which it may be suspended. Here the sentence was suspended for a period not in excess of five years and therefore was not contrary to the provisions of G.S. 15-200.

We have reviewed all assignments of error brought forward and conclude that defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

MARGARET ELLEN TODD v. WILLIE R. SHIPMAN AND JAMES C. RAMSEY

No. 7128SC537

(Filed 17 November 1971)

Automobiles § 19— intersectional accident — statutes relating to right-of-way — instructions

Evidence in an accident case arising out of an intersectional collision called for the application of the statute relating to the right-of-way of an automobile already in the intersection, G.S. 20-155(b), and not for the application of the statute relating to the failure to stop at a stop sign at an intersection, G.S. 20-158(a), where the evidence was to the effect (1) that the defendant driver stopped at the stop sign and then drove into the intersection when he ascertained his movement could be made with safety; (2) that he stopped twice in the busy intersection to see if movement could be made with safety; and (3) that while stopped for the third time he was hit by plaintiff, who was proceeding into the intersection from the dominant street.

APPEAL by plaintiff from *Martin, Harry C., Judge,* 25 January 1971 Session of BUNCOMBE Superior Court.

In this action plaintiff seeks to recover for personal injury sustained by her when the 1965 Ford she was operating collided with a 1962 Ford owned and occupied by defendant Ramsey and operated by defendant Shipman. In her pleadings plaintiff alleges: The collision occurred around 1:45 p.m. in the intersection of Hendersonville Road and Angle Street in the City of Asheville. Plaintiff was traveling south on Hendersonville Road, the dominant street, and defendants were traveling west on Angle Street, a servient street. At the time of the collision, a stop sign had been duly erected on Angle Street requiring travelers on it to stop and yield the right-of-way before entering Hendersonville Road. Defendants were negligent in that they failed to yield right-of-way; failed to keep a proper lookout; failed to stop at stop sign; failed to keep their vehicle under proper control; and caused their automobile to collide with plaintiff's automobile.

In their answer defendants denied any negligence on their part and alleged that plaintiff was negligent in that: she failed to keep a proper lookout; failed to keep her car under proper control; failed to yield right-of-way; attempted to pass on the right; operated her car in excess of the legal speed limit; failed

to bring her car to a stop or to decrease its speed as she approached an intersection; operated her car in wilful and wanton disregard of the safety of others; failed to give audible warning before passing; and that if defendants are negligent at all, plaintiff was contributorily negligent.

The evidence presented at trial tended to show: Defendants came to a complete stop on Angle Street before entering Hendersonville Road and remained stopped for a period of about five minutes due to traffic congestion. They then drove across the two lanes for northbound traffic on Hendersonville Road and stopped again for about 30 seconds. Thereafter they pulled in front of a car heading south on Hendersonville Road attempting to turn left at the same intersection and stopped once again. At this point while defendants were stopped, plaintiff came up behind the car turning left, swerved to the right to avoid hitting it and then swerved back to the left, striking the front of defendants' car that was stopped in the intersection halfway across the entire southbound portion of Hendersonville Road. When defendants first entered the intersection no vehicle was approaching in a southerly direction on Hendersonville Road. Defendants intended to proceed west on Angle Street.

At the close of the plaintiff's evidence, defendant Ramsey moved for a directed verdict which was allowed. As to defendant Shipman the jury found no negligence and from judgment denying recovery from Shipman, plaintiff appealed.

Hendon & Carson by George Ward Hendon for plaintiff appellant.

Williams, Morris & Golding by William C. Morris, Jr., for defendant appellee.

BRITT, Judge.

The question presented by plaintiff on appeal is whether the court erred in instructing the jury on G.S. 20-155(b) relative to right-of-way at intersections and in failing to instruct the jury on G.S. 20-158(a) relative to stop signs at intersecting highways. We think the court was correct.

G.S. 20-158(a) provides: "The State Highway Commission, with reference to State highways, and local authorities,

with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection. . . . "

The portion of G.S. 20-155 pertinent to this case provides: "(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction. . . . "

At first glance G.S. 20-155(b) would seem inapplicable in this case since the intersection was controlled by stop signs and there are cases holding that where one street, because of a stop sign, automatic signal or other device, is favored over another at an intersection G.S. 20-155 is not applicable. *White v. Phelps,* 260 N.C. 445, 132 S.E. 2d 902 (1963); *Jordan v. Blackwelder,* 250 N.C. 189, 108 S.E. 2d 429 (1959). However, under the particular facts of this case the presence of the stop sign is not relevant and the law on that point is not pertinent, thus G.S. 20-155(b) is controlling.

A driver along a servient street is required, in compliance with G.S. 20-158, to bring his vehicle to a stop in obedience to a stop sign lawfully erected, and not to proceed into an intersection with the dominant highway until, in the exercise of due care, he can determine that he can do so with reasonable assurance of safety. *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357 (1954). In the instant case the uncontradicted evidence showed that defendant driver stopped at the stop sign, yielded to traffic, and when he ascertained his movement could be made with reasonable assurance of safety, drove into the intersection across the northbound lanes; he then stopped again to see if he could proceed safely, and thereafter proceeded to the point where he stopped for a third time in the congested intersection to yield the right-of-way and see that his further movements could be made safely; while stopped the third time

he was hit by plaintiff. At the time they were struck, defendants had fully complied with G.S. 20-158(a) and G.S. 20-155(b) was applicable.

In *Farmer v. Reynolds,* 4 N.C. App. 554, 561, 167 S.E. 2d 480, 485 (1969), a case involving a yield right-of-way sign, this court held that, "[w]here the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way."

After defendant driver complied with the purpose and the letter of G.S. 20-158(a), it became moot. In fact, it would have been error to charge on G.S. 20-158(a) since "[i]t is established by our decisions that an instruction about a material matter not based on sufficient evidence is erroneous. . . . And it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury." *Childress v. Motor Lines,* 235 N.C. 522, 530, 70 S.E. 2d 558, 564 (1952).

No error.

Judges BROCK and VAUGHN concur.

WILLIAM COLLYER AND WIFE, MARTHA ANN COLLYER v. HUGH BELL AND WIFE, IRENE BELL

No. 7129DC625

(Filed 17 November 1971)

1. Venue § 1 — objection to venue — waiver

The right to object to the venue of an action may be waived if the objection is not made in apt time. G.S. 1-76 through G.S. 1-83.

2. Rules of Civil Procedure § 12— motion to dismiss — time of motion

A motion to dismiss on the ground that the complaint failed to state a cause of action upon which plaintiffs could be granted relief may not be raised for the first time on appeal. G.S. 1A-1, Rule 12(b)(6).

3. Appeal and Error § 30— exception to evidence — form of exception

Where an exception to evidence is not supported by an objection or a motion to strike, the competency or incompetency of the evidence is not before the court.

4. Evidence § 31— best evidence — objection to carbon copy of letter

A party may not object to the introduction of testimony as to the contents of a carbon copy of a letter when he was served with notice to produce the original letter at trial and failed to do so.

5. Evidence § 4— mailing of letter — presumption of receipt

Evidence showing that a letter was mailed creates a presumption that it was received by the party to whom it was mailed.

6. Appeal and Error § 31— assignment of error to the charge

An assignment of error to the charge must quote the portion of the charge to which the appellant takes exception, point out the alleged error, and indicate what the court should have charged.

7. Appeal and Error § 31— broadside exception to the charge

An assignment of error which questions the failure of the court to apply the law to the evidence is a broadside exception and will not be considered.

APPEAL by defendants from *Gash, Judge,* 5 April 1971 Session of District Court held in HENDERSON County.

On 21 July 1969, the defendants, Hugh Bell and wife, Irene Bell, executed a lease to William Collyer and wife, Martha Ann Collyer, for certain property situate in Polk County, North Carolina. The lease agreement entered into by the parties was for a term of one year beginning 1 September 1969, at a monthly rental of $75. It included an option to purchase at the price of $14,500, subject to certain terms and conditions. The lease specifically provided that "Tenant may exercise the option granted herein by giving the Landlord *written notice* of his desire to so do not less than thirty (30) days prior to the expiration of the term of this lease." (Emphasis added.) On 23 September 1970, plaintiffs instituted this suit for specific performance of the option contending that they mailed written notice to defendants of their intention to exercise the option to purchase, and that the notice was mailed along with the rental payment on 6 April 1970. In their answer the defendants admitted having received the check for the April rent but denied having received the written notice which plaintiffs contend accompanied the check. Defendants also cross-claimed for

the sum of $100 per month as rent for the plaintiffs' holding over after the expiration of the lease on 31 August 1970.

At a pre-trial conference held 11 February 1971, the parties stipulated that the only issue to be submitted to the jury was "Did the plaintiffs exercise the option to purchase in accordance with the terms of the lease?" On 7 April 1971, after a day and a half of trial, the jury returned a verdict in favor of the plaintiffs. The defendants excepted and gave notice of appeal to the entry of the judgment.

Redden, Redden and Redden, by Monroe M. Redden, Jr., for plaintiff appellees.

Prince, Youngblood, Massagee and Groce, by Edwin R. Groce, for defendant appellants.

MORRIS, Judge.

[1] From the outset it is noted that the property in question was located in Polk County, plaintiffs' residence, but the suit was brought in Henderson County, defendants' residence. G.S. 1-76 to 1-83 relate to venue, not jurisdiction, and provide that an objection to the wrong venue is waived if not made in apt time. Defendants made no objection to venue in apt time and thus waived the right. *Mitchell v. Jones,* 272 N.C. 499, 158 S.E. 2d 706 (1968). Perhaps defendants preferred the action tried in their own yard. We also note that counsel representing defendants on appeal did not appear for defendants in the trial of this action.

[2] The defendants' first assignment of error pertains to the adequacy of the legal description of the land in the complaint and in the lease attached to the complaint. No objection was made by defendants at trial or prior thereto. The defendants now contend on appeal, after verdict and entry of judgment, that the complaint failed to state a cause of action upon which plaintiffs could be granted relief. Defendants have also filed a written motion to dismiss for the same reason. A motion under G.S. 1A-1, Rule 12(b) (6) cannot be raised for the first time on appeal. *Dale v. Lattimore,* 12 N.C. App. 348, 183 S.E. 2d 417 (1971). The motion to dismiss is, therefore, denied, and the assignment of error is overruled.

[3] Defendants' next assignment of error is: "That the trial court erred by admitting the testimony of Martha Ann Collyer

as to the condition of the premises or property which was the subject of this action." It appears from the record that defendants' exception No. 2 appears on page 18 of the record on appeal, following evidence to which no objection is made. However, following the exception, appears a question to which objection was entered and sustained. Then there appears a question to which objection was made and overruled by the court. No motion to strike the answer was made. We assume that defendants intend exception No. 2 to apply to some of the evidence appearing thereafter. In any event, the competency or incompetency of this evidence is not properly before us. 1 Strong, N.C. Index 2d, Appeal and Error, § 30.

[4, 5] The defendants next contend that the court erred in admitting the testimony of Martha Ann Collyer as to the contents of a carbon copy of the alleged notice which the plaintiffs allege they sent to the defendants. The defendants allege the evidence was admitted without the laying of a proper foundation showing that the copy of said notice was the best evidence; and that there was no showing that the plaintiffs had made a diligent effort to locate and produce the original of said notice by giving defendants proper notice and proper time to produce the original of the notice, if such existed. At the pre-trial conference on 11 February 1971, counsel for defendants was advised that a carbon copy of the letter dated 6 April 1970 giving defendants notice would be offered at trial, and defendants were also given a copy of that exhibit. A subpoena duces tecum was issued 5 April 1971 ordering the defendant Hugh Bell to produce the original of the letter of notification dated 6 April 1970. At trial, counsel for defendants made no objection to the subpoena but stated that they denied the existence of the original letter or that they ever received it. Plaintiffs' evidence also tended to show that a letter of notice was properly mailed, thus creating a presumption that it was received by the defendants. *Daves v. Insurance Co.*, 3 N.C. App. 82, 164 S.E. 2d 195 (1968). The defendants may not object to the introduction of testimony as to the contents of a carbon copy when he was served with notice to produce the original letter at trial and failed to do so. *Thrower v. Dairy Products*, 249 N.C. 109, 105 S.E. 2d 428 (1958); see also 3 Strong, N.C. Index 2d, Evidence, § 31; 4 Wigmore on Evidence 3d, § 1199-1210. This evidence is treated in the record in the same fashion as the evidence sought to be considered under exception No. 2. The

question of its competence is, therefore, not before us. 1 Strong, N.C. Index 2d, supra.

[6, 7] We find no merit in defendants' contention that plaintiffs could only exercise the option to purchase by personal delivery of written notice. Defendants attempt to raise this question by assignment of error addressed to the charge of the court to the jury. This assignment of error is not properly before us. It does not quote the portion of the charge to which defendants take exception nor does it point out the alleged error and indicate what the court should have charged. 1 Strong, N.C. Index 2d, Appeal and Error, § 31. Nor do we find merit in defendants' other assignment of error addressed to the charge. This assignment purports to raise the question of whether the court erred in failing to charge and properly explain and apply the law as to defendants' counterclaim. This assignment of error is a broadside exception and will not be considered. 1 Strong, N.C. Index 2d, Appeal and Error, § 31.

Defendants next assign as error the court's failure to submit to the jury an issue dealing with defendants' counterclaim. No objection was made at trial to the issues submitted, nor did defendants tender an issue on their counterclaim. In fact, it appears that the parties stipulated as to the issue to be submitted. This assignment of error is overruled.

Defendants' remaining assignments of error have been examined and found to be without merit.

Affirmed.

Judges BRITT and PARKER concur.

IN RE: ESTATE OF JOAN SUZANNE BELOW

No. 7129SC613

(Filed 17 November 1971)

Costs § 4; Executors and Administrators § 30— costs of administration — wrongful death proceeds

Proceeds recovered for the wrongful death of a decedent are not subject to the assessment of costs in "the administration of estates of decedents" provided for under G.S. 7A-307(a)(2), since the proceeds recovered under the wrongful death statute are not a part of the decedent's estate.

In re Below

APPEAL by the Clerk of the Superior Court of HENDERSON County from *Martin (Harry C.), Judge,* 9 July 1971 Session of Superior Court held in HENDERSON County.

Joan Suzanne Below was killed 19 July 1967 when the aircraft in which she was a passenger collided with another aircraft in the air space over Henderson County. Jefferson H. Bruton qualified as administrator of Miss Below's estate and received the sum of $50,000 in settlement of a claim for her wrongful death.

In June of 1971 the administrator tendered to the Clerk of Superior Court of Henderson County a final account. The clerk rejected the account on several grounds, including the ground that in preparing and tendering the final account the administrator refused to pay to the clerk the sum of $50, "representing 10¢ per $100.00 of the $50,000.00 recovered, as provided by Section 2 of General Statute 7A-307."

The administrator appealed the clerk's order to the Superior Court. In an order, dated 9 July 1971, Judge Martin reversed that portion of the clerk's order requiring the payment of $50 pursuant to the provisions of G.S. 7A-307(a) (2), concluding that the $50,000 recovered by the administrator in settlement of the wrongful death claim is not an asset within the meaning of that statute. The order of the clerk was sustained in all other respects. The clerk appealed from that portion of Judge Martin's order adverse to him.

Attorney General Morgan by Assistant Attorney General Rich for the appellant.

Warren C. Stack for respondent appellee Jefferson H. Bruton, Administrator.

GRAHAM, Judge.

G.S. 7A-307(a) (2) provides in pertinent part:

"(a) In the administration of the estates of decedents . . . , the following costs shall be assessed:

(2) For support of the General Court of Justice the sum of eight dollars ($8.00), plus an additional ten cents (10¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate. Gross estate shall include the

fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. This fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. . . . "

The question before us is whether proceeds recovered for the wrongful death of a decedent are subject to the assessment of costs provided for under G.S. 7A-307(a)(2). We agree with Judge Martin that they are not. The statute provides for the assessment of costs in "the administration of the estates of decedents." Proceeds recovered under the wrongful death statute are not a part of a decedent's estate, and in dealing with these funds neither the clerk nor the estate's personal representative is "administering the estate of a decedent."

The wrongful death statute (G.S. 28-173) specifically provides that the amount recovered for death by wrongful act is not liable to be applied as an asset of the estate in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding $500.

Appellant contends that while the recovery is not an asset of the estate for the purpose of paying debts or legacies, it is an asset of the estate for other purposes, including that of assessing costs under G.S. 7A-307(a)(2). We do not agree. A cause of action for wrongful death, being conferred by statute at death, could never have belonged to the deceased. A recovery resulting from such cause of action is therefore not an asset of the deceased's estate, although by virtue of the specific provisions of G.S. 28-173 it is treated as an asset with respect to burial expenses and certain hospital and medical costs.

These principles are spelled out in a long line of court decisions.

In the case of *Hartness v. Pharr,* 133 N.C. 566, 45 S.E. 901, the question before the court was whether an ancillary administrator in North Carolina was required to pay a sum

recovered for the wrongful death of his intestate to the South Carolina administrator of the decedent's estate. The Supreme Court held that the fund, not being an asset of the estate, was not to be paid to the South Carolina administrator, but was to be distributed directly to the beneficiary entitled to receive it under the provisions of this State's wrongful death act. The court stated: "The administration of the defendant Pharr is not ancillary to that of the administration in South Carolina, so far as the fund now in his hands which was recovered from the railroad companies is concerned. In no possible view, as we have said, can this fund be regarded as a part of the assets of the estate of the deceased. The cause of action never accrued to him and never came into existence until his death, and the recovery thereon cannot be considered or treated as any part of his estate."

In *Broadnax v. Broadnax,* 160 N.C. 432, 76 S.E. 216, the decedent's widow was denied a year's support from the amount recovered in an action for wrongful death. The court held: "The allowance can only be set apart from the personal estate of the deceased, and the right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term. *Baker v. R. R.,* 91 N.C., 310; *Hartness v. Pharr,* 133 N.C., 566; *Vance v. R. R.,* 138 N.C., 463." In accord: *In re Ives' Estate,* 248 N.C. 176, 102 S.E. 2d 807; *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49; *Long v. Coble,* 11 N.C. App. 624, 182 S.E. 2d 234.

In receiving funds paid in settlement of a wrongful death claim a personal representative of a decedent's estate is not acting for the estate but as the trustee for the beneficiaries under the law. As stated in *Hood v. Telegraph Co.,* 162 N.C. 92, 95, 77 S.E. 1094, 1095, a personal representative "does not derive any right, title, or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator. . . . " See also *Stetson v. Easterling,* 274 N.C. 152, 161 S.E. 2d 531; *Crawford v. Hudson,* 3 N.C. App. 555, 165 S.E. 2d 557.

It is certainly within the power of the General Assembly to subject recoveries in wrongful death actions to costs such as

those imposed by G.S. 7A-307(a) (2) on the assets of a decedent's estate. However, we fail to find in the language of that statute, or that of G.S. 28-173, any indication that it has done so.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

LOUIE MAJOR DEAN v. MARGARET THOMAS NASH AND ALEXANDER VON NASH

No. 7126DC619

(Filed 17 November 1971)

1. **Rules of Civil Procedure § 51— unequal stress to defendants' contention**

In this action in which plaintiff sought to recover for the death of his pony when struck by defendants' car and the male defendant counterclaimed for damages to his car, the trial court violated G.S. 1A-1, Rule 51(a), by giving unequal stress to defendants' contention that plaintiff allowed the pony to move freely about the area, creating a hazard. G.S. 1A-1, Rule 51(a).

2. **Negligence § 37— instructions — erroneous use of "contributory negligence"**

The trial court erred in using the term "contributory negligence" in instructing on defendant's counterclaim when the actionable negligence of plaintiff was under consideration.

3. **Rules of Civil Procedure § 50— motion for judgment NOV**

A motion for judgment NOV must be supported by a timely made motion for directed verdict. G.S. 1A-1, Rule 50(b)(1).

APPEAL by plaintiff from *Stukes, District Judge,* 10 May 1971 Session of MECKLENBURG District Court.

In this action plaintiff seeks to recover $1550.00 damages arising from the death of his pony caused by its being struck by an automobile owned by the male defendant and operated by the feme defendant. Plaintiff alleged that the feme defendant was operating the automobile at excessive speed, failed to take appropriate action to avoid hitting the pony, failed to keep a proper lookout and failed to keep the automobile under proper control.

Defendants denied any negligence on their part and alleged that plaintiff was contributorily negligent in that he failed to

maintain adequate fences for the containment of his pony, allowed the pony to "roam freely about an area" where plaintiff knew or should have known said animal might stray into the highway and cause a collision, and failed to use reasonable care to contain the pony when plaintiff knew of its propensity to escape its enclosure. Defendants further pleaded a counterclaim for damages to the automobile, pleading the same acts and omissions of negligence as those pleaded on the defense of contributory negligence.

The evidence presented at trial tended to show: A short while prior to the accident on a sunny day the pony was being ridden by a nine year old boy in plaintiff's yard. The boy slipped off the pony after which it trotted out of the yard, onto a public road and then into an old field. The plaintiff, who had a history of heart trouble, and three children walked after the pony and after crossing RPR 1666 once, turned the animal toward home and when it crossed the road the second time going toward plaintiff's home, the collision occurred.

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

(1) Was the plaintiff's pony injured and damaged by the negligence of the defendants as alleged in the complaint? Answer: No.

(2) If so, did the plaintiff by his own negligence contribute to the injuries as alleged in the answer? Answer: _____

(3) What amount if any, is the plaintiff entitled to recover of the defendants? Answer: _____

(4) Was the defendant Alexander V. Nash damaged by the negligence of the plaintiff as alleged in the Counterclaim? Answer: Yes.

(5) If so, what amount, if any, is the defendant Alexander V. Nash entitled to recover? Answer: Recover full damages ($557.52?).

Plaintiff moved for judgment NOV and that issues 1, 4 and 5 be set aside and issue 4 answered "No" disallowing the counterclaim on the grounds that defendants offered no evidence of actionable negligence against the plaintiff in order to hold

him responsible for damages to the car. The motions were denied and from judgment entered on the verdict, plaintiff appeals.

Myers and Collie by Charles T. Myers for plaintiff appellant.

W. T. Chandler, Jr., for defendant appellee.

BRITT, Judge.

Six of the assignments of error brought forward and argued in plaintiff's brief relate to the trial court's charge to the jury. For errors in the charge, we conclude that plaintiff is entitled to a new trial.

[1] In charging the jury the court made numerous referrals to defendants' allegation of negligence that plaintiff allowed the pony to move freely about the area, creating a hazard. When the court was charging on the issue of contributory negligence, it stated this contention of defendants twice. Then when the court was charging on defendants' counterclaim, on the fourth issue, it repeated the contention. We concede that on the issue of contributory negligence and negligence on the counterclaim, it was proper for the court to state legitimate contentions of the defendants. However, when the court was submitting plaintiff's contentions of negligence of the feme defendant on the first issue, a critical point for plaintiff in the charge, the court twice stated this contention of defendants. Defendants' contentions that plaintiff failed to maintain adequate fences for containment of the pony and that plaintiff failed to use reasonable care to contain the pony when plaintiff knew of the pony's propensity to escape its enclosure were not supported by the evidence; therefore, assuming that defendants' contention that plaintiff allowed the pony to move freely about the area, creating a hazard, was supported by the evidence, it became a key contention for defendants. Under the facts of this case and considering the charge as a whole, we think the court gave unequal stress to this contention in violation of G.S. 1A-1, Rule 51(a). *Worrell v. Credit Union,* 12 N.C. App. 275, 182 S.E. 2d 874 (1971).

[2] In the portion of its charge concerning the fourth issue, the court used the term *contributory* negligence in referring to the counterclaim of the male defendant when the actionable

negligence of the plaintiff was under consideration. We quote: "Now, I have already instructed you on this first issue what the law is on negligence, and the defendant says and contends that the plaintiff is guilty of contributory negligence as alleged in their counterclaim and are to be considered by you on this fourth issue." This instruction was confusing and we think erroneous. Although defendants' allegations of contributory negligence and of negligence on the counterclaim were identical, they obviously served different purposes. The first was to keep plaintiff from recovering in the event the jury should find that the feme defendant was negligent; the other was to allow the male defendant to recover on his counterclaim in the event the jury found no actionable negligence on the part of the feme defendant but did find actionable negligence on the part of plaintiff.

We think there were other errors in the charge but a discussion of them is not necessary. While any one of the errors might not be sufficiently prejudicial within itself to justify a new trial, the cumulative effect of the errors was sufficiently prejudicial to the plaintiff to warrant the granting of a new trial. *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Lemmond,* 12 N.C. App. 128, 182 S.E. 2d 636 (1971).

[3] Plaintiff also assigns as error the failure of the court to grant his motion for judgment NOV as to the male defendant's counterclaim. Since plaintiff failed to move for a directed verdict as to the counterclaim at the close of all the evidence, the motion did not meet the requirement of G.S. 1A-1, Rule 50(b)(1) that a motion for judgment NOV be supported by a timely made motion for directed verdict.

New trial.

Judges MORRIS and PARKER concur.

URAL BREVARD v. J. D. BARKLEY

No. 7129DC674

(Filed 17 November 1971)

1. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

The burden is upon the party moving for summary judgment to establish the lack of a triable issue of fact.

2. **Rules of Civil Procedure § 56— summary judgment — reliance on pleading**

If a defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact but must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial.

3. **Rules of Civil Procedure § 56— summary judgment — consideration of complaint**

Although plaintiff did not respond by affidavit or otherwise to plaintiff's motion for summary judgment and affidavit filed in support thereof, plaintiff's verified complaint should have been considered by the court in determining whether defendant had carried the burden of showing the lack of a genuine issue of material fact and whether defendant was entitled to judgment as a matter of law.

4. **Rules of Civil Procedure § 56— denial of summary judgment**

The pleadings of both parties and affidavit filed by defendant showed that there were genuine issues of material fact and that defendant is not entitled to judgment as a matter of law on either plaintiff's claim or defendant's counterclaim.

APPEAL by plaintiff from *Gash, Chief District Judge,* 4 August 1971 Session of District Court held in HENDERSON County.

This is a civil action wherein plaintiff seeks to recover damages for personal injury allegedly resulting from an automobile collision occurring on 21 December 1969 in Henderson County. Plaintiff alleged that he was traveling in an automobile in a slow and careful manner in a southerly direction along U.S. Highway 25 in Henderson County when he met and collided with the automobile being driven by the defendant in a northerly direction at a dangerous and reckless rate of speed. Plaintiff alleged in a verified complaint that the defendant was negligent in the operation of his automobile as follows:

"1. That the defendant attempted to pass some of the vehicles traveling north just in front of him and pulled

out on to the plaintiff's side of the road, hitting the plaintiff vehicle head-on.

"2. That the defendant was traveling at a dangerous rate of speed under the conditions there existing.

"3. That the defendant did not have his vehicle under control.

"4. That the defendant was driving in utter disregard of the rights and safety of others especially the plaintiff."

The defendant filed answer denying the material allegations of negligence in plaintiff's complaint, pleaded plaintiff's contributory negligence, and filed a counterclaim seeking to recover damages for injury to person and property allegedly resulting from the collision. The defendant alleged that he was operating his 1964 Buick automobile in a northerly direction along U.S. Highway 25 in Henderson County when he met and collided with a 1954 Chevrolet pickup truck being operated by the plaintiff in a southerly direction, and that the plaintiff was negligent in the operation of the pickup truck in that the plaintiff failed to keep the truck under proper control; failed to keep a proper lookout; failed to yield the right of way; drove on his left and wrong side of the road; failed to allow at least one-half of the main traveled portion of the highway to the defendant; drove at an unreasonable and imprudent speed; failed to reduce his speed; drove the truck while he was under the influence of some intoxicating beverage; and failed to give any notice, warning or signal.

On 2 July 1971, pursuant to G.S. 1A-1, Rule 56, of the Rules of Civil Procedure, defendant filed a motion for summary judgment in favor of the defendant with respect to plaintiff's claim, and with respect to the defendant's counterclaim, on the grounds that there was no genuine issue as to any material fact, and that defendant was entitled to judgment as a matter of law. The motion was supported by an affidavit of the defendant which set out substantially the same matters as alleged in the answer and counterclaim. The plaintiff did not respond to the motion for summary judgment by opposing affidavits or as otherwise provided by Rule 56.

On 4 August 1971, after hearing, the court allowed the defendant's motion and entered judgment in pertinent part as follows:

"And the court having considered the matter and both counsel for the plaintiff and counsel for the defendant having argued the matter and the defendant having submitted to the court a sworn affidavit and the plaintiff having attempted to rely upon the allegations of his verified complaint;

"And the court being of the opinion that the plaintiff is unable, as a matter of law, to rely upon the allegations of his complaint in a motion for summary judgment and the court further being of the opinion that there is no genuine issue as to any material fact in this case and that the defendant is entitled to a summary judgment against the plaintiff with respect to the claim of the plaintiff and for a summary judgment as to liability only against the plaintiff with respect to the defendant's counterclaim;

"IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant have judgment against the plaintiff with respect to the claim of the plaintiff and this claim is dismissed;

"Further that the defendant have judgment against the plaintiff with respect to the issue of liability in the defendant's counterclaim. . . . "

The plaintiff appealed.

Paul K. Barnwell; and Redden, Redden & Redden by M. M. Redden for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Hyde by Emerson D. Wall for defendant appellee.

HEDRICK, Judge.

Summary judgment is appropriate in a case where "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); *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970); *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1 (1970); *Haithcock v. Chimney Rock Co.,* 10 N.C. App. 696,

179 S.E. 2d 865 (1971); *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885 (1971), cert. den. 279 N.C. 348; *White v. Jordan*, 12 N.C. App. 175, 182 S.E. 2d 593 (1971).

In *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147 (1971), Judge Parker wrote:

> "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."

[1, 2] The burden is upon the moving party to establish the lack of a triable issue of fact. If defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Haithcock v. Chimney Rock Co., supra.*

[3] In the present case, defendant's affidavit in support of the motion for summary judgment merely reiterates the allegations in the defendant's answer and counterclaim. The plaintiff did not respond to the motion for summary judgment by affidavit or otherwise as provided by Rule 56; however, the plaintiff's verified complaint was on file and should have been considered by the court in determining whether the defendant had carried the burden of showing the lack of a genuine issue of material fact and whether the defendant was entitled to a judgment as a matter of law.

[4] In our opinion the pleadings and affidavit show clearly that there are genuine issues of material fact and that the defendant is not entitled to judgment as a matter of law on either plaintiff's claim or defendant's counterclaim.

The judgment appealed from is reversed.

Reversed.

Chief Judge MALLARD and Judge GRAHAM concur.

HUGH B. FULTON v. ROBERT W. RICE

No. 7130DC692

(Filed 17 November 1971)

1. **Contracts § 6— contractors' licensing statute — what constitutes a general contractor — "cost of undertaking" defined**

In determining whether a contractor who undertakes to build a house is a "general contractor" within the meaning of G.S. 87-1, which provides that a person is a general contractor if the cost of the undertaking is $20,000 or more, the term "cost of undertaking" is construed as the contractor's contract price, not the total cost of the building.

2. **Contracts § 6— unlicensed contractor — right to maintain counterclaim against homeowner**

An unlicensed contractor whose contract price to erect a house was less than $20,000 is not barred from maintaining a counterclaim against the homeowner for the balance due on the contract, notwithstanding the homeowner's obligations to third parties raised the total cost of the home to more than $20,000.

3. **Statutes § 10— construction of criminal statute**

A statute which imposes criminal penalties for its violation must be strictly construed.

4. **Statutes § 5— statutory restriction of occupation**

A statute restricting the practice of an otherwise lawful occupation to a special class of persons must be construed so as not to extend it to activities and transactions not intended by the legislature to be included.

APPEAL by defendant from *Leatherwood, District Judge,* 26 May 1971 Session of District Court held in JACKSON County.

The plaintiff is the owner of an interest in land located in Jackson County, North Carolina. On 29 August 1968 the plaintiff entered into a written contract with defendant for

the erection of a pre-cut log cabin on plaintiff's property. The plaintiff was to provide all materials, including the structure but excluding miscellaneous materials. The defendant was to provide and supervise the labor required to erect the structure plus miscellaneous materials. He was to be paid the cost of the labor and miscellaneous materials plus ten per cent.

Defendant's original estimate for the cost of his services was less than $15,000.00. At the time of this appeal the defendant claims to be entitled to a total of $12,698.67 of which plaintiff has paid $11,189.07. The balance claimed by defendant is $1,590.60. The plaintiff incurred additional expenses with third parties in the amount of $9,170.12 for building materials and supplies, transportation of the supplies to the construction site, and engineering and site preparation. The total cost of the building to the plaintiff was $21,868.79. The defendant was not licensed as a "general contractor" under G.S. 87-1 at the time the contract was entered and the work performed.

On September 5, 1969, plaintiff filed suit against the defendant alleging that defendant had breached the contract through faulty workmanship and that as a result the plaintiff has been damaged in the amount of $5,000.00. The defendant answered and counterclaimed for $1,590.60, the balance alleged to be due the defendant under the contract.

On April 21, 1971, plaintiff moved for dismissal of defendant's counterclaim alleging that defendant acted as a general contractor by undertaking to construct a building costing $20,000.00 or more; that defendant was not licensed as required by G.S. 87-1; and that an unlicensed contractor was barred from recovery where he undertook construction costing $20,000.00 or more in violation of G.S. 87-13. Matters outside the pleading were presented. The trial court found no material issue of fact and, treating plaintiff's motion as one for summary judgment, entered judgment dated 26 May 1971 dismissing defendant's counterclaim.

From this judgment, the defendant appeals.

Millar, Alley and Killian by Leon M. Killian III for plaintiff appellee.

Morgan, Ward and Brown by H. S. Ward, Jr., for defendant appellant.

VAUGHN, Judge.

[1, 2] The sole question raised on appeal is whether the defendant by entering into the instant contract became a general contractor within the meaning of G.S. 87-1 and was thus barred from recovery on his counterclaim because of his failure to have the license required by Chapter 87 of the General Statutes.

The statute in effect at the time of the institution of this suit defined a "general contractor" as

> " . . . one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, sewer main, grading or any improvement or structure where the cost of the undertaking is twenty thousand dollars ($20,000.00) or more and anyone who shall bid upon or engage in constructing any undertaking or improvements above mentioned in the State of North Carolina costing twenty thousand dollars ($20,000.00) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.
>
> "This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick, chimneys, and monuments."

The plaintiff contends that in determining whether a contractor is a general contractor within the meaning of G.S. 87-1, the court must look to the owner's total cost of the structure. If it exceeds the statutory amount, the contractor is a general contractor.

The defendant contends that the cost of the contractor's undertaking is determinative. This would, in most cases, be the contract price or the amount paid the contractor.

[3, 4] Certain principles of construction must be applied in arriving at a decision in this case. The statute before us imposes criminal penalties for its violation. G.S. 87-13. It must be strictly construed and its scope may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described. *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970) (citing cases). It is also a statute restricting the practice of an otherwise lawful occupation to a special class of persons and as such

it must be construed so as not to extend it to activities and transactions not intended by the legislature to be included. *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277 (1965).

[1, 2] The statute defines a general contractor as "one who . . . undertakes to bid upon or construct any building . . . or structure where the *cost of the undertaking* is twenty thousand dollars ($20,000.00) or more . . . . " (emphasis added). These words must be construed strictly in favor of the defendant because the statute carries criminal penalties and is in derogation of the right to engage in a lawful occupation. *Vogel v. Supply Co. and Supply Co. v. Developers, Inc., supra.* The contractor is a general contractor if the cost of the undertaking exceeds $20,000.00. It is clear that the cost of the undertaking is determinative.

An undertaking is defined as, "[a]n engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other." Black's Law Dictionary, Rev. 4th Edition (1968).

The undertaking is the promise or engagement. The cost of the undertaking is therefore the cost of the promise or engagement. The contract price and the total cost of the building are frequently, if not usually, the same. But where this is not the case, to allow the owner's total cost of the building to be determinative, would leave the contractor at the mercy of the owner. In such a situation the contractor would have no control over the purchase of materials or other expenses which the owner might incur and no way of insuring that he did not exceed the statutory cost limitation and thus fall within the definition of a general contractor.

In the case before this Court, the cost of the contractor's undertaking was less than $20,000.00. He was not within the definition of "general contractor" in G.S. 87-1 and therefore his counterclaim against plaintiff was not barred as a matter of law. The plaintiff's motion should have been denied.

Reversed.

Judges MORRIS and PARKER concur.

JAMES NORFLEET JARRELL v. SAMSONITE CORPORATION (A FOREIGN CORPORATION), AND HERB COCHRANE, T/A C & C RESTAURANT

No. 7126SC681

(Filed 17 November 1971)

1. **Limitation of Actions § 4— injury caused by defective chair — accrual of action against manufacturer**

Cause of action against a chair manufacturer for an injury arising out of the use of the chair in a restaurant *is held* to accrue when the chair was sold to the restaurant owner and not when the injury occurred; consequently, plaintiff's cause of action against the manufacturer which was instituted more than three years after the chair was sold is barred by the statute of limitations. G.S. 1-52.

2. **Rules of Civil Procedure § 56— summary judgment — defendant's satisfaction of his burden of proof — proof by plaintiff**

If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely on the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial.

APPEAL by plaintiff from *Hasty, Judge,* 21 June 1971 Session of Superior Court held in MECKLENBURG County

This is a civil action wherein plaintiff seeks to recover damages for personal injury allegedly sustained when plaintiff sat in a chair designed, manufactured and distributed by defendant, Samsonite Corporation (Samsonite), and used in a restaurant owned and operated by the defendant, Herb Cochrane (Cochrane).

In his complaint, plaintiff alleged that the defendant Cochrane was the owner or part-owner of a restaurant operating under the name of C & C Restaurant in Huntersville, North Carolina; that on 25 April 1969, while the plaintiff was in the C & C Restaurant as a customer, a chair belonging to defendant Cochrane and manufactured, sold, and distributed by defendant Samsonite crushed the plaintiff's finger, and that the injury was the result of negligence of Cochrane or Samsonite or both. Plaintiff alleged that Samsonite negligently designed, inspected and tested the chair and failed to give adequate warning of its danger and adequate direction for its use.

On 18 May 1971, the defendant Samsonite moved for summary judgment in its favor on the ground that there was no genuine issue as to any material fact and that the defendant Samsonite was entitled to judgment as a matter of law in that plaintiff's claim against the defendant Samsonite was barred by the statute of limitations, G.S. 1-52.

The defendant Samsonite's motion was supported by the following pertinent interrogatories and answers of defendant Cochrane, verified 4 September 1970:

"11. How many other chairs like this said Samsonite chair did you have in your place of business on the said date of Plaintiff's injury?

* * *

11. I had a total of 44 such chairs. I had had them four and one-half years on the premises."

"12. How long had you had the types of said Samsonite chairs in your premises of the type which injured the Plaintiff on April 25th, 1969?

* * *

12. I had had them four and one-half years on the premises. I do not know that the plaintiff was injured by any one of them."

"13. a) From whom and when did you purchase the Samsonite chairs?

b) How much was the approximate price thereof?

* * *

13. (a) Harris-Teeter Super Market; delivered in store at Cornelius.

(b) About $3.00 apiece."

On 21 June 1971, plaintiff filed a "Response to Motion for Summary Judgment" wherein plaintiff reiterated some of the allegations in his complaint and denied that his claim was barred by the three-year statute of limitations.

On 24 June 1971, after hearing, the court allowed defendant Samsonite's motion for summary judgment.

The plaintiff appealed.

Don Davis for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by James P. Crews for Samsonite Corporation, defendant appellee.

HEDRICK, Judge.

[1] The question presented on this appeal is whether the record discloses that plaintiff's claim against the defendant Samsonite is barred by the running of the statute of limitations. If so, the defendant Samsonite was entitled to judgment as a matter of law and the entry of summary judgment under G.S. 1A-1, Rule 56, was appropriate. *Brantley v. Dunstan,* 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

[2] If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely on the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Haithcock v. Chimney Rock Co.,* 10 N.C. App. 696, 179 S.E. 2d 865 (1971).

[1] In the present case the answers of defendant Cochrane to the interrogatories disclose that the chair which plaintiff alleged caused his injury was purchased by the defendant Cochrane from Harris-Teeter Super Market more than three years before plaintiff's suit was instituted against the defendant Samsonite or the defendant Cochrane.

Although the plaintiff filed a response to the motion for summary judgment, he did not set out in his opposing affidavit specific facts showing that the chair had not been in the defendant Cochrane's possession for more than three years before the suit was instituted, as shown in the answers to the interrogatories, or that the chair had been under the control of the defendant Samsonite within three years of the time that suit was instituted.

As to when the statute of limitations commenced to run, we think the recent decision of this Court in *State v. Aircraft Corp.,* 9 N.C. App. 557, 176 S.E. 2d 796 (1970), is controlling. There the State sought to recover for damages allegedly sustained by one of its buildings when an airplane manufactured, assembled and sold by defendant Cessna more than three years prior to the date suit was instituted crashed into the building

as a result of the negligence of the defendant Cessna in the manufacture, assembly and sale of the plane. Citing as authority, *Thurston Motor Lines, Inc. v. General Motors Corporation,* 258 N.C. 323, 128 S.E. 2d 413 (1962), and *Hooper v. Lumber Co.,* 215 N.C. 308, 1 S.E. 2d 818 (1939), this Court held that the statute of limitations commenced to run on the date the airplane was sold by defendant Cessna and not on the date of the crash.

Since the record in the instant case discloses clearly that the chair which allegedly caused plaintiff's injury had been sold to the defendant Cochrane, and had been out of the control of the defendant Samsonite for more than three years before suit was instituted, we hold that the defendant Samsonite was entitled to judgment as a matter of law because of the running of the three-year statute of limitations, G.S. 1-52, and the entry of summary judgment was appropriate.

Affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

STATE OF NORTH CAROLINA v. DAVID J. NOLES

No. 7127SC622

(Filed 17 November 1971)

1. **Criminal Law § 143— activation of suspended sentence — appellate review**

When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

2. **Criminal Law §§ 23, 143— appeal from activation of suspended sentence — voluntariness of guilty plea — collateral attack on judgment**

Contention on appeal from an order activating a suspended sentence that defendant's conviction is invalid because the record does not affirmatively show that his plea of guilty was voluntarily and understandingly entered is an impermissible collateral attack on the original judgment.

3. **Criminal Law § 143— suspended sentence — revocation hearing — right to counsel**

Contention that defendant was prejudiced because he "was not advised of his right to counsel at the hearing to activate his suspended sentence" is without merit where the record shows that counsel was present at the revocation hearing and made an argument on defendant's behalf.

4. **Criminal Law § 143— revocation of suspended sentence — notice of hearing — capias**

Capias issued to defendant constituted substantial compliance with the requirements of G.S. 15-200.1 for giving defendant notice of an intention to pray the court to revoke his suspended sentence.

5. **Criminal Law § 143— activation of suspended sentence — conviction of subsequent crime**

The evidence supported the court's determination that defendant violated the conditions of his suspended sentence by being convicted of a subsequent crime.

APPEAL by defendant from *Grist, Judge,* 17 May 1971 Session of Superior Court, LINCOLN County.

On 13 July 1970, the defendant entered a plea of guilty in Lincoln County District Court to the offense of uttering a worthless check. The court suspended a six-month sentence for five years on condition that the defendant pay the costs of court and a $50 fine and that he violate none of the laws of North Carolina during those five years. On 10 December 1970 the defendant entered a plea of guilty in Catawba County District Court to the offense of uttering worthless checks. The court suspended a 12-month sentence for three years subject to certain terms and conditions of probation not pertinent to this appeal. On 15 January 1971, a capias was issued commanding the sheriff to arrest defendant to assure his personal appearance in Lincoln County District Court on 18 January 1971 for violating the 13 July 1970 judgment. The defendant was not able to post $300 bail and was committed to jail on 15 January 1970. On 18 May 1971 the Lincoln County District Court ordered the 13 July 1970 six-month sentence into effect because the defendant's 10 December 1970 conviction violated the terms of the suspension. The defendant appealed the activation of his suspended sentence to the Lincoln County Superior Court. A hearing was held in Superior Court wherein the defendant was allowed to testify and present evidence. On 21 May 1971 the Superior Court ordered activation of defendant's six-month sentence, and it is from that order that defendant appeals.

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

Joseph B. Roberts III for defendant appellant.

MORRIS, Judge.

[1, 2] Defendant's first two assignments of error attack the validity of the warrant upon which he was originally tried and the resulting judgment entered 13 July 1970 because there was no affirmative showing on the record that the defendant entered a plea of guilty understandingly and voluntarily. The defendant cites *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971), as authority for his proposition, but the cases can be distinguished. Both cases involve appeals from an order activating suspended sentences and in both the contention was that guilty pleas not in compliance with *Boykin v. Alabama,* 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709 (1969), were entered. In *Harris* the defendant directly attacked the validity of the later judgment which was the basis for the activation of his original suspended sentence. In the present case, however, the defendant tries to attack collaterally the validity of the original judgment, where his sentence was suspended, in an appeal from the revocation of that suspension. It is here that the similarity ends and the difference lies. When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time. *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970). Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack. The proper procedure which provides the defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is under the Post-Conviction Hearing Act. G.S. 15-217, et seq. See *State v. White,* 274 N.C. 220, 162 S.E. 2d 473 (1968).

Even if a collateral attack on the original judgment were permissible, there is no showing on the record before us that the issue of the voluntariness of the guilty plea was raised at the revocation hearing.

[3] By defendant's third and fourth assignments of error he contends that he "was not advised of his right to counsel at the hearing to activate his suspended sentence." It is clear from the record that the same attorney who represented the defendant at the 10 December 1970 trial was present at the revocation hearing in Superior Court on 21 May 1970, and that he made argument on the defendant's behalf. These assignments of error are overruled.

[4] Defendant also urges on appeal that he "was not properly informed in writing of the solicitor's intention to pray the court to activate his suspended sentence as required under G.S. 15-200.1." The capias issued to defendant on 15 January 1971 constitutes substantial compliance with G.S. 15-200.1, and we find no merit in this assignment of error. *State v. Dawkins*, 262 N.C. 298, 136 S.E. 2d 632 (1964).

[5] Finally, defendant assigns as error the entry of the judgments activating his suspended sentence, alleging that they were not supported by sufficient evidence. The evidence before the court was sufficient to support its conclusion that the defendant had violated the conditions of his suspended sentence and that the sentence should be activated.

Affirmed.

Judges PARKER and VAUGHN concur.

EUGENE ORR AND BETHA LEE ORR RACKLEY v. ERNIE ORGO, GEORGE MAVRODE AND O & R ASSOCIATES, INC.

No. 7129DC718

(Filed 17 November 1971)

1. **Principal and Agent § 4— proof of agency — extra-judicial statements of alleged agent — admissibility**

Extra-judicial statements of an alleged agent are not competent against the principal unless the fact of agency appears from other evidence, and also unless it appears from evidence that the statements were within the actual or apparent scope of the agent's authority.

2. **Principal and Agent § 4— proof of agency — statement that person was acting for "his company"**

Statements by an alleged agent that a certain company was "his company" are inadmissible, standing alone, to establish his agency

on behalf of the company at the time when he made purchases of ivy and evergreens from the plaintiffs; consequently, the admission of the statements in evidence was reversible error.

3. **Appeal and Error § 57— nonjury trial — presumption that judge disregarded incompetent evidence**

The presumption that the judge in a nonjury trial disregarded incompetent evidence in making his decision does not obtain when the judge expressly states that he is considering evidence which later proves incompetent.

APPEAL by defendant O & R Associates, Inc. from *Carnes, District Judge,* 29 April 1971 Session of District Court held in TRANSYLVANIA County.

Defendant, O & R Associates, Inc., appeals from a judgment, entered by the court after trial without a jury, that plaintiff recover from O & R the sum of $2,147.40.

Ramsey, Hill, Smart & Ramsey by John K. Smart, Jr., for plaintiff appellees.

Ramsey & White by William R. White for defendant appellant O & R Associates, Inc.

GRAHAM, Judge.

Appellant assigns as error the admission in evidence of various extra-judicial statements purportedly made to plaintiffs by George Mavrode. Mavrode was named a party defendant but was not served with process and was not present at the trial.

The statements in question tended to show, among other things, that in October 1969 Mavrode asked plaintiffs to purchase ivy and evergreens for him and "his company." Plaintiffs performed as requested and this suit is to recover the commissions which Mavrode allegedly agreed to pay.

[1] Extra-judicial statements of an alleged agent are not competent against the principal unless the fact of agency appears from other evidence, and also unless it appears from other evidence that the statements were within the actual or apparent scope of the agent's authority. *Sealy v. Insurance Co.,* 253 N.C. 774, 117 S.E. 2d 744; *Commercial Solvents v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716; *D.L.H., Inc. v. Mack Trucks, Inc.,* 3 N.C. App. 290, 164 S.E. 2d 532.

[2] The record in this case is devoid of any evidence, other than the purported statements of Mavrode, to show that appellant was "Mavrode's company" or that Mavrode was appellant's agent or employee at the time he made the statements in question. It was therefore error to admit in evidence against appellant plaintiffs' testimony as to the out of court statements made by Mavrode.

Plaintiffs testified that the ivy and evergreens which they purchased for Mavrode were shipped in trucks bearing the name of appellant. They argue that this fact alone establishes Mavrode as the apparent agent of appellant. We disagree. The shipments were made after plaintiffs had agreed to make purchases for Mavrode. There is no evidence that Mavrode was in possession of trucks bearing appellant's name at the time he contracted with plaintiffs, or that he possessed other indicia of agency at that time. Nor is there any evidence to suggest that plaintiffs were misled into thinking they were dealing with appellant. Plaintiff Orr testified that he knew Mavrode was in the general business of buying ivy and selling it to different people. It is clear that plaintiffs looked to Mavrode, and not to appellant, for the cash needed for the purchase of ivy. Orr testified: "I got the money to purchase the ivy from Western Union and part of the time George [Mavrode] would give us cash." Plaintiff Rackley recalled that the name of Ernie Orgo & Associates appeared on the money orders. When she needed money to pay for ivy she would attempt to contact Mavrode.

Plaintiffs offered no evidence as to the type of business appellant was engaged in. We think it significant that appellant's evidence, which is not contradicted, is that it is engaged in the business of renting trucks and that its only connection with Mavrode was that it rented him three trucks.

[3] In a non-jury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision. *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373; *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111. Here the trial judge expressly stated that he was considering evidence of Mavrode's statements against appellant, as well as against the other defendants. His findings of fact further indicate that he considered the incompetent evi-

dence in making his decision. Appellant is therefore entitled to a new trial.

New trial.

Chief Judge MALLARD and Judge HEDRICK concur.

EDGAR N. JAYNES AND WIFE, NELL LEE JAYNES v. ERNEST LAWING AND WIFE, JENNIE LEE LAWING

No. 7129DC664

(Filed 17 November 1971)

1. **Landlord and Tenant § 13— lease for a definite term of years — termination of lease**

A lease which provided for a definite term of fifteen years and gave the lessee the right to terminate the lease upon thirty days' notice after the expiration of the first year does not authorize the landlord, in the absence of express language in the lease, to terminate the lease upon thirty days' notice to the lessee.

2. **Landlord and Tenant §§ 13, 15— lease for definite term of years — option to terminate lease — tenancy at will**

A properly executed lease for a definite term of years is not converted to a tenancy at will solely by virtue of the fact that it contains an option to terminate it by one party without a corresponding option in favor of the other party.

APPEAL by plaintiffs from *Gash, District Judge,* 19 July 1971 Session of District Court held in HENDERSON County.

After a hearing, the trial court, under date of 21 July 1971, allowed defendants' motion for judgment on the pleadings as provided in G.S. 1A-1, Rule 12(c) on the grounds that plaintiffs' complaint failed to state a claim on which relief could be granted. From the judgment entered, the plaintiffs appealed.

Prince, Youngblood, Massagee & Groce by Kenneth R. Youngblood and Edwin R. Groce for plaintiff appellants.

Bennett, Kelly & Long by E. Glenn Kelly for defendant appellees.

MALLARD, Chief Judge.

[1] Plaintiffs seek to recover possession of certain real estate from defendants. Plaintiffs allege in their complaint, which was filed 7 November 1966, that defendants entered into possession thereof on 9 March 1964 under a lease agreement. It is not alleged that any installment of rent was unpaid or that the defendants have breached any of the provisions of the lease. It is alleged, however, that "said lease in paragraph (i) granted to the Defendants the right of termination at any time after one year from the date of the agreement and that said provision in law is granted also to the Plaintiffs. That after one year from the date of said lease the Plaintiffs notified the Defendants in writing and otherwise of their intention to terminate the lease as of 1 May, 1965, or sooner if desired by the Defendants."

The lease, which was attached to and made a part of the complaint, was properly executed and acknowledged and was for the definite term of fifteen years beginning as of 1 March 1964. It also gave the defendants the option to purchase the premises described at any time during the term of the lease and further provided that the defendants pay to the plaintiffs a monthly rental of $300. The lease also contained the following provision:

> "(i) If parties of the SECOND part have paid all installments of rental theretofore due and have done and performed all matters and things herein specified to be done and performed by them, they may at any time after one year from the date hereof terminate this lease by giving to the parties of the first part thirty (30) days' written notice of their intention so to do."

Plaintiffs contend that under the above-quoted provision, a tenancy at will, terminable at the will of either party, was created after the first year, and that the trial judge committed error in allowing defendants' motion for judgment on the pleadings. The cases cited by plaintiffs in support of their contentions are distinguishable.

The language the parties used to express their agreement relating to termination is clear. There is no ambiguity. If the parties had intended that the plaintiffs (lessors) have the right to terminate the lease upon thirty days notice after the expiration of one year, it would have required no great effort to so

state. The only expressed provision relating to the termination of the lease by the plaintiffs was that if any installment of rent was overdue and unpaid for thirty days, they could, during such default, declare the lease terminated.

In 49 Am. Jur. 2d, Landlord and Tenant, § 75, it is stated:

> "Moreover, where a lease is for a definite term of years and complies with the formal requisites of such a term, it creates a tenancy for years, and not a mere tenancy at will, even though it is made terminable at the option of the lessee, such a lease not being within the application of the foregoing broad rule that a lease or estate at the will of one of the parties is equally at the will of the other."

In 51C C.J.S., Landlord & Tenant, § 91, it is stated:

> "An agreement is not invalid although it gives the lessor or the lessee alone the right to terminate the lease. The common-law rule . . . that an estate at the will of one party is equally at the will of the other, does not render a lease granting such an option to one of the parties terminable at the option of the other party."

[2] A properly executed lease for a definite term of years is not converted to a tenancy at will solely by virtue of the fact that it contains an option to terminate it by one party without a corresponding option in favor of the other party. See 49 Am. Jur. 2d, Landlord and Tenant, § 999; Annot. 137 A.L.R. 362; *First Nat. Bldg. Corporation v. Harrod,* 175 F. 2d 107 (1949).

[1] We hold that the provisions of the lease, permitting the defendants (lessees) to terminate it after one year upon thirty days written notice, did not create a tenancy at will and did not give the plaintiffs (lessors), as a matter of law, the option of terminating the lease and repossessing the property. The trial judge did not commit error in allowing the defendants' motion for judgment on the pleadings under the provisions of G.S. 1A-1, Rule 12(c).

Affirmed.

Judges HEDRICK and GRAHAM concur.

PAULINE BRADLEY v. LEWIS MOTORS, INC., AND FORD MOTOR COMPANY

No. 7127DC710

(Filed 17 November 1971)

Limitation of Actions § 4; Sales § 22— defective automobile — accrual of action against manufacturer

Plaintiff's claim for relief against an automobile manufacturer for damages allegedly resulting from a defect in the steering mechanism of plaintiff's automobile accrued on the date plaintiff purchased the automobile and was barred by the three-year statute of limitations, the action having been commenced prior to the effective date of G.S. 1-15(b).

APPEAL by plaintiff from *Mull, District Judge,* 26 August 1971, GASTON District Court.

This action was instituted by the issuance of summons and filing of complaint on 24 May 1971. Plaintiff seeks to recover for personal injury and property damage allegedly sustained by her when a Ford Mustang manufactured by defendant Ford Motor Company (Ford) and purchased by her from defendant Lewis Motors, Inc. (Lewis) went out of control and crashed into a metal rail on the side of a highway. Pertinent allegations of the complaint are summarized as follows:

On 13 January 1967 plaintiff purchased a new 1967 Ford Mustang from defendant Lewis, said Lewis being engaged in the sale of automobile products manufactured by defendant Ford. At the time of the purchase said automobile, including its steering mechanism and brakes, was warranted by defendant Ford to be in good condition. Approximately three weeks later as plaintiff was driving the vehicle it went out of control when the front wheels unexpectedly turned to the right. Defendant Lewis removed the automobile to its place of business where the steering defect was supposedly corrected. Thereafter, plaintiff had a similar experience with said Mustang and defendant Lewis again purportedly corrected the steering defect. Sometime thereafter plaintiff received a notice from defendant Ford requesting that she return the car to defendant Lewis for correction of certain latent defects. Plaintiff did as requested and defendant Lewis purportedly repaired the defects and assured plaintiff that the vehicle was then in safe condition to be operated. On 15 April 1969 while plaintiff was operating said

Mustang on Interstate Highway 85 in Mecklenburg County, the front wheels suddenly "swerved to the left and the steering wheel became locked," causing the car to crash into a metal rail adjacent to the highway, resulting in injuries to plaintiff and damage to her property.

Defendant Ford filed answer and among other defenses alleged that any right of action or claim for relief set forth in the complaint against it did not accrue within three years next before the commencement of the action and is therefore barred by the applicable statute of limitations.

Defendant Ford also filed motion for summary judgment and for judgment on the pleadings pursuant to Rules 12 and 56 of the Rules of Civil Procedure, setting forth, among other things, that the action is barred by G.S. 1-52 in that any claim for relief set forth in the complaint against Ford accrued more than three years prior to the date of the institution of the action.

Following a hearing the trial court allowed defendant Ford's motion for summary judgment and adjudged that the action as against Ford be dismissed. Plaintiff appealed.

Joseph B. Roberts III for the appellant.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellee.

BRITT, Judge.

Did the trial court err in granting summary judgment in favor of defendant Ford? We hold that it did not.

Summary judgment is proper when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101 (1970). For the reasons stated by us in *State v. Aircraft Corp.,* 9 N.C. App. 557, 176 S.E. 2d 796 (1970), we think plaintiff's claim for relief alleged against defendant Ford accrued on 13 January 1967 when she purchased the Mustang, which date was more than three years prior to the date she instituted this action. The pleadings show

that defendant Ford was entitled to summary judgment on its plea of the three years statute of limitations.

We are aware of the proviso of Chapter 1157 of the 1971 Session Laws, codified as G.S. 1-15(b); however, Section 2 of the act provides that it shall become effective upon ratification and shall not affect pending litigation. The act was ratified on 21 July 1971, some 60 days after this action was instituted.

The judgment appealed from is

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. HAROLD RAY GREENE

No. 7125SC536

(Filed 17 November 1971)

1. **Criminal Law § 58; Constitutional Law § 33— evidence of handwriting — self-incrimination**

A handwriting sample taken from defendant after his arrest for forgery is admissible in evidence without violating defendant's Fifth Amendment privilege against self-incrimination.

2. **Forgery § 1— element of intent to defraud**

Intent to defraud is an essential element of the crime of forgery. G.S. 14-119.

3. **Forgery § 2— forgery of checks — evidence of intent to defraud**

In a prosecution charging defendant with the forgery of checks, the State offered sufficient evidence to support a jury finding that the defendant made the checks with the requisite intent to defraud.

APPEAL by defendant from *Friday, Judge,* 8 February 1971 Session of Superior Court held in CATAWBA County.

Defendant Harold Ray Greene was charged in two bills of indictment, proper in form, with forging and uttering two checks, in violation of G.S. 14-119 and 14-120. The defendant pleaded not guilty.

The State offered evidence tending to show that approximately 90 checks and a check-writing machine were stolen from Building Specialties Company, Hickory, North Carolina.

Alva Gene Hines, whose purported signature appeared on the two checks in question, testified that the checks had been prepared by use of the stolen check-writing machine, and that he had not signed the checks or given anyone authority to sign his name on the checks. One of the checks was cashed at Belk's in Hickory by a man identified as Jimmy Gray; the other was cashed at Sky City Discount Center in Hickory by an unidentified party.

An expert in handwriting analysis, who compared the handwriting on the checks with a handwriting sample taken from the defendant after his arrest, testified that in his opinion the checks and the handwriting sample were prepared by the same writer.

At the close of the State's evidence, the court allowed the defendant's motion for judgment as of nonsuit on the counts charging him with uttering forged checks. The defendant offered no evidence. The jury found the defendant guilty of forgery in each indictment and from judgments imposing prison sentences, the defendant appealed.

Attorney General Robert Morgan, Assistant Attorney General William W. Melvin, and Associate Attorney Louis W. Payne, Jr., for the State.

Kenneth D. Thomas for defendant appellant.

HEDRICK, Judge.

[1] By appropriate assignments of error the defendant contends that the evidence of the expert in handwriting analysis was inadmissible because the samples of handwriting were taken from the defendant in violation of his Fifth Amendment privilege against self-incrimination.

Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the Fifth Amendment privilege against self-incrimination. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *State v. Bryant,* 5 N.C. App. 21, 167 S.E. 2d 841 (1969); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, Cert. den. 393 U.S. 1087 (1968). These assignments of error are overruled.

[2, 3] Defendant next assigns as error the court's denial of his motion for judgment as of nonsuit on the counts charging him with forging checks. Defendant contends that the State failed to offer any evidence from which the jury could find beyond a reasonable doubt that the checks were made with intent to defraud. Intent to defraud is an essential element of the crime of forgery. G.S. 14-119; *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22 (1968). "Intent is a mental attitude which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it can be inferred. 2 Strong, N.C. Index 2d, Criminal Law, § 2, p. 481. And in determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged. *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473." *State v. Kendrick,* 9 N.C. App. 688, 177 S.E. 2d 345 (1970).

In the instant case evidence that 90 checks and a check-writing machine were stolen from Building Specialties Company; that the defendant forged the signature of Alva Gene Hines on the two Building Specialties Company checks; that the stolen check-writing machine was used to write the forged checks; that the checks had the capability of defrauding, and were actually used to defraud, are all circumstances from which the jury could find beyond a reasonable doubt that the defendant forged the checks with intent to injure and defraud Building Specialties Company. *State v. Wyatt,* 9 N.C. App. 420, 176 S.E. 2d 386 (1970). This assignment of error is overruled.

Finally, defendant contends that the trial court committed error in charging the jury on the element of fraudulent intent. This contention is without merit. We think the charge, when read as a whole, is correct and free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

DEWEY MACK CLARY v. D. L. NIVENS AND D. W. YOUNG, AS INDIVIDUALS; AND THE CITY OF CHARLOTTE

No. 7126SC541

(Filed 17 November 1971)

Limitation of Actions § 12; Malicious Prosecution § 7; Rules of Civil Procedure § 15— amendment of complaint — relation back — statute of limitations

Where plaintiff on 23 March 1970 instituted an action against defendant police officers to recover damages for a false arrest which allegedly occurred on 30 May 1967, and plaintiff, by leave of the court, filed an amended complaint on 18 February 1971 seeking to recover for the same occurrence on theories of false arrest and malicious prosecution, the action for malicious prosecution relates back to the date of the original complaint and is therefore not barred by the three-year statute of limitations, since the original complaint placed defendant on notice of the occurrences to be proved pursuant to the amended complaint. G.S. 1A-1, Rule 15(c).

APPEAL by plaintiff from *Clarkson, Judge,* 26 April 1971 Special Non-jury Session of Superior Court held in MECKLENBURG County.

On 23 March 1970 plaintiff instituted an action against defendant police officers seeking damages arising out of an alleged false arrest on 30 May 1967. On 18 February 1971, by leave of the court, plaintiff filed an amended complaint in which he again sought to recover for false arrest. His amended complaint also alleged a second cause of action seeking to recover on the theory of malicious prosecution. Defendants answered denying the material allegations of the complaint and alleging that the action for false arrest was instituted more than one year after the date of the alleged event and that the same was therefore barred by G.S. 1-54. With respect to the cause of action for malicious prosecution, the defendants denied the material allegations of the complaint and pleaded that plaintiff's amended complaint, seeking to recover on that theory, was not filed until more than three years after 30 May 1967, the date of the alleged event and was therefore barred by G.S. 1-52.

Defendants moved for summary judgment and the same was granted. The court found, in part, as follows:

> "And it further appearing that there is no genuine issue as to any material fact before the court, the sole

questions being those of law; that is, whether or not plaintiff's two causes of action as set forth in his Amended Complaint of February 18, 1971 were brought within the time prescribed by N. C. General Statute 1-54 and N. C. General Statute 1-52 respectively. Plaintiff's first cause of action was brought after more than one year from the date that it accrued, and his second cause of action for malicious prosecution was commenced after more than three years had passed from the date that the cause of action had accrued.

"The court finds there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law."

From entry of judgment dismissing the action for malicious prosecution, plaintiff appealed.

John D. Warren and Warren D. Blair for plaintiff appellant.

W. A. Watts for defendant appellees.

VAUGHN, Judge.

Plaintiff did not except to the dismissal of his claim for false arrest which was properly dismissed as being barred by G.S. 1-54. The question presented is whether plaintiff's claim for malicious prosecution is barred by the Statute of Limitations in that he first sought to recover on this theory in an amended complaint which was filed more than three years after the events which gave rise to the action. The pending action in which the amended complaint was filed had been instituted prior to the expiration of three years from the date of the alleged events. If the amended complaint relates back to the date of the original pleading, plaintiff's action for malicious prosecution is not barred by the Statute of Limitations.

Rule 15(c) of the North Carolina Rules of Civil Procedure is as follows:

"(c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or

occurrences, to be proved pursuant to the amended pleading."

It is not necessary to set out the pleadings in this case. It suffices to say that the original pleadings clearly gave "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleadings." In fact, the essential details of the alleged events are alleged in substantially the same fashion in both the original and the amended complaints. Certainly the original pleadings placed defendants on notice of the events involved. It was error, therefore, to dismiss plaintiff's claim for malicious prosecution as being barred by the Statute of Limitations.

Reversed.

Judges BROCK and GRAHAM concur.

JAMES B. HUSS v. PAUL JUNIOR THOMAS AND REA CONSTRUCTION COMPANY, A CORPORATION

No. 7127SC714

(Filed 17 November 1971)

1. **Highways and Cartways § 7— intersection accident — removal of stop sign by contractor — liability of contractor**

Plaintiff's evidence tending to show that he entered an intersection on the dominant highway, that another driver entered the intersection from a servient street without stopping and a collision occurred, that defendant contractor was making repairs on the servient street and removed the stop sign on the servient street, and that the other driver had never been along the street before and thought he had the right-of-way at the intersection because there were no signs, barricades or other warnings to indicate to the contrary, *held* sufficient to be submitted to the jury on the issue of defendant contractor's negligence.

2. **Torts § 7— evidence of covenant not to sue another tort-feasor**

The trial court erred in allowing defendant to elicit evidence concerning a covenant not to sue which plaintiff had given to another tort-feasor.

APPEAL by plaintiff from *Froneberger, Emergency Judge,* 12 July 1971 Session of Superior Court held in GASTON County.

Plaintiff seeks to recover for personal injuries and property damages sustained in an automobile accident which occurred in an intersection. Plaintiff alleged that the damages resulted from the negligence of Thomas and Rea Construction Company. Prior to trial plaintiff gave Thomas a covenant not to sue and proceeded against Rea as the sole defendant. At the close of plaintiff's evidence judgment was entered granting defendant's motion for a directed verdict and dismissing the action. Plaintiff appealed.

Whitesides and Robinson by Henry M. Whitesides for plaintiff appellant.

Sanders and LaFar by Julius T. Sanders for defendant appellee.

VAUGHN, Judge.

[1] Plaintiff was traveling along the dominant highway. Thomas entered the intersection from the servient street without stopping and a collision occurred. Plaintiff alleged and offered evidence tending to show that Rea, a contractor engaged in making certain repairs on the servient street, had removed the stop sign which directed motorists traveling along the servient street to stop before entering the intersection. Thomas was called as a witness for plaintiff and testified, in substance, that he had never been along the street before and that he thought he had the right-of-way at the intersection because there were no signs, barricades or other warnings to indicate to the contrary.

The duty of the defendant contractor was as follows:

> "When a contractor undertakes to perform work under contract with the State Highway Commission, the positive legal duty devolves on him to exercise ordinary care for the safety of the general public traveling over the road on which he is working. [citations omitted]. Contractors must exercise ordinary care in providing and maintaining reasonable warnings and safeguards against conditions at the time and place. [citations omitted]. ' . . . The test of the sufficiency of the warning . . . is whether the means employed, whatever they may be, are reasonably sufficient for the purpose.' 25 Am. Jur., Highways, s. 413, p.

708. . . . " *Equipment Co. v. Hertz Co.*, 256 N.C. 277, 123 S.E. 2d 802.

See also *Evans v. Construction Co.*, 194 N.C. 31, 138 S.E. 411; *Furlough v. Highway Commission*, 195 N.C. 365, 142 S.E. 230; *Council v. Dickerson's Inc.*, 233 N.C. 472, 64 S.E. 2d 551; *Moss v. Tate*, 264 N.C. 544, 142 S.E. 2d 161. Without further review of plaintiff's evidence, it suffices to say that such evidence, when taken as true and viewed in its most favorable light, is sufficient to raise a question for the jury as to whether the defendant failed to meet this positive legal duty. The question of plaintiff's contributory negligence is also a matter for the jury.

[2] Plaintiff's second assignment of error is that counsel for Rea was allowed to elicit evidence concerning the covenant not to sue which had been given by plaintiff to Thomas. Plaintiff's position is well taken. " . . . [T]he preferred method of crediting one tort-feasor with the amount another has paid the plaintiff as consideration for a covenant not to sue is for the judge to deduct the amount *after* the jury has assessed the full amount of the plaintiff's damage, and that all evidence of the payment and covenant should be excluded. . . . " *Waden v. McGhee*, 274 N.C. 174, 161 S.E. 2d 542.

Reversed.

Judges BROCK and BRITT concur.

CLYDE RICHARDSON PLOTT v. WACHOVIA BANK AND TRUST COMPANY (A BANKING CORPORATION)

No. 7126DC680

(Filed 17 November 1971)

Limitation of Actions § 4; Retirement Systems § 5— pension trust — action against trustee — statute of limitations

Where plaintiff alleged that under the terms of a pension trust for which defendant was trustee, he became entitled to the payment of $817.50 on 30 January 1953 and that defendant was legally obligated to pay him that amount on 30 January 1953, plaintiff's action instituted against defendant in 1970 is barred by the statute of limitations.

APPEAL by plaintiff from *Johnson, District Judge*, 14 June 1971 Session of District Court held in MECKLENBURG County.

Defendant moved to dismiss or for judgment on the pleadings. The court allowed the motion and plaintiff appealed.

Don Davis for plaintiff appellant.

Helms, Mulliss & Johnston by Robert B. Cordle for defendant appellee.

MALLARD, Chief Judge.

The allegations of plaintiff's complaint, filed 6 October 1970, are set forth as follows:

"1. That the Defendant is a banking corporation and is doing business and operating in the State of North Carolina.

2. That sometime before January 30th, 1953, the Plaintiff was employed by the Queen City Coach Co. and that thereafter sometime before January 30th, 1953, the Plaintiff's employment with said Queen City Coach Co. ceased.

3. That under or by virtue of his employment with the said Queen City Coach Co., the Plaintiff on or about January 30th, 1953, became entitled to payment of $817.50 under a so-called 'Queen City Coach Pension Trust Agreement' of which the Defendant, Wachovia Bank and Trust Co. was Trustee thereof.

4. The defendant Wachovia Bank and Trust Co. was legally obligated to pay unto the Plaintiff on or about January 30th, 1953, the said sum of $817.50 in its fiduciary capacity.

5. That the Defendant Wachovia Bank and Trust Co., Trustee, has failed and refused to pay unto the Plaintiff the said $817.50 due him; and

6. There is legally due and owing the Plaintiff the sum of $817.50 by the Defendant Wachovia Bank and Trust Co. as Trustee; and

7. The Plaintiff demands Judgment against the Defendant Wachovia Bank and Trust Co. in the amount of $817.50, together with interest thereon from January 30th, 1953, at the rate of 6% per annum until paid."

In the answer, paragraphs numbered 1, 2, 3 and 4 are admitted and 5, 6 and 7 are denied. Defendant, for further answers, pleaded payment and the statute of limitations in bar of the claim. After answer was filed but on same date (12 November 1970), defendant filed a "Motion to Dismiss Or For Judgment On The Pleadings," asserting as grounds the "failure to state a claim against the defendant upon which relief can be granted, in that it appears from the face of the complaint herein that claim is barred by the applicable statute of limitations, North Carolina General Statutes section 1-52."

According to the allegations in the complaint, plaintiff's cause of action accrued in 1953. When this action was brought, it was barred by the statute of limitations. "Statutes of limitation are inflexible and unyielding." *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1957). See also *State v. Aircraft Corp.,* 9 N.C. App. 557, 176 S.E. 2d 796 (1970), and 7 Wake Forest Law Review 101 (1970).

We hold that the trial judge, on this record, did not commit prejudicial error on 16 June 1971 when, after a hearing, the motion of the defendant was allowed and the action dismissed.

Affirmed.

Judges HEDRICK and GRAHAM concur.

GENERAL MOTORS ACCEPTANCE CORPORATION v. STEVE FEDER

No. 7126DC678

(Filed 17 November 1971)

Appeal and Error § 6— denial of motion to dismiss — appeal from interlocutory order

An order denying a motion to dismiss an action is an interlocutory order from which no immediate right of appeal lies.

APPEAL by defendant from *Stukes, District Judge,* 11 June 1971 Session of District Court held in MECKLENBURG County.

Plaintiff seeks in this action, and through the ancillary remedy of claim and delivery, to recover judgment for the amount allegedly owed by defendant under the terms of a condi-

tional sales contract, to obtain possession of an automobile which is the subject of the contract, and to have the automobile ordered sold and the proceeds applied to the judgment.

Before filing answer defendant filed a motion to dismiss in which he alleged that plaintiff had failed to state a claim upon which relief could be granted and that another action involving the same subject matter was pending between plaintiff and defendant at the time this action was instituted. Defendant's motion was denied and he appealed.

Moore and Van Allen by George V. Hanna III for plaintiff appellee.

William D. McNaull, Jr., for defendant appellant.

GRAHAM, Judge.

Plaintiff has filed a written motion in this court asking that defendant's appeal be dismissed on the ground the order appealed from is an interlocutory order from which no immediate right of appeal lies.

Rule 4, Rules of Practice in the Court of Appeals of North Carolina, as amended by the Supreme Court on 20 January 1971, provides:

> "4. The Court of Appeals will not entertain an appeal:
>
> 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."

An order denying a motion to dismiss an action is an interlocutory order from which no immediate right of appeal lies. *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E. 2d 381; *Acorn v. Knitting Corp.*, 12 N.C. App. 266, 182 S.E. 2d 862. Plaintiff has not petitioned for a writ of certiorari nor has he attempted to show that the order in question affects a substantial right. See G.S. 1-277.

The order entered denying defendant's motion to dismiss this action is an interlocutory order and plaintiff's motion to dismiss defendant's appeal from the order is allowed.

We have nevertheless reviewed the record and are of the opinion the trial court did not err in denying defendant's motion to dismiss.

Appeal dismissed.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN LEE NELSON

No. 713SC633

(Filed 17 November 1971)

Criminal Law § 143— revocation of a suspended sentence

Trial judge acted within his discretion in revoking suspension of defendant's prison sentence upon a finding that defendant had wilfully violated conditions of his probation.

APPEAL by defendant from *Rouse, Judge,* 10 May 1971 Criminal Session of Superior Court held in CRAVEN County.

Attorney General Robert Morgan by Assistant Attorney General Edward L. Eatman, Jr., for the State.

Sam L. Whitehurst, Jr., for defendant appellant.

PARKER, Judge.

This is an appeal from a judgment revoking suspension of a six months suspended sentence upon a finding of defendant's wilfull violation of the terms of his probation. Appellant's only contention is that the court abused its discretion. There is no merit in this contention. No abuse of discretion has been shown. The court's finding that defendant had wilfully violated conditions of his probation is amply supported in the record, and such finding supports the judgment.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES MOSES McCAULEY

No. 7126SC573

(Filed 17 November 1971)

APPEAL by defendant from *McLean, Judge,* 19 April 1971 Special Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment with the felony of burglary. When the case is called for trial, the solicitor for the State announced that the State elected to place defendant on trial for the lesser included offense of felonious breaking or entering. To this latter charge defendant entered a plea of not guilty.

State's evidence tended to show: At approximately seven o'clock p.m. on 5 January 1971 Rosiland Wheeler was alone in her mother's home at 1617 Pyron Street in the city of Charlotte. As she completed taking a bath and came out of the bathroom, she saw defendant standing in the living room. She ran out of the house and to a friend's house across the street from where she called her brother by telephone. She and her friend watched as defendant came out of the house carrying a record player in one hand and a tape recorder in the other. Rosiland Wheeler's brother and brother-in-law later brought defendant back to the scene where city police took him in custody.

Defendant's evidence tended to show: He was visiting in Charlotte and trying to locate where a friend lived. He saw Rosiland Wheeler on the front porch of her house and asked if she knew his friend. She invited him into the house where she inquired of visitors in the house if they knew defendant's friend. Obtaining no information from them, she volunteered to go to a home across the street and make further inquiry for defendant leaving him in her house with the several other visitors. When she did not return in three or four minutes, defendant left. He did not take anything out of the house, and did not walk away with a record player and a tape recorder. A little while later, he was accosted and returned to the scene by persons unknown to him.

Upon a verdict of guilty of felonious breaking or entering an active prison sentence was imposed. Defendant appealed.

Attorney General Morgan, by Associate Attorney Witcover for the State.

Blackwell, Foley, Morton & Robinson, by James H. Morton, for defendant.

BROCK, Judge.

We have carefully considered defendant's assignments of error and we find no error sufficient to justify a new trial. In our opinion defendant had a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action

The pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action in the same court or in another court of this State having jurisdiction. *Acorn v. Knitting Corp.*, 266.

The trial judge, on motion, may enter an order staying the proceedings in this State to permit trial in a foreign jurisdiction upon finding that it would work a substantial injustice for the action to be tried in a court of this State; if such motion is denied, the movant may seek a review by a writ of *certiorari. Ibid.*

ACTIONS

§ 5. Plaintiff's Wrongful Act Constituting Element of His Cause of Action

Public policy prevents administrator of named insured from recovering for loss of automobile by fire where automobile was intentionally burned by named insured's son and son would be a substantial beneficiary of attempted recovery. *Pleasant v. Insurance Co.*, 236.

A husband whose negligence in an automobile accident resulted in his wife's death may not share in any wrongful death recovery obtained against him. *Cummings v. Locklear*, 572.

ADMINISTRATIVE LAW

§ 4. Procedure and Hearing of Administrative Board

Banking Commission members who had not heard all of the evidence and oral arguments, but who had received transcript of the proceedings, could vote on application to establish a branch bank. *Banking Comm. v. Bank*, 112.

ADVERSE POSSESSION

§ 5. Continuity of Possession

Defendants' evidence which showed intermittent acts of ownership over disputed property between 1935 and 1952 was insufficient to establish a continuous possession for a 20-year period. *Campbell v. Mayberry*, 469.

§ 25. Sufficiency of Evidence

A ruling in a trial without a jury that plaintiffs have failed to prove title by adverse possession will not be disturbed on appeal. *Campbell v. Mayberry*, 469.

Plaintiffs in a trespass to try title action offered sufficient evidence to establish their ownership of a wooded tract of land by adverse possession. *Poe v. Bryan*, 462.

ANIMALS

§ 2. Liability of Owner for Injuries Inflicted by Domestic Animals

The gravamen of an action to recover for injuries inflicted by a domestic animal is not negligence but is the wrongful keeping of an animal with knowledge of its viciousness. *Miller v. Snipes*, 342.

ANIMALS—Continued

§ 3. Animals Roaming at Large

Plaintiff's evidence did not disclose contributory negligence as a matter of law on part of the driver of its truck in striking defendant's cows which were being driven across the road. *Timber Co. v. Smith,* 137.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

The Court of Appeals had no jurisdiction to make findings of fact in an appeal from a proceeding for child custody and visitation rights, and the trial court's own findings in the proceeding were conclusive on appeal. *Horton v. Horton,* 526.

No right of immediate appeal lies from an interlocutory order denying defendant's motion to dismiss and to stay the proceeding. *Acorn v. Knitting Corp.,* 266; *Acceptance Corp. v. Feder,* 696.

§ 9. Moot Question

Assignment of error to order awarding temporary custody of child to its father without notice to its mother presented a moot question. *Zajicek v. Zajicek,* 563.

§ 10. Motions

Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for first time on appeal. *Britt v. Allen,* 399.

§ 24. Form of and Necessity for Objections, Exceptions and Assignments of Error

Purported assignments of error are ineffectual where only indication of alleged error is a reference to a page of the record and exceptions grouped together relate to several questions of law. *In re Will of Howell,* 271.

Grouping under a single assignment of error of a number of exceptions which raise different and distinct questions of law does not conform with the Court rules. *Duke v. Meisky,* 329.

Exceptions and assignments of error must point out specifically the alleged error of which review is sought. *Pegram-West, Inc. v. Homes, Inc.,* 519.

§ 26. Exceptions and Assignment of Error to Judgment

Sole assignment of error to signing of judgment presents face of record proper for review. *Ross v. Perry,* 47.

An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. *Wimbish v. Aviation, Inc.,* 98.

§ 30. Objections and Exceptions to Evidence and Motions to Strike

Hearsay testimony was competent and could be considered in a juvenile hearing where the respondent, who was represented by counsel, made no objection or motion to strike. *In re Dunston,* 33.

Where an exception to evidence is not supported by an objection or a motion to strike, the competency of the evidence is not before the court. *Collyer v. Bell,* 653.

APPEAL AND ERROR—Continued

§ 31. Exceptions and Assignment of Error to Charge

An assignment of error to the charge must quote the portion of the charge to which appellant takes exception. *Collyer v. Bell,* 653.

Exceptions to the charge on an issue not reached by the jury are moot. *Scism v. Holland,* 405.

§ 39. Time of Docketing

Appeal is dismissed for failure to docket record within 90 days from date of judgment appealed from. *Phillips v. Wrenn Brothers,* 35; *King v. Daniels,* 156; *Crow v. Crow,* 176; *Sheets v. Sessions,* 283.

§ 45. Effect of Failure to Discuss Exceptions and Assignments of Error

Exceptions and assignments of error not brought forward and argued in the brief are deemed abandoned. *Dale v. Lattimore,* 384; *Scism v. Holland,* 405; *Andrews v. Andrews,* 410.

§ 47. Harmless and Prejudicial Error

Where the judgment is in conformity with the ultimate rights of the parties, or the appellant, as a matter of law, is not entitled to the relief sought, mere technical error will not justify disturbing the judgment of the trial tribunal. *Burkhimer v. Furniture Co.,* 254.

An appellant may not complain of a trial court's ruling which is favorable to him. *Prevette v. Bullis,* 552.

§ 49. Harmless and Prejudicial Error in Instructions

Exclusion of testimony cannot be held prejudicial where record fails to show what answers of the witnesses would have been. *Spinella v. Pearce,* 121; *Sanders v. Anchor Co.,* 362.

§ 57. Findings

Court's findings are presumed to be supported by competent evidence where no exceptions were taken to any of the findings. *Pegram-West, Inc. v. Homes, Inc.,* 519.

Where evidence is not brought forward in record, it was presumed that evidence was sufficient to support court's findings of fact. *Zajicek v. Zajicek,* 563.

The presumption that the judge in a nonjury trial disregarded incompetent evidence in making his decision does not obtain when the judge expressly states that he is considering evidence which later proves incompetent. *Orr v. Orgo,* 679.

The Court of Appeals had no jurisdiction to make findings of fact in an appeal from a proceeding for child custody. *Horton v. Horton,* 526.

ARREST AND BAIL

§ 9. Right to Bail During Trial

The trial court, during trial, could properly order the incarceration of a defendant who was out on bond. *S. v. Andrews,* 421.

ASSAULT AND BATTERY

§ 5. Assault with Deadly Weapon

An instruction that the board used by defendant to assault his wife could be found to be a deadly weapon per se was not error. *S. v. McLaurin*, 23.

ATTORNEY AND CLIENT

§ 9. Persons Liable for Compensation of Attorney

Where a promissory note contained requirement that a debtor pay reasonable attorneys' fees of creditor in collection of the note, but a guaranty of payment of the note contained no such provision, the guarantors are not liable for the attorneys' fees of the creditor in an action on the contract of guaranty. *Credit Corp. v. Wilson*, 481.

AUTOMOBILES

§ 19. Right of Way at Intersections

Evidence in an accident case arising out of an intersectional collision called for the application of the statute relating to the right-of-way of an automobile already in the intersection, not the statute relating to failure to stop at a stop sign at an intersection. *Todd v. Shipman*, 650.

§ 39. Bicycles

A bicycle is a vehicle and its rider is a driver within the meaning of our Motor Vehicle Law. *Sadler v. Purser*, 206.

§ 40. Pedestrians

Right of pedestrian to proceed is superior to that of a turning motorist where the pedestrian and motorist are both proceeding under favorable signal lights. *Duke v. Meisky*, 329.

§ 53. Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction

Defendants were not liable for injuries suffered by plaintiff when car in which plaintiff was riding as a passenger skidded on icy road into the lane in which defendants were traveling. *White v. Jordan*, 175.

Defendants' counterclaims should have been submitted to the jury where their evidence tended to show that automobile driven by plaintiff's intestate crossed the center line and struck defendants' on-coming vehicle. *Brown v. Whitley*, 306.

§ 57. Intersection Accident

Plaintiff passenger's evidence was insufficient to be submitted to the jury in action against driver of automobile in which plaintiff was riding for injuries received in intersection collision. *Harris v. McLain*, 404.

§ 58. Turning and Hitting Turning Vehicles

Trial court erred in entering a directed verdict in defendant's favor where there was conflicting evidence as to the location of plaintiff's vehicle at the time of the accident. *Odell v. Lipscomb*, 318.

Evidence was sufficient for jury in action for wrongful death of a motorcyclist who was struck from the rear by defendant's automobile while attempting to make a left turn. *Snellings v. Roberts*, 476.

AUTOMOBILES—Continued

§ 59. Entering Highway

Plaintiff's evidence was insufficient for jury where it showed that defendant, at direction of a police officer, drove out of a parking lot and collided with plaintiff's car. *McClure v. Mungo*, 163.

§ 62. Striking Pedestrians

Evidence by pedestrian who was struck by automobile while crossing a street was insufficient to show negligence by defendant driver and disclosed the pedestrian's contributory negligence as a matter of law. *Byrd v. Potts*, 262.

A pedestrian who was struck by defendant's automobile as she attempted to cross a street at a place other than a marked or unmarked crosswalk presented insufficient evidence to go to the jury. *Gwyn v. Lincoln*, 384.

Evidence of plaintiff pedestrian was sufficient for jury in this action for injuries received when plaintiff was struck by defendant's right-turning vehicle at an intersection while both plaintiff and defendant were proceeding under favorable signal lights. *Duke v. Meisky*, 329.

§ 75. Stopping or Parking

It may be negligence for a plaintiff to permit her car to run out of gas and stall on the traveled portion of the highway, and such conduct is properly considered by the jury on the issue of contributory negligence. *Prevette v. Bullis*, 552.

§ 79. Contributory Negligence in Intersectional Accidents

In defendant's counterclaim against plaintiff, defendant was not contributorily negligent as a matter of law where evidence showed that defendant turned left at an intersection on the green arrow and was struck by plaintiff's oncoming car before he could safely cross plaintiff's lane of travel. *Reece v. Karraz*, 245.

Plaintiff's evidence disclosed her contributory negligence as a matter of law in striking a left-turning automobile that had entered an intersection from the opposite direction. *Ibid.*

§ 80. Contributory Negligence in Turning

Plaintiff's testimony on cross-examination that he did not see the defendant's following vehicle before he attempted a left turn does not establish plaintiff's contributory negligence as a matter of law in failing to see that the turn could be made in safety, since the plaintiff also testified that, as he was going into the turn, he looked into his mirror and saw the defendant. *Odell v. Lipscomb*, 318.

§ 83. Pedestrian's Contributory Negligence

Evidence by pedestrian who was struck by automobile while crossing a street was insufficient to show negligence by defendant driver and disclosed the pedestrian's contributory negligence as a matter of law. *Byrd v. Potts*, 262.

§ 84. Contributory Negligence of Child

A 15-year-old plaintiff is presumed to have sufficient capacity to understand and avoid a clear danger. *Sadler v. Purser*, 206.

§ 85. Contributory Negligence of Person on Bicycle

Evidence disclosed that a 15-year-old bicyclist was contributorily negligent as a matter of law. *Sadler v. Purser*, 206.

AUTOMOBILES—Continued

§ 87. Concurring Negligence

Evidence was sufficient for jury to find that defendant's negligence in wrecking his car upon a bridge was a proximate cause of the injuries to plaintiffs when their car struck defendant's wrecked car. *Raynor v. Foster*, 193.

§ 88. Sufficiency of Evidence of Contributory Negligence for Jury

Evidence was sufficient to be submitted to jury on issue of contributory negligence of automobile mechanic in remaining under automobile when he knew that the automobile owner was changing the left front tire. *Williams v. Insurance Co.*, 131.

§ 90. Instructions in Automobile Accident Cases

Conflicting instructions on duty of defendant to see that his brakes met statutory requirements and to find latent defects constituted prejudicial error. *Talbert v. Honeycutt*, 375.

Appellant was benefited, and therefore could not complain on appeal, when the trial court failed to charge on the statute which prohibited the leaving of a vehicle on the traveled portion of the highway. *Prevette v. Bullis*, 552.

§ 127. Sufficiency of Evidence of Driving Under the Influence

State's evidence was sufficient to be submitted to jury on issue of defendant's guilt of drunken driving. *S. v. Cartwright*, 4.

§ 129. Instructions in Prosecution for Drunken Driving

Trial court's instruction on "under the influence" complied substantially with Supreme Court case law. *S. v. King*, 568.

§ 140. Operating Motorcycle without Wearing Helmet

Failure of motorcyclist to wear helmet was not contributory negligence per se. *Snellings v. Roberts*, 476.

BAILMENT

§ 5. Rights in Regard to Third Persons

Bailor cannot void effect of insurance providing coverage on property of others in his custody simply by failing to file proof of loss. *Nichols v. Insurance Co.*, 116.

BANKS AND BANKING

§ 1. Control and Regulation

Banking Commission members who had not heard all of the evidence and oral arguments, but who had received transcript of the proceedings, could vote on application to establish a branch bank. *Banking Comm. v. Bank*, 112.

Sufficient foundation was laid for opinion testimony by Commissioner of Banks that establishment of a branch bank by plaintiff would not materially affect solvency of protestant bank. *Ibid.*

BANKS AND BANKING—Continued

Evidence was sufficient to support findings and conclusions of Banking Commission in allowing branch bank to be established. *Ibid.*

Banking Commission did not err in consolidating for hearing two applications by a bank to establish two branches in the same city and in making findings and conclusions applicable to both branches. *Banking Comm. v. Bank,* 232.

Findings and conclusions of Banking Commission in approving applications of a bank to establish two branches in the same city are supported by competent evidence. *Ibid.*

BILLS AND NOTES

§ 4. Consideration

A wife presented sufficient evidence to go to the jury on the question of whether a $10,000 note executed to her by her husband was given for sufficient consideration. *Little v. Oil Co.,* 394.

BOUNDARIES

§ 10. Sufficiency of Description and Admissibility of Evidence Aliunde

Although defendants offered persuasive evidence that a highway relied upon by plaintiffs as a boundary line was not actually constructed until after the delivery and execution of plaintiffs' deed, plaintiffs' own evidence was sufficient to support a jury finding that a road existed at the time the deed was executed. *Poe v. Bryan,* 462.

BROKERS AND FACTORS

§ 6. Right to Commissions

Lessor's obligation to pay 5% monthly commission to real estate agent as compensation for agent's services in procuring a 50-year lease of the property terminated when a municipal redevelopment commission condemned and took possession of the property. *Ross v. Perry,* 47.

The estate of a sales agent who had negotiated a coal sales contract between the defendant seller of coal and a power company is entitled to the sales commissions on the coal which the seller has delivered to the power company since the agent's death. *Peaseley v. Coke Co.,* 226.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Elements of Burglary

When a burglary indictment alleges intent to commit a particular felony, the State must prove the particular felonious intent alleged. *S. v. Ray,* 646.

§ 5. Sufficiency of Evidence

State's evidence held sufficient for jury in prosecution for feloniously breaking and entering automobile supply store. *S. v. Pittman,* 401.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

Evidence held sufficient for jury to find that defendant entered an apartment with an intent to commit larceny. *S. v. Ray*, 646.

§ 6. Instructions

Trial court did not err in instructing jury that defendant was charged in the indictment with first degree burglary but the State had elected to try him only for the lesser included offense of felonious breaking and entering. *S. v. Ray*, 646.

§ 7. Instructions as to Possible Verdicts

Trial court erred in failing to submit offense of nonfelonious breaking or entering. *S. v. Pittman*, 401.

§ 10. Prosecutions for Possessing Housebreaking Implements

In an indictment alleging possession of housebreaking implements, an allegation that defendant possessed implements for opening car doors, which was not illegal under the statute, could be disregarded as surplusage. *S. v. Kersh*, 80.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. Cancellation for Fraud

Evidence did not require court to submit tendered issues of fraud and undue influence in action to set aside deed. *Mangum v. Surles*, 547.

§ 3. Cancellation for Mental Incapacity

In this action to set aside a deed on the ground of mental incapacity of the grantor, the trial court did not err in refusing to allow plaintiffs to amend their complaint to allege that defendants fraudulently induced the grantor to sign the deed by representing the instrument to be a note. *Mangum v. Surles*, 547.

CARRIERS

§ 19. Liability for Injury to Passenger

Plaintiff bus passenger was contributorily negligent as a matter of law in stepping from defendant's bus into a muddy, rain-filled area. *Smith v. Coach Lines*, 25.

CONSPIRACY

§ 2. Action for Civil Conspiracy

Evidence was insufficient for jury in action for civil conspiracy to prevent plaintiff from being reemployed as a school teacher. *King v. Daniels*, 156.

§ 4. Warrant and Indictment

Bills of indictment sufficiently alleged a conspiracy to force open a safe and vault. *S. v. Andrews*, 421.

Failure of a conspiracy indictment to allege the names of the co-conspirators was not fatal. *Ibid.*

CONSPIRACY—Continued

§ 5. Competency and Relevancy of Evidence

A co-conspirator is a competent witness to testify to the conspiracy, whether or not his testimony is supported by corroborating evidence. *S. v. Andrews*, 421.

§ 6. Sufficiency of Evidence

Evidence of defendants' guilt of conspiracy to force open a safe and vault was sufficient to be submitted to the jury. *S. v. Andrews*, 421.

CONSTITUTIONAL LAW

§ 12. Regulation of Trades

The operator of a billiard hall has no vested constitutional right to engage in his business free from statutory regulation. *S. v. Greenwood*, 584.

§ 20. Equal Protection of Laws

The doctrine of parental immunity does not deny an unemancipated child the rights of due process and of the equal protection of the laws. *Evans v. Evans*, 17.

A statute and a municipal ordinance which regulate the operation of billiard halls are not rendered invalid on the ground that bowling alleys and snooker pool rooms are not also included therein. *S. v. Greenwood*, 584.

§ 26. Full Faith and Credit to Foreign Judgments

Duly authenticated child custody order entered in Florida court was properly admitted, notwithstanding there was no showing that Florida court had jurisdiction. *Zajicek v. Zajicek*, 563.

§ 30. Due Process in Trial; Speedy Trial

Record on appeal fails to show that defendant was denied a speedy trial where it shows only that defendant was arrested on 15 July 1968 and was tried in February 1971. *S. v. Wrenn*, 146.

A defendant who was indicted in February 1970 and brought to trial in March 1971 failed to establish that he was denied the right to a speedy trial. *S. v. Andrews*, 421.

§ 31. Right of Confrontation

Trial court did not err in failing to advise defendant who was not represented by counsel of his right to subpoena witnesses and to assist him in having subpoenaes issued. *S. v. Jenkins*, 387.

§ 32. Right to Counsel

Defendant was not denied constitutional right to counsel by failure of trial court to appoint counsel to represent him in consolidated trial of two petty misdemeanors, notwithstanding maximum punishment for the two offenses could have been seven months. *S. v. Speights*, 32.

U. S. Supreme Court decision that an accused has a constitutional right to counsel at a preliminary hearing is not retroactive. *S. v. Hager*, 90.

CONSTITUTIONAL LAW—Continued

No abuse of discretion was shown by fact that trial court, at defendant's request, allowed defendant, who was represented by appointed counsel, to examine and cross-examine some of the witnesses himself. *S. v. Rogers,* 160.

Finding by trial court "from the affirmations made by the applicant and after due inquiry made" that defendant is financially able to employ counsel held sufficient to support court's denial of court-appointed counsel. *S. v. Jenkins,* 387.

§ 33. Self-Incrimination

A handwriting sample taken from defendant after his arrest for forgery is admissible in evidence without violating defendant's Fifth Amendment privilege against self-incrimination. *S. v. Greene,* 687.

CONTEMPT OF COURT

§ 7. Punishment

Sentencing of a father to 10 days in jail for contempt of court was proper where the father disobeyed a court order that he deliver his truck to be sold for child support obligations. *Upton v. Upton,* 579.

CONTRACTS

§ 2. Offer, Acceptance and Mutuality

A party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in good faith. *Speizman v. Williamson,* 297.

Plaintiff is liable for breach of contract in failing to deliver to defendant stock brokers stock which plaintiff's president instructed defendants to sell under the mistaken belief that plaintiff owned shares of such stock. *Ibid.*

§ 4. Consideration

Purported contract to reserve for defendant one booth at plaintiff's bridal fair is invalid for failure of consideration. *Radio, Inc. v. Brogan,* 172.

§ 6. Contracts Against Public Policy: Construction Contract

Under the statute providing that a person is a general contractor if the cost of the undertaking is $20,000 or more, the term "cost of undertaking" is construed as the contractor's contract price, not the total cost of the building. *Fulton v. Rice,* 669.

An unlicensed contractor whose contract price to erect a house was less than $20,000 is not barred from maintaining a counterclaim against the homeowner for the balance due on the contract, notwithstanding the homeowner's obligations to third parties raised the total cost of the home to more than $20,000. *Ibid.*

§ 12. Construction of Contracts

Where a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court. *Peaseley v. Coke Co.,* 226.

CONTRACTS—Continued

§ 14. Contracts for Benefit of Third Persons

A third party beneficiary of a contract is entitled to maintain an action for its breach provided the contract was made for his direct benefit and any benefit accruing to him is not merely incidental. *Carding Developments v. Gunter & Cooke,* 448.

§ 16. Time of Performance

Subcontract provision that "Final payment will be paid within 15 days of acceptance of and payment for the entire contract by the Owner" relates solely to the time of payment and postpones payment until, in the usual course of business, final settlement of accounts between the contractor and the owner could reasonably be expected. *Electrical Co. v. Construction Co.,* 63.

§ 18. Modification

To be effective as a modification, a new agreement, whatever its form and however evidenced, must possess all elements necessary to form a contract. *Peaseley v. Coke Co.,* 226.

§ 21. Performance and Breach

Plaintiff is liable for breach of contract in failing to deliver to defendant stock brokers stock which plaintiff's president instructed defendants to sell under the mistaken belief that plaintiff owned shares of such stock. *Speizman Co. v. Williamson,* 297.

An agreement to construct a building in a workmanlike manner extended to the materials used in the construction. *Langley v. Helms,* 620.

§ 23. Waiver of Breach

Acceptance of work done under construction contract does not constitute a waiver of latent defects. *Langley v. Helms,* 620.

§ 24. Parties

Third party beneficiary had standing to maintain an action for breach of contract against one of the parties to the contract. *Carding Developments v. Gunter & Cooke,* 448.

A party to a contract was not a necessary party in an action for breach of the contract brought by a third party beneficiary against the other contracting party, but such party was a proper party. *Ibid.*

§ 25. Pleadings, Burden of Proof and Issues

Where alleged contract is made a part of the complaint, the court will be governed by its particular provisions rather than the conclusions alleged by plaintiff. *Radio, Inc. v. Brogan,* 172.

§ 26. Competency and Relevancy of Evidence

In action for breach of contract, trial court did not commit prejudicial error in admission of evidence of defendant's character and reputation which was based on specific acts. *Johnson v. Massengill,* 6.

Trial court did not err in admission of testimony by general contractor as to whether defects in plaintiffs' home resulted from poor workmanship. *Langley v. Helms,* 620.

CONTRACTS—Continued

§ 27. Sufficiency of Evidence

Plaintiffs' evidence was sufficient for jury on issue of defendant's breach of home construction contract by faulty workmanship. *Langley v. Helms*, 620.

§ 28. Instructions

In action for breach of contract, trial court did not err in failing to submit issue of whether plaintiff and defendant entered into a contract as alleged in the complaint. *Johnson v. Massengill*, 6.

COSTS

§ 4. Items of Cost

Proceeds recovered for the wrongful death of a decedent are not subject to the assessment of costs in "the administration of estates of decedents" provided for by statute. *In re Below*, 657.

COURTS

§ 9. Jurisdiction of Superior Court after Order of Another Superior Court Judge

An order of one judge denying a motion for summary judgment does not prevent another judge from considering the case on its merits and rendering judgment. *Glover v. Spinks*, 380.

§ 14. Jurisdiction of 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.

A district court judge who was assigned to hold a juvenile session in one county of the district had no authority, in an alimony proceeding that was pending in another county of the district, to conduct an in-chambers hearing on the wife's motion seeking subsistence pendente lite. *Austin v. Austin*, 286.

§ 15. Criminal Jurisdiction of Juvenile Court

Failure of record of juvenile delinquency proceeding to show the exact time and manner of service of summons and petition upon the juvenile and his parents was not fatal. *In re Collins*, 142.

CRIME AGAINST NATURE

§ 2. Prosecution

Bill of indictment was sufficient to charge crime against nature. *S. v. Reep*, 125.

CRIMINAL LAW

§ 7. Entrapment

Defense that defendant never would have sold drugs to an undercover agent of the police but for the fact that the agent had a gun is held to raise a question of entrapment. *S. v. Bradshaw*, 510.

CRIMINAL LAW—Continued

§ 21. Preliminary Hearing

U. S. Supreme Court decision that an accused has a constitutional right to counsel at a preliminary hearing is not retroactive. *S. v. Hager*, 90.

§ 23. Plea of Guilty

Defendant's plea of guilty was not rendered invalid by the trial judge's incorrect statement of the maximum terms of imprisonment. *S. v. Harris*, 576.

Defendant's plea of guilty was voluntarily and understandingly made. *S. v. Harris*, 570.

Contention on appeal from order activating suspended sentence that defendant's conviction is invalid because the record does not affirmatively show that his plea of guilty was voluntarily entered is an impermissible collateral attack on the original judgment. *S. v. Noles*, 676.

§ 25. Plea of Nolo Contendere

Plea of nolo contendere must be set aside where record fails to show affirmatively that court made any findings or adjudication that the plea was understandingly and voluntarily entered. *S. v. Treadway*, 167.

§ 33. Facts in Issue

Trial court did not err in exclusion of defendant's testimony that a Negro had murdered his father, which defendant contends would tend to cast doubt upon the State's evidence that he had committed a robbery in the company of a Negro. *S. v. Stack*, 101.

§ 42. Articles Connected with Crime

Adhesive tape used to tie up the wrists and ankles of armed robbery victims was admissible in evidence. *S. v. Hampton*, 371.

Western Union money order forms that were the subject of armed robbery were admissible to corroborate the testimony by a Western Union employee that there was an armed robbery of the company's premises. *Ibid.*

§ 58. Evidence in Regard to Handwriting

A handwriting sample taken from defendant after his arrest for forgery is admissible in evidence without violating defendant's Fifth Amendment privilege against self-incrimination. *S. v. Greene*, 687.

§ 66. Evidence of Identity by Sight

A solicitor who had difficulty in getting the witness to identify the defendant could ask leading questions of the witness and could point out defendant in the courtroom. *S. v. Westmoreland*, 357.

§ 75. Test of Voluntariness of Confession; Admissibility

A defendant who was represented by privately-employed counsel during trial and on appeal may not challenge the admissibility of his in-custody inculpatory statements on the ground that the arresting officer did not advise him of the constitutional rights of an indigent. *S. v. Bailey*, 494.

A defendant's in-custody confession in the absence of counsel is inadmissible where the defendant was indigent and had not signed a written waiver of counsel. *S. v. Jackson*, 566.

CRIMINAL LAW—Continued

§ 76. Determination and Effect of Admissibility of Confession

Admission of defendant's inculpatory in-custody statements was proper. *S. v. West*, 13.

Defendant's statement to police officers explaining his possession of housebreaking tools was made spontaneously and not as a result of custodial interrogation. *S. v. Kersh*, 80.

Defendant's confession to crime of robbery after having been fully advised of his constitutional rights was not rendered inadmissible by his confession three days earlier to another crime without having been advised of his constitutional rights. *S. v. Stack*, 101.

§ 84. Evidence Obtained by Unlawful Means

Defendant's constitutional rights were not violated by an adversary hearing to determine preliminarily which materials seized from defendants were obscene and should be retained pending trial of defendants for disseminating obscenity. *S. v. Bryant*, 530.

§ 87. Direct Examination of Witnesses

Trial court did not err in allowing solicitor to ask leading questions of the State's witness whose testimony in court conflicted with his prior statements to a deputy sheriff. *S. v. Williams*, 161.

A solicitor who had difficulty in getting the witness to identify the defendant could ask leading questions of the witness and could point out defendant in the courtroom. *S. v. Westmoreland*, 357.

§ 88. Cross-Examination

A defendant who takes the witness stand in his own behalf cannot demand that the solicitor be prevented from cross-examining him as to his criminal record. *S. v. Andrews*, 421.

§ 91. Continuance

Trial court did not err in the denial of defendant's motion for a continuance made on the ground that a defense witness was unavailable for trial because he was in custody of military authorities in Texas awaiting court-martial. *S. v. Shirley*, 440.

§ 92. Consolidation of Counts

Trial court did not err in consolidating larceny prosecutions against three defendants. *S. v. McCall*, 85.

§ 95. Admission of Evidence Competent for Restricted Purpose

The admission, over objection by codefendants, of incompetent testimony given by one defendant was not prejudicial error in a prosecution against defendant and the codefendants for conspiracy to force open a safe and vault. *S. v. Andrews*, 421.

§ 97. Introduction of Additional Evidence

Trial court did not abuse its discretion in denial of defendant's motion, made after close of all the evidence, to recall the prosecuting witness. *S. v. Stack*, 101.

CRIMINAL LAW—Continued

§ 99. Expression of Opinion by Court on the Evidence During Trial

Trial judge expressed an opinion on the evidence when he sustained his own objections to 16 questions propounded by defense counsel to two State's witnesses. *S. v. Lemmond,* 128.

Trial judge's questioning of defendants amounted to cross-examination and constituted an expression of opinion on the credibility of defendants' testimony. *S. v. Lowery,* 538.

§ 101. Conduct of Jury and Misconduct Affecting Jury; Witnesses

Where testimony by State's witness conflicted with earlier statements he had given to a deputy sheriff, trial court did not err in allowing solicitor to confer privately with the witness, after which the witness returned to the stand and testified consistently with the statements he had made before trial. *S. v. Williams,* 161.

Trial court did not abuse its discretion in refusing to declare mistrial when some of the jurors indicated they had heard radio report in which defendant was referred to as a "dope pusher." *S. v. Moye,* 178.

§ 102. Argument to Jury

Defendants who did not testify and who were granted the last argument to the jury cannot contend on appeal that the trial judge conditioned the last argument to the jury upon the presentation of no evidence by the defendants. *S. v. Andrews,* 421.

§ 112. Instructions on Burden of Proof and Presumptions

Instructions which placed burden upon defendant to disprove evidence presented by the State constituted prejudicial error. *S. v. Hager,* 90.

§ 113. Statement of Evidence and Application of Law Thereto

Trial judge violated G.S. 1-180 where he merely read the statute under which defendant was charged and summarized the contentions of the parties. *S. v. Pittman,* 401.

§ 115. Instructions on Lesser Degrees of Crime

Trial court did not err in instructing jury that defendant was charged in the indictment with first degree burglary but the State had elected to try him only for the lesser included offense of felonious breaking and entering. *S. v. Ray,* 646.

§ 122. Additional Instructions after Initial Retirement of Jury

Trial court did not err in urging jury to return a verdict after jury had deliberated an hour and 50 minutes and informed the court they were hopelessly deadlocked. *S. v. Reep,* 125.

§ 130. New Trial for Misconduct Affecting Jury

Trial court did not abuse its discretion in refusing to declare mistrial when some of the jurors indicated they had heard radio report in which defendant was referred to as a "dope pusher." *S. v. Moye,* 178.

§ 134. Form and Requisites of Judgment

Failure of trial judge to sign minutes of court or judgment does not affect validity of judgment in a noncapital case. *S. v. Case,* 11.

CRIMINAL LAW—Continued

§ 138. Severity of Sentence

Defendant's constitutional rights were not violated by imposition of a greater sentence in superior court than sentence imposed in district court. *S. v. Speights*, 32; *S. v. Harris*, 272.

§ 143. Revocation of Suspension of Judgment or Sentence

Trial judge acted within his discretion in revoking a suspended prison sentence. *S. v. Nelson*, 698.

Contention on appeal from order activating suspended sentence that defendant's conviction is invalid because the record does not affirmatively show that his plea of guilty was voluntarily entered is an impermissible collateral attack on the original judgment. *S. v. Noles*, 676.

Capias issued to defendant constituted substantial compliance with the requirements for giving defendant notice of intention to pray the court to revoke his suspended sentence. *Ibid.*

G.S. 15-200 does not limit the length of a suspended sentence to five years but limits the period of time for which the sentence may be suspended. *S. v. Ray*, 646.

§ 144. Modification and Correction of Judgment in Trial Court

Where the record shows a discrepancy between the pronouncement in open court that defendant be imprisoned for six years and the written judgment that defendant be imprisoned for eight years, the cause is remanded to the trial court for imposition of the six-year sentence. *S. v. Lawing*, 21.

§ 148. Judgments Appealable

Order entered at conclusion of a preliminary adversary hearing to determine whether materials seized were obscene and lawfully retained as evidence pending trial is an interlocutory order which is not appealable. *S. v. Bryant*, 530.

§ 149. Right of State to Appeal

The State, which had appealed the quashal of a warrant from the district court to the superior court, could likewise appeal the superior court's quashal of the warrant to the Court of Appeals. *S. v. Greenwood*, 584.

§ 154. Case on Appeal

Order of trial court extending time for defendant to serve case on appeal was ineffective where it was entered after expiration of statutory time to serve case on appeal. *S. v. Treadway*, 167.

§ 155.5. Docketing of Transcript in Court of Appeals

Appeal is subject to dismissal for failure to docket record on appeal within 90 days from date of judgment appealed from. *S. v. Locklear*, 36; *S. v. Treadway*, 167; *S. v. Davis*, 174.

§ 158. Conclusiveness of Record

Appellate court is bound by record as certified to it. *S. v. Hager*, 90.

§ 161. Necessity for and Requisites of Exceptions

Where defendant made no objection to the identification testimony of the prosecuting witness and made no request for a voir dire hearing on

CRIMINAL LAW—Continued

the validity of the pretrial identification, the defendant is precluded from raising the question of identification on appeal. *S. v. Bailey,* 280.

§ 162. Objections and Assignments of Error to Evidence

The appellate court cannot rule on the exclusion of testimony where there is nothing in the record to show what the excluded testimony would have been. *S. v. Bailey,* 280.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

The denial of defendant's motion for nonsuit made at the conclusion of the State's evidence is waived by the defendant's introduction of evidence and is not available to him on appeal. *S. v. Bradshaw,* 510.

§ 166. The Brief

Assignment of error will be deemed abandoned where no reason or argument is stated or authority cited in its support. *S. v. Stack,* 101; *S. v. Harris,* 272.

§ 167. Burden of Showing Prejudicial Error

The burden is upon the defendant to establish prejudicial error in the trial. *S. v. Bailey,* 280.

§ 168. Harmless and Prejudicial Error in Instructions

Conflicting instructions upon a material aspect in a case must be held prejudicial error. *S. v. Hager,* 90.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Error, if any, in exclusion of order entered in trial of defendant for another crime was cured when court thereafter allowed the order into evidence. *S. v. Stack,* 101.

Exceptions to exclusion of testimony will not be considered on appeal where counsel made no attempt to have the excluded testimony entered on the record. *Ibid.*

§ 172. Whether Error is Cured by Verdict

Error, if any, in submission to jury of second-degree murder and manslaughter was not prejudicial where defendant was found guilty of involuntary manslaughter. *S. v. King,* 157.

§ 175. Review of Findings

Findings of fact by the trial judge are conclusive on review if supported by any competent evidence. *S. v. Kersh,* 80.

DAMAGES

§ 3. Compensatory Damages for Injury to Person

In determining future earning capacity, prior earnings are admissible in evidence if there is a reasonable relation between past and probable future earnings. *Jernigan v. R. R. Co.,* 241.

Evidence that a plaintiff's business suffered as a result of his injuries is competent and admissible as an aid in determining impairment of earning capacity. *Ibid.*

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

The administrator of a wife's estate may maintain a wrongful death action against the husband for the death of the wife in an automobile accident in which the husband was a driver, even though the ultimate beneficiaries are the minor, unemancipated children of the marriage. *Cummings v. Locklear*, 572.

§ 9. Distribution of Recovery

A husband whose negligence in an automobile accident resulted in his wife's death may not share in any wrongful death recovery obtained against him. *Cummings v. Locklear*, 572.

DIVORCE AND ALIMONY

§ 1. Jurisdiction

A district court judge who was assigned to hold a juvenile session in one county of the district had no authority, in an alimony proceeding that was pending in another county of the district, to conduct an in-chambers hearing on the wife's motion seeking subsistence pendente lite. *Austin v. Austin*, 286.

§ 16. Alimony without Divorce

Evidence was sufficient for submission to jury on question of whether wife was maliciously turned out of doors. *Osornio v. Osornio*, 30.

Wife's action for alimony without divorce was properly dismissed and an order awarding the wife alimony pendente lite was properly terminated where husband had been granted absolute divorce in another action. *Smith v. Smith*, 378.

§ 18. Alimony and Subsistence Pendente Lite

The order awarding the wife alimony pendente lite must contain a specific finding and conclusion that the wife does not have sufficient means to subsist during the prosecution of her action and to defray the necessary expenses. *Mitchell v. Mitchell*, 54.

Evidence was insufficient to support a finding that the husband has offered such indignities to the wife as to render her condition intolerable and her life burdensome. *Presson v. Presson*, 109.

Where plaintiff's complaint sought annulment of her marriage and custody and support of a minor child, court had jurisdiction to hear plaintiff's motion seeking alimony, counsel fees and child support pendente lite. *Williams v. Williams*, 170.

Trial court did not err in the entry of temporary order that failed to give wife alimony pendente lite but which provided for support of two infant daughters who resided with the wife and for maintenance of the home in which they lived. *Mauney v. Mauney*, 269.

District court was without authority to determine plaintiff's motion for temporary alimony and counsel fees pending disposition of defendant's motion to remove action as a matter of right to another county. *Little v. Little*, 353.

The award of alimony pendente lite, counsel fees, and child custody and support must be supported by sufficient findings of fact. *Austin v. Austin*, 286.

DIVORCE AND ALIMONY—Continued

Trial court did not err in requiring husband to pay wife lump sum of $2,700 subsistence pendente lite for accrued living expenses since the time the husband abandoned the wife. *Austin v. Austin,* 390.

Trial court erred in ordering husband to pay $3,000 counsel fees pendente lite where no evidence was presented as to reasonable attorney's fees. *Ibid.*

When adultery is pleaded in bar of a demand for alimony or alimony pendente lite, an award of alimony pendente lite will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking such an award. *Austin v. Austin,* 286.

§ 19. Modification of Decrees

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.

§ 22. Jurisdiction and Procedure in Custody Proceeding

An award of custody of the minor children must be supported by sufficient findings of facts. *Austin v. Austin,* 286.

§ 23. Support

Trial court is not required to designate separately the amount of support payments for each child. *Brooks v. Brooks,* 626.

Trial court's order increasing the amount of father's child support payments was proper. *Andrews v. Andrews,* 410.

Trial court did not err in requiring the father to assist in payment of the attorney fees for the mother in this hearing for modification of father's child support payments. *Ibid.*

§ 24. Custody

Trial judge in a visitation proceeding properly found that the mother had made no effort to see or visit her child since 1964. *Horton v. Horton,* 526.

A mother who consented to the private examination of her daughter by the trial judge in a proceeding to establish visitation rights may not complain on appeal that the examination was made in the absence of the parties and their attorneys. *Ibid.*

Trial court properly awarded custody of a 16-year-old child to his mother, even though the child expressed a desire to be in the custody of his father. *Brooks v. Brooks,* 626.

The father no longer has a preferential right to the custody of his minor child. *Ibid.*

§ 26. Validity of and Attack on Domestic Decrees

A husband's unsuccessful action in 1970 for absolute divorce did not bar the husband's subsequent action in 1971 for absolute divorce, the basis for the two actions being entirely different. *Johnson v. Johnson,* 505.

EJECTMENT

§ 1. Nature and Scope of Summary Ejectment

Allegations by tenant that landlords' efforts to eject her from an apartment are in retaliation for her conduct in airing grievances of other tenants constitute no defense to action in summary ejectment. *Evans v. Rose,* 165.

ESTOPPEL

§ 5. Parties Estopped

A wife who signed her name at the bottom of her husband's holographic will could not be estopped from challenging her husband's purported devise of entirety property, since the wife's signature constituted a complete nullity. *Glover v. Spinks,* 380.

EVIDENCE

§ 3. Facts within Common Knowledge

It is a matter of common knowledge that electric hot water heaters are widely used to fill the hot water requirements of residential, commercial, and industrial users. *Page v. Sloan,* 433.

§ 4. Presumptions

Evidence showing that a letter was mailed creates a presumption that it was received by the party to whom it was mailed. *Collyer v. Bell,* 653.

§ 11. Transactions or Communications with Decedent

Defendant's cross-examination of deceased employee's widow opened the door for admission of widow's previously excluded testimony as to a telephone conversation with decedent. *Gay v. Supply Co.,* 149.

Dead man's statute did not prohibit defendant from testifying as to how collision occurred between vehicles operated by defendant and plaintiff's intestate. *Brown v. Whitley,* 306.

§ 19. Evidence of Prior Transactions

In action for breach of contract to deliver to defendant stock broker the stock that plaintiff had allegedly instructed defendant to sell for plaintiff's account, evidence as to prior transactions between the parties was relevant. *Speizman Co. v. Williamson,* 297.

§ 28.5. Affidavits

Letters not under oath could not be considered as affidavits. *Lineberger v. Ins. Co.,* 135.

§ 29. Private Writings

The fact that a letter describing plaintiff's physical condition was contained in plaintiff's Veterans Administration file did not make the letter admissible as an entry in the regular course of business. *Jernigan v. R. R. Co.,* 241.

§ 31. Best Evidence of Writings

A party may not object to the introduction of testimony as to contents of a carbon copy of a letter when he was served with notice to produce the original letter at trial and failed to do so. *Collyer v. Bell,* 653.

EVIDENCE—Continued

§ 33. Hearsay Evidence

Testimony that on afternoon before fatal accident that night the witness was with the employee in a motel and that the employee said he had to "go in" because his employer's president "wanted him to bring some papers" held admissible as an exception to the hearsay rule. *Gay v. Supply Co.*, 149.

A letter in which plaintiff's fellow employee recorded his observations of plaintiff's physical condition was properly excluded as hearsay evidence. *Jernigan v. R. R. Co.*, 241.

§ 44. Nonexpert Opinion Evidence as to Physical Health

A letter in which plaintiff's fellow employee had recorded his observations of the plaintiff's physical condition at the time plaintiff began employment *held* properly excluded as hearsay evidence in plaintiff's action to recover for injuries sustained in a railroad crossing accident. *Jernigan v. R. R. Co.*, 241.

§ 45. Nonexpert Opinion Evidence as to Value

Plaintiff could testify as to his average monthly net income without using tax returns or other documentary evidence. *Jernigan v. R. R. Co.*, 241.

§ 48. Expert Testimony; Competency and Qualification of Experts

Banking Commission did not err in allowing Commissioner of Banks to give expert opinion testimony, notwithstanding Commissioner was not found to be an expert, where record shows witness was an expert. *Banking Comm. v. Bank*, 112.

Letters from physicians containing opinions which would be competent in court only if the physicians were established to be medical experts were not competent for consideration upon a motion for summary judgment where there was no admission that any of the letter writers were medical experts, and none of the letters contain information which would support a finding that they were. *Lineberger v. Insurance Co.*, 135.

Trial court properly excluded opinion testimony by employees of decedent's employer as to the safeness of certain equipment, where none of the witnesses had been tendered or qualified as an expert. *Hamel v. Wire Corp.*, 199.

There was ample evidence to support trial court's finding that witness was an expert in the field of buying and selling stocks. *Speizman Co. v. Williamson*, 297.

Trial court did not commit prejudicial error in stating in the presence of the jury its finding that defendants' witness was an expert in the field of buying and selling stocks. *Ibid.*

§ 49. Examination of Expert Witnesses

Sufficient foundation was laid for opinion testimony by Commissioner of Banks that establishment of a branch bank by plaintiff would not materially affect solvency of protestant bank. *Banking Comm. v. Bank*, 112.

§ 50. Medical Testimony

Trial court did not err in permitting an expert in general surgery to testify that in his opinion there was a probability that blows which plaintiff received in an accident "could cause a growth to enlarge and spread." *Duke v. Meisky*, 329.

EVIDENCE—Continued

Testimony by expert in chiropractic went beyond limitations of his qualification as an expert in chiropractic. *Allen v. Hinson*, 515.

EXECUTORS AND ADMINISTRATORS

§ 30. Taxes and Assessments

Proceeds recovered for the wrongful death of a decedent are not subject to the assessment of costs in "the administration of estates of decedents" provided for by statute. *In re Below*, 657.

FORGERY

§ 2. Prosecution

In an indictment charging defendant in separate counts with forgery and uttering a forged check, the failure of the forgery count to set forth a copy of the forged check or facts pertaining to it renders the forgery count fatally defective, even though the full text of the check is set forth in the uttering count. *S. v. Hackney*, 558.

In a prosecution charging defendant with the forgery of checks, the State offered sufficient evidence to show defendant had the requisite intent to defraud. *S. v. Greene*, 687.

GAMES AND EXHIBITIONS

§ 3. Liability of Proprietor to Participants

Plaintiff, who was injured when the brakes failed on the golf cart rented from defendant, failed to establish defendant's negligence. *Roberts v. Memorial Park*, 69.

HABEAS CORPUS

§ 4. Review

Except in cases involving the custody of minor children, an appeal does not lie from a judgment on return to a writ of habeas corpus. *S. v. Francum*, 37.

HIGHWAYS AND CARTWAYS

§ 7. Construction of Highways: Signs; Liability of Contractor

Plaintiff's evidence was sufficient to require submission of the case to the jury as to whether defendant contractor was negligent in failing to maintain a suitable detour around highway construction work. *Dowless v. Mangum, Inc.*, 258.

Evidence that contractor making repairs on highway removed stop sign from servient street was sufficient to go to jury in action against contractor for damages resulting from an intersection collision. *Huss v. Thomas*, 692.

HUSBAND AND WIFE

§ 15. Nature and Incidents of Estate by Entireties

Rental income from entirety property may be placed in receivership and applied against the debts of the husband alone. *Hodge v. Hodge,* 574.

§ 17. Termination and Survivorship of Estate by Entireties

A wife who signed her name at the bottom of her husband's holographic will could not be estopped from challenging her husband's purported devise of entirety property, since the wife's signature constituted a complete nullity. *Glover v. Spinks,* 380.

INDICTMENT AND WARRANT

§ 5. Return by Grand Jury

Bill of indictment was not improperly delivered to court where foreman delivered it to officer serving the grand jury and the officer gave the indictment to the solicitor who carried it into the courtroom. *S. v. Reep,* 125.

§ 9. Charge of Crime

If an averment in an indictment is not necessary in charging the offense, it may be disregarded. *S. v. Kersh,* 80.

Each count of an indictment containing several counts should be complete within itself. *S. v. Hackney,* 558.

§ 17. Variance Between Averment and Proof

There was no material variance between an indictment alleging that the housebreaking tools possessed by defendant were in front of "his automobile" and evidence indicating that another person owned the automobile and that most of the tools were located in the trunk of the car. *S. v. Kersh,* 80.

There was no fatal variance between indictment charging unlawful possession and sale of heroin on 10 October 1970 and evidence that crime occurred on 6 October 1970. *S. v. Lemmond,* 128.

There was no fatal variance between indictment and proof where indictment charged larceny from "Piggly Wiggly Store #7" and evidence showed that the store was "Piggly Wiggly Wilson, Inc." *S. v. McCall,* 85.

There was no fatal variance where the indictment charged felonious larceny of $1948 and the evidence showed felonious larceny of $1748. *Ibid.*

INFANTS

§ 5. Duties and Authority of Next Friend

A judgment or compromise settlement negotiated by a next friend or guardian without the investigation and approval of the court is invalid. *Ballard v. Hunter,* 613.

A purported "Confession of Judgment" whereby the defendants in an automobile accident case confessed the sum of $10,000 to a minor plaintiff in discharge of their obligations arising out of the accident *is held* a nullity where the judgment was not investigated and approved by a judge of the superior court; the judgment was not given validity by the trial judge's awarding of a fee to plaintiff's attorney out of the $10,000 or by the guardian's receipt of the balance of the $10,000. *Ballard v. Hunter,* 613.

INFANTS—*Continued*

§ 9. Hearing and Grounds for Awarding Custody of Minor

Judgment awarding exclusive custody of a daughter to the divorced father and denying the mother any visitation rights held supported by the findings. *Horton v. Horton,* 526.

A mother who consented to the private examination of her daughter by the trial judge in a proceeding to establish visitation rights may not complain on appeal that the examination was made in the absence of the parties and their attorneys. *Ibid.*

The father no longer has a preferential right to the custody of his minor child. *Brooks v. Brooks,* 626.

Trial court properly awarded custody of a 16-year-old child to his mother, even though the child expressed a desire to be in the custody of his father. *Ibid.*

§ 10. Commitment of Minors for Delinquency

Hearsay testimony was competent and could be considered in a juvenile hearing where the respondent, who was represented by counsel, made no objection or motion to strike. *In re Dunstan,* 33.

Failure of record of juvenile delinquency proceeding to show the exact time and manner of service of summons and petition upon the juvenile and his parents was not fatal. *In re Collins,* 142.

INJUNCTIONS

§ 7. Injunction to Restrain Occupancy or Use of Land

An injunction was a proper remedy to restrain a continuous trespass. *Collins v. Freeland,* 560.

§ 12. Issuance and Continuance of Temporary Orders

A prayer for relief in the complaint may constitute a sufficient motion for a preliminary injunction under Rule 65(b). *Collins v. Freeland,* 560.

§ 13. Grounds for Temporary Order

Trial court properly enjoined defendants in usury action from foreclosing deed of trust securing the allegedly usurious note pending final determination of the usury action. *Development Corp. v. Farms,* 1.

INNKEEPERS

§ 5. Negligence of Motel Owners

A motel owner could be found negligent for hiring a plumber rather than a licensed electrician to make repairs to a hot water heater that subsequently exploded. *Page v. Sloan,* 433.

Issue of motel owners' negligence should have been submitted to the jury, under the doctrine of res ipsa loquitur, in a wrongful death action arising out of the explosion of an electric hot water heater located on the motel premises. *Ibid.*

INSURANCE

§ 6. Construction of Policies

Ambiguity or uncertainty in insurance policy must be resolved in favor of the policyholder or beneficiary. *Nichols v. Insurance Co.,* 116.

INSURANCE—Continued

§ 76. Automobile Fire Policy

Public policy prevents administrator of named insured from recovering for loss of automobile by fire where automobile was intentionally burned by named insured's son and son would be a substantial beneficiary of attempted recovery. *Pleasant v. Insurance Co.*, 236.

§ 95. Cancellation — Vehicle Financial Responsibility Act

Failure of insured to pay the premium for renewal of assigned risk policy did not constitute cancellation of the policy by insured, and insurer's attempted cancellation was ineffective where insured notified Department of Motor Vehicles on 13 March 1968 that the insurance terminated 8 March 1968. *Insurance Co. v. Cotten*, 212.

§ 120. Property Insured for Loss from Fire

Tobacco left overnight on truck inside tobacco warehouse was in the custody of the warehouse for auction within the coverage of a fire insurance policy issued to the owners of the warehouse. *Nichols v. Insurance Co.*, 116.

§ 130. Notice and Proof of Loss

Owner of tobacco destroyed by fire in a tobacco warehouse was not required by policy of insurance issued to tobacco warehouse owner to give notice and proof of loss to insurer. *Nichols v. Insurance Co.*, 116.

JUDGMENTS

§ 30. Procedural Matters; Motion in Cause or Separate Suit

Where the record in a tax foreclosure proceeding shows on its face that service of process was lawfully had on the delinquent property owner, it is improper, in a subsequent action in ejectment in which the property owner is not a party, to attack the foreclosure judgment collaterally on the ground that service of process was not had on the property owner. *Horton v. Davis*, 592.

§ 37. Conclusiveness of Prior Judgment

A husband's unsuccessful action in 1970 for absolute divorce did not bar the husband's subsequent action in 1971 for absolute divorce, the basis for the two actions being entirely different. *Johnson v. Johnson*, 505.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractors or Material Furnisher

Materialman's complaint failed to state claim for relief against homeowner for materials furnished in construction of home where it alleged materials were furnished pursuant to an express contract between the materialman and a general contractor. *Lumber Co. v. White*, 27.

§ 9. Priorities of Lien

Doctrine of instantaneous seisin did not apply to give a purchase money deed of trust superior lien over a materialman's lien where deed of trust was not recorded until 11 days after vendee's deed was recorded. *Pegram-West, Inc. v. Homes, Inc.*, 519.

LANDLORD AND TENANT

§ 8. Liability for Injury to Person

Plaintiff's action to recover for personal injuries sustained when he fell from the porch of defendant's apartment building in the nighttime was properly dismissed by the trial court. *Sheets v. Sessions*, 283.

§ 13. Expiration of Term, Renewals and Extensions

Allegations by tenant that landlords' efforts to eject her from an apartment are in retaliation for her conduct in airing grievances of other tenants constitute no defense to action in summary ejectment. *Evans v. Rose*, 165.

A lease which provided for a definite term of fifteen years and gave the lessee the right to terminate the lease upon thirty days' notice after the expiration of the first year does not authorize the landlord, in the absence of express language in the lease, to terminate the lease upon thirty days' notice to the lessee. *Jaynes v. Lawing*, 682.

§ 15. Tenancies at Will

A properly executed lease for a definite term of years is not converted to a tenancy at will solely by virtue of the fact that it contains an option to terminate it by one party without a corresponding option in favor of the other party. *Jaynes v. Lawing*, 682.

§ 18. Forfeiture for Nonpayment of Rent

In a lessor's action to recover possession of the leased premises on the ground that the tenant failed to pay the $5.00 monthly increase in the rent, it was reversible error when the trial court failed to apply the law to evidence showing the lessor continued to accept the old rent for ten consecutive months. *Price v. Conley*, 636.

A provision in a lease providing for termination at the option of the lessor upon breach of the lessee's obligations to pay rental is not self-executing and may be waived by the lessor. *Ibid.*

LARCENY

§ 6. Competency and Relevancy of Evidence

Trial court properly admitted testimony as to amount of money found on defendants to show why defendants were charged with larceny of greater amount than that found in bag which had been thrown from defendants' car. *S. v. McCall*, 85.

§ 7. Sufficiency of Evidence

State's evidence was sufficient for jury under doctrine of recent possession. *S. v. Ward*, 159.

§ 8. Instructions

Evidence was sufficient to justify instructions as to all defendants on doctrine of recent possession, notwithstanding stolen money was thrown from defendants' car by a person who was not a defendant. *S. v. McCall*, 85.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

Action to recover benefits under a pension trust was barred by the statute of limitations. *Plott v. Trust Co.*, 694.

LIMITATION OF ACTIONS—Continued

Claim against automobile manufacturer for damages resulting from defect in steering mechanism accrued on the date plaintiff purchased the automobile. *Bradley v. Motors, Inc.*, 685.

Cause of action against a chair manufacturer for an injury arising out of the use of the chair in a restaurant is held to accrue when the chair was sold to the restaurant owner and not when the injury occurred. *Jarrell v. Samsonite Corp*, 673.

§ 12. Institution of Action

Amended complaint seeking to recover for false arrest and malicious prosecution related back to date of original complaint seeking damages for false arrest and was therefore not barred by statute of limitations. *Clary v. Nivens*, 690.

MALICIOUS PROSECUTION

§ 7. Limitations

Amended complaint seeking to recover for false arrest and malicious prosecution related back to date of original complaint seeking damages for false arrest and was therefore not barred by statute of limitations. *Clary v. Nivens*, 690.

MASTER AND SERVANT

§ 21. Liability of Contractee for Injuries to Third Persons

A motel owner could be found negligent for hiring a plumber, rather than a licensed electrician, to make repairs to an electric hot water heater that subsequently exploded, notwithstanding the plumber was an independent contractor. *Page v. Sloan*, 433.

§ 47. Construction of Workmen's Compensation Act

The Workmen's Compensation Act should be liberally construed. *West v. Stevens Co.*, 456.

§ 54. Casual Employees

Plaintiff's employment for a period of only two days to help prepare the annual company picnic is casual employment and is not within the course of the employer's usual business of manufacturing. *Clark v. Mills, Inc.*, 535.

§ 55. Injuries Compensable Generally

The mere fact of injury does not of itself establish the fact of accident. *Bigelow v. Tire Sales Co.*, 220.

§ 56. Causal Relation Between Employment and Injury

The death of a charter flying service employee, who was also the sole stockholder of the employer-corporation, did not occur in an accident arising out of and in the course of his employment, where the employee was killed in an airplane crash while on a trip to make repairs to a beach trailer home owned by the corporation, and where the ownership of the trailer home benefited the employee and his family rather than the corporation. *Wimbish v. Aviation, Inc.*, 98.

MASTER AND SERVANT—Continued

There was sufficient evidence to support Commission's finding that injury by accident to plaintiff's leg caused a clot to form which obstructed an artery in the leg and resulted in its amputation. *Blalock v. Roberts*, 499.

§ 65. Back Injury

Medical expert testimony sufficiently established a causal relationship between an employee's ruptured disc and the employee's accident. *Bigelow v. Tire Sales Co.*, 220.

A tire company employee who sustained a ruptured disc while he was attempting to put a 900-pound tire on a tractor hub sustained an "injury by accident" within the meaning of the Workmen's Compensation Act. *Ibid.*

§ 73. Loss of Specific Members

A conclusion by the Industrial Commission that there was a causal relation between an employee's accident and his loss of vision in the right eye and that the employee was industrially blind in the right eye, held supported by the findings of fact and the evidence. *Sides v. Electric Co.*, 312.

§ 77. Review of Award for Change of Condition

Industrial Commission Form 28(b) serves as explicit notice to the recipient of compensation benefits that if further benefits are claimed the Commission must be notified in writing within one year from the date of receipt of the recipient's last compensation check. *Sides v. Electric Co.*, 312.

A finding by the Industrial Commission that the recipient of compensation benefits never received a copy of Form 28(b) with his final compensation payment is supported by the evidence adduced at the hearing on the recipient's claim. *Ibid.*

A change in the degree of permanent disability is a change in condition within the meaning of G.S. 97-47. *West v. Stevens Co.*, 456.

A plaintiff who failed to appeal from an Industrial Commission finding that there was not causal relation between the immobility in her right leg and an accident arising out of her employment is *held* barred from asserting a subsequent claim for change of condition with respect to the right leg. *Ibid.*

The Industrial Commission properly assessed plaintiff's disability of her left leg at 27.5% upon hearing medical testimony that there was no longer any chance for improvement in the leg, notwithstanding the actual physical condition of the leg had not changed since the Commission previously assessed her disability at 12.5%. *Ibid.*

§ 79. Persons Entitled to Payment

Two brothers and a sister of a deceased employee who were all over the age of 18 and married at the time of the employee's death were not entitled to "next of kin" compensation under the Workmen's Compensation Act. *Stevenson v. Durham*, 632.

§ 93. Prosecution of Claim and Proceedings Before Commission

Adverse examination of defendant's president taken on 2 January 1968 was rendered admissible by Rule 26 in workmen's compensation hearing held on 28 May 1970. *Gay v. Supply Co.*, 149.

Testimony that on afternoon before fatal accident that night the witness was with the employee in a motel and that the employee said he had to "go in" because his employer's president "wanted him to bring some papers" held admissible as an exception to the hearsay rule. *Ibid.*

MASTER AND SERVANT—Continued

Hypothetical questions asked plaintiff's expert medical witness did not contain assumptions of fact not established by the evidence. *Blalock v. Roberts Co.*, 499.

§ 94. Findings and Award of Commission

Conflicts in the evidence are for the Industrial Commission to resolve. *Bigelow v. Tire Sales Co.*, 220.

Industrial Commission failed to find facts determinative of question at issue in proceeding to recover workmen's compensation for loss of plaintiff's right foot after plaintiff suffered acid burns on his left foot. *Hudson v. Stevens and Co.*, 366.

MORTGAGES AND DEEDS OF TRUST

§ 2. Purchase-Money Mortgages

Doctrine of instantaneous seisin did not apply to give a purchase money deed of trust superior lien over a materialman's lien where deed of trust was not recorded until 11 days after vendee's deed was recorded. *Pegram-West, Inc. v. Homes, Inc.*, 519.

§ 19. Right to Foreclose and Defenses; Injunction

Trial court properly enjoined defendants in usury action from foreclosing deed of trust securing the allegedly usurious note pending final determination of the usury action. *Development Corp. v. Farms*, 1.

MUNICIPAL CORPORATIONS

§ 32. Regulations Relating to Public Morals

An ordinance of the City of Asheville providing that billiard halls shall not be open between the hours of 12:00 midnight and 8:00 a.m. or at any time on Sunday, *held* constitutional. *S. v. Greenwood*, 584.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses Relating to Narcotics

State Board of Health's addition of MDA to list of drugs in Uniform Narcotic Drug Act was insufficient to make MDA a narcotic drug under provisions of G.S. 90-87(9), where there was no finding that MDA has an addiction-forming or addiction-sustaining liability similar to morphine or cocaine, or that it possesses hallucinogenic properties similar to LSD. *S. v. Hosick*, 74.

§ 2. Indictment

Indictment for felonious possession of marijuana must allege that defendant unlawfully possessed more than one gram of marijuana. *S. v. Shirley*, 440.

§ 4. Sufficiency of Evidence

Issues of defendant's guilt of possessing more than one gram of marijuana and of possessing and transporting marijuana by means of a vehicle were properly submitted to the jury. *S. v. Hart*, 14.

NARCOTICS—Continued

There was no fatal variance between indictment charging unlawful possession and sale of heroin on 10 October 1970 and evidence that crime occurred on 6 October 1970. *S. v. Lemmond*, 128.

The State's evidence was sufficient for submission to the jury in this prosecution for illegal possession of marijuana. *S. v. Moye*, 178.

Defense that defendant never would have sold drugs to an undercover agent of the police but for the fact that the agent had a gun is held to raise a question of entrapment. *S. v. Bradshaw*, 510.

Evidence of defendant's guilt of possessing amphetamines for sale was sufficient to go to the jury. *Ibid.*

§ 4.5. Instructions

Trial court did not commit prejudicial error in reviewing evidence concerning transportation of narcotics charge which had been nonsuited. *S. v. Cazarres*, 580.

§ 5. Verdict and Punishment

Where indictment for unlawful possession of marijuana did not include an allegation that the amount was more than one gram, verdict of guilty "as charged" will support judgment imposing punishment only for a misdemeanor. *S. v. Shirley*, 440.

§ 6. Forfeitures

A defendant who was convicted of possession of marijuana was not entitled to have the jury pass upon his claim that the court unlawfully confiscated the truck used to transport the marijuana. *S. v. O'Hora*, 250.

NEGLIGENCE

§ 5.1. Business Places; Duties to Invitees

A department store customer who was struck in the face by a swinging glass door failed to show that the department store was negligent in construction or maintenance of the door; consequently, the customer failed to establish the store's actionable negligence. *Sanders v. Anchor Co.*, 362.

Although the hotel or motel keeper is not an insurer of the guest's personal safety, he has the duty to exercise reasonable care to maintain the premises in a reasonably safe condition. *Page v. Sloan*, 433.

§ 6. Res Ipsa Loquitur

A department store customer who was injured when a swinging glass door struck her on the nose may not rely upon the mere happening of the occurrence to carry her case to the jury. *Sanders v. Anchor Co.*, 362.

In the absence of explanation, the explosion of an electric hot water heater reasonably warranted an inference of negligence. *Page v. Sloan*, 433.

§ 13. Contributory Negligence in General

Evidence was sufficient to be submitted to the jury on issue of contributory negligence of automobile mechanic in remaining under automobile when he knew that the automobile owner was changing the left front tire. *Williams v. Insurance Co.*, 131.

§ 18. Contributory Negligence of Minors

A 15-year-old plaintiff is presumed to have sufficient capacity to understand and avoid a clear danger. *Sadler v. Purser*, 206.

NEGLIGENCE—Continued

§ 29. Sufficiency of Evidence of Negligence

It was a jury question whether the explosion of a hot water heater in a motel was caused by a thunderstorm or by the motel owner's negligence. *Page v. Sloan,* 433.

Plaintiff, who was injured when the brakes failed on the golf cart rented from defendant, failed to establish defendant's negligence. *Roberts v. Memorial Park,* 69.

§ 31. Res Ipsa Loquitur: Summary Judgment

Application of the doctrine of res ipsa loquitur precludes summary judgment for defendant. *Page v. Sloan,* 433.

§ 37. Instructions on Negligence

Trial court erred in using the term "contributory negligence" in instructing on defendant's counterclaim when the actionable negligence of plaintiff was under consideration. *Dean v. Nash,* 661.

§ 40. Instructions on Proximate Cause

Failure of the trial court to charge that foreseeability is an element of proximate cause is reversible error. *Ward v. Worley,* 555.

§ 53. Duties and Liabilities to Invitees

A department store customer who was struck in the face by a swinging glass door failed to show that the department store was negligent in construction or maintenance of the door; consequently, the customer failed to establish the store's actionable negligence. *Sanders v. Anchor Co.,* 362.

Issue of motel owners' negligence should have been submitted to the jury, under the doctrine of res ipsa loquitur, in a wrongful death action arising out of the explosion of an electric hot water heater located on the motel premises. *Page v. Sloan,* 433.

OBSCENITY

Order entered at conclusion of a preliminary adversary hearing to determine whether materials seized were obscene and lawfully retained as evidence pending trial is an interlocutory order which is not appealable. *S. v. Bryant,* 530.

Defendant's constitutional rights were not violated by an adversary hearing to determine preliminarily which materials seized from defendants were obscene and should be retained pending trial of defendants for disseminating obscenity. *Ibid.*

PARENT AND CHILD

§ 2. Liability of Parent or Child for Injury or Death of the Other

The doctrine of parental immunity does not deny an unemancipated child the rights of due process and of the equal protection of the laws. *Evans v. Evans,* 17.

An unemancipated minor child is precluded by the doctrine of parental immunity from maintaining an action against his mother for injuries resulting from the mother's negligence. *Ibid.*

PARENT AND CHILD—Continued

The administrator of a wife's estate may maintain a wrongful death action against the husband for the death of the wife in an automobile accident in which the husband was a driver, even though the ultimate beneficiaries of the action are the minor, unemancipated children of the marriage. *Cummings v. Locklear*, 572.

§ 6. Right to Custody of Child

The father no longer has a preferential right to the custody of his child. *Brooks v. Brooks*, 626.

PARTIES

§ 1. Necessary Parties

A party to a contract was not a necessary party in an action for breach of the contract brought by a third party beneficiary against the other contracting party, but such party was a proper party. *Carding Developments v. Gunter & Cooke*, 448.

Rules of Civil Procedure made no substantive change in the rules relating to joinder of parties. *Ibid.*

Necessary and proper parties defined. *Ibid.*

§ 2. Parties Plaintiff

Third party beneficiary had standing to maintain an action for breach of contract against one of the parties to the contract. *Carding Developments v. Gunter & Cooke*, 448.

PLEADINGS

§ 32. Amendment of Pleadings

Trial court did not err in permitting defendant, after plaintiff had introduced her evidence, to amend its answer to allege additional acts of contributory negligence. *Williams v. Insurance Co.*, 131.

Trial court did not err in allowing defendants to amend their answer to elaborate on defense of contributory negligence. *Southwire Co. v. Mfg. Co.*, 335.

In this action to set aside a deed on the ground of mental incapacity of the grantor, the trial court did not err in refusing to allow plaintiffs to amend their complaint to allege that defendants fraudulently induced the grantor to sign the deed by representing the instrument to be a note. *Mangum v. Surles*, 547.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

Statements by alleged agent that a certain company was "his company" were inadmissible, standing alone, to establish his agency on behalf of the company. *Orr v. Orgo*, 679.

§ 10. Rights and Duties of Agent as Respects Principal

The estate of a sales agent who had negotiated a coal sales contract between the defendant seller of coal and a power company is entitled to

PRINCIPAL AND AGENT—Continued

the sales commissions on the coal which the seller has delivered to the power company since the agent's death. *Peaseley v. Coke Co.*, 226.

PRINCIPAL AND SURETY

§ 10. Private Construction Bonds

Subcontractors, laborers and materialmen cannot recover on the general contractor's bond to the owners. *Lumber Co. v. Surety Co.*, 641.

QUASI CONTRACTS

§ 1. Elements of Right of Action

Materialman's complaint failed to state claim for relief against homeowner for materials furnished in construction of home where it alleged materials were furnished pursuant to an express contract between the materialman and a general contractor. *Lumber Co. v. White*, 27.

QUIETING TITLE

§ 2. Action to Remove Cloud from Title

Evidence in a quieting title action was insufficient to support a determination that either plaintiffs or defendants owned the land in dispute. *Campbell v. Mayberry*, 469.

Plaintiff's showing of a connected chain of title to disputed property for a period of 30 years was insufficient, standing alone, to establish plaintiff's title, for plaintiff also had the burden of showing title by one of the methods set out in Mobley v. Griffin. *Ibid.*

RAILROADS

§ 7. Injury to Automobile Passengers in Crossing Accident

Trial court properly acted within its discretion in refusing to set aside a $107,500 verdict in favor of a plaintiff who was injured in a collision with defendants' train at a railroad crossing. *Jernigan v. R. R. Co.*, 241.

RETIREMENT SYSTEMS

§ 5. Claims of Members

Action to recover benefits under a pension trust was barred by the statute of limitations. *Plott v. Trust Co.*, 694.

ROBBERY

§ 3. Competency of Evidence

Adhesive tape taken from the wrists and ankles of armed robbery victims was admissible in evidence to corrobrate the victims' testimony describing the manner in which they were tied up during the robbery. *S. v. Hampton*, 371.

ROBBERY—Continued

§ 4. Sufficiency of Evidence

In a common law robbery prosecution, State's evidence was sufficient to support a jury finding that defendant and his friend intended to permanently deprive a storekeeper of his pistol. *S. v. Montgomery,* 94.

The trial court in a prosecution for common law robbery acted within its discretion in denying defendant's motion to set aside the verdict as being against the greater weight of the evidence. *S. v. Bailey,* 280.

Issue of defendant's guilt of the common law robbery of a money box from a store was properly submitted to the jury under the facts of this case. *S. v. Westmoreland,* 357.

§ 5. Instructions and Submission of Lesser Degrees of Crime

Evidence that when defendant and his companions were apprehended for robbery they had less than $200 on their persons did not warrant an instruction on the offense of larceny of property less than $200 in value, where all the evidence showed that the money taken in the robbery amounted to $600 or $700. *S. v. Westmoreland,* 357.

RULES OF CIVIL PROCEDURE

§ 7. Form of Motions

All motions must state the rule number or numbers under which the movant is proceeding. *Duke v. Meisky,* 329.

§ 12. Defenses and Objections; When and How Presented; Motion for Judgment on the Pleadings

Defendants' motion for judgment on the pleadings and the hearing on the motion were premature where the motion was filed before defendants had filed answer and the hearing was held before plaintiff had opportunity to file reply. *Yancey v. Watkins,* 140.

Lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative; however, failure of the complaint to state a claim for relief does not constitute a lack of jurisdiction of the subject matter. *Dale v. Lattimore,* 348.

Where there has been a trial, a party cannot on appeal interpose the defense that the complaint fails to state a claim upon which relief can be granted. *Ibid.*

District court was without authority to determine plaintiff's motion for temporary alimony and counsel fees pending disposition of defendant's motion to remove action as a matter of right to another county. *Little v. Little,* 353.

Dismissal of an action is appropriate where a party ordered joined is not subject to the court's jurisdiction. *Carding Developments v. Gunter & Cooke,* 448.

A motion to dismiss on the ground the complaint failed to state a cause of action upon which plaintiffs could be granted relief may not be raised for the first time on appeal. *Collyer v. Bell,* 653.

RULES OF CIVIL PROCEDURE—Continued

§ 15. Amended and Supplemental Pleadings

Trial court did not err in permitting defendant, after plaintiff had introduced her evidence, to amend its answer to allege additional acts of contributory negligence. *Williams v. Insurance Co.*, 131.

Amended complaint seeking to recover for false arrest and malicious prosecution related back to date of original complaint seeking damages for false arrest and was therefore not barred by statute of limitations. *Clary v. Nivens*, 690.

Trial court did not err in allowing defendants to amend their answer to elaborate on defense of contributory negligence. *Southwire Co. v. Mfg. Co.*, 335.

§ 17. Parties Plaintiff

Infants and incompetents who are plaintiffs should appear by duly appointed guardian ad litem and not by a next friend as under the former practice. *Sadler v. Purser*, 206.

§ 19. Necessary Joinder of Parties

Rules of Civil Procedure made no substantive change in the rules relating to joinder of parties. *Carding Developments v. Gunter & Cooke*, 448.

§ 26. Deposition in a Pending Action

Adverse examination of defendant's president taken on 2 January 1968 was rendered admissible by Rule 26 in workmen's compensation hearing held on 28 May 1970. *Gay v. Supply Co.*, 149.

§ 38. Jury Trial of Right

Where there was no controversy as to any of the facts in a partitioning proceeding, a motion for a jury trial was properly denied. *Glover v. Spinks*, 380.

§ 40. Trials: Continuances

Continuances are addressed to the sound discretion of trial judges and may be granted only for good cause shown and as justice may require. *Austin v. Austin*, 286.

§ 41. Dismissal of Actions

General motions to dismiss made by all defendants were insufficient to raise the question of whether the evidence was sufficient to establish plaintiff's right to the particular relief sought against appellant. *Pegram-West, Inc. v. Homes, Inc.*, 519.

Motion to dismiss under Rule 41 does not raise question of whether the findings made by the court are supported by the evidence. *Ibid.*

Dismissal for failure to join necessary or proper party is not a dismissal on the merits and may not be with prejudice. *Carding Developments v. Gunter & Cooke*, 448.

§ 50. Motion for Directed Verdict

Discrepancies in the evidence should be resolved in favor of the party against whom the motion for directed verdict is made. *Odell v. Lipscomb*, 318.

RULES OF CIVIL PROCEDURE—Continued

The trial judge on his own motion may enter a directed verdict within ten days after the jury is discharged for failing to reach a verdict. *Ibid.*

The fact that the jury may have failed to reach a verdict should not influence the court in ruling upon a motion for directed verdict. *Ibid.*

In ruling on defendant's motion for directed verdict, the evidence is considered in the light most favorable to the plaintiff, with all conflicts resolved in plaintiff's favor. *Ibid.*

The motion for a directed verdict presents a question of law for the court, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. *Ibid.*

Procedure whereby the trial judge withheld his ruling on directed verdict until after the jury had returned its verdict is disapproved. *Hamel v. Wire Corp.*, 199.

Statutory requirement that specific grounds be stated in motion for directed verdict is mandatory. *Worrell v. Credit Union*, 275.

A motion for judgment NOV must be supported by a timely made motion for directed verdict. *Dean v. Nash*, 661.

§ 51. Instructions to Jury

Trial judge expressed an opinion when he sustained his own objections to questions posed by defendant's counsel and when he gave unequal stress to the contentions of plaintiff. *Worrell v. Credit Union*, 275.

Trial court gave unequal stress to a contention of defendants in this action to recover for the death of plaintiff's pony. *Dean v. Nash*, 661.

The trial judge is required to declare and explain the law arising on the evidence given in the case. *Price v. Conley*, 636.

§ 56. Summary Judgment

Summary judgment was properly entered for petitioners in proceeding for sale of house and lot for partition where only opposing material offered by respondents was an affidavit by their attorney which asserts that he believes he will be able to offer pertinent evidence at trial. *Schoolfield v. Collins*, 106.

Where evidentiary matter supporting motion for summary judgment is insufficient to establish the lack of a triable issue of fact, it is not incumbent upon the opposing party to present counter-affidavits or other materials. *Lineberger v. Insurance Co.*, 135.

Letters written by various physicians relating to their examinations and treatment of plaintiff were not competent for consideration by the court in passing upon defendant's motion for summary judgment. *Ibid.*

The party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact. *Miller v. Snipes*, 342.

An order of one judge denying a motion for summary judgment does not prevent another judge from considering the case on its merits and rendering judgment. *Glover v. Spinks*, 380.

Summary judgment in favor of defendants is reversed where judgment was entered on the court's own motion and plaintiffs were not given 10 days' notice required by statute. *Britt v. Allen*, 399.

RULES OF CIVIL PROCEDURE—Continued

Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for first time on appeal. *Britt v. Allen*, 399.

Summary judgment is proper only where movant shows that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Page v. Sloan*, 433.

Plaintiff's verified complaint should have been considered by the court in determining whether defendant had carried the burden of showing lack of a genuine issue of material fact. *Brevard v. Barkley*, 665.

If defendant moving for summary judgment successfully carries his burden of proof, plaintiff must set forth specific facts showing that there was a genuine issue for trial. *Jarrell v. Samsonite Corp.*, 673.

§ 63. Disability of a Judge

Where trial court hearing case without a jury answered in favor of plaintiff issues which had been prepared by counsel for defendant, and instructed plaintiff's counsel to submit a proposed judgment, but trial judge died before signing the judgment, it was held that the issues and court's answers thereto constituted neither a verdict nor findings of fact and conclusions of law which would permit a substitute judge to proceed under Rule 63 to enter judgment in the case. *Bank v. Easton*, 153.

§ 65. Injunctions

A prayer for relief in the complaint may constitute a sufficient motion for a preliminary injunction under Rule 65(b). *Collins v. Freeland*, 560.

SALES

§ 14. Actions for Breach of Warranty

A plaintiff who persisted in using a defective refrigerator despite his knowledge that food and milk were continually spoiling therein was not entitled to go to the jury on issue of dealer's breach of warranty and liability for spoiled food. *Burkhimer v. Furniture Co.*, 254.

§ 18. Issues and Instructions

Trial court did not err in instructing jury that manufacturer and distributor of equipment were not required to anticipate negligence on the part of decedent's employer in maintaining and servicing the equipment. *Hamel v. Wire Corp.*, 199.

§ 22. Actions for Personal Injuries Based Upon Negligence, Defective Goods or Materials

Trial court did not err in instructing jury that manufacturer and distributor of equipment were not required to anticipate negligence on the part of decedent's employer in maintaining and servicing the equipment. *Hamel v. Wire Corp.*, 199.

Claim against automobile manufacturer for damages resulting from defect in steering mechanism accrued on the date plaintiff purchased the automobile. *Bradley v. Motors, Inc.*, 685.

SALES—Continued

§ 23. Inherently Dangerous Articles

Trial court properly instructed jury that manufacturer of a machine which is patently dangerous because of the way it functions owes to those who use it a duty merely to make it free from latent defects and defects which are concealed dangers. *Hamel v. Wire Corp.*, 199.

SEARCHES AND SEIZURES

§ 2. Consent to Search without Warrant

The evidence fully supported a finding that the owner of an automobile voluntarily consented to a warrantless search which uncovered defendant's housebreaking implements in the trunk of her car. *S. v. Kersh*, 80.

§ 3. Requisites and Validity of Search Warrant

Affidavit was sufficient under former statute for issuance of search warrant for marijuana where affiant had observed marijuana plants growing in defendant's backyard. *S. v. Wrenn*, 146.

Affidavit of police officer based on information supplied by a confidential informant was sufficient to support finding of probable cause for issuance of a warrant to search for narcotics. *S. v. Moye*, 178; *S. v. Shirley*, 440.

Incorrect date given in affidavit for a search warrant as to when affiant received information from a reliable informant was clearly a typographical error and was immaterial. *S. v. Shirley*, 440.

Warrant sufficiently described premises to be searched as "2515 Clark Ave." and description was not rendered uncertain by fact that the affidavit further incorrectly described the premises as a brick structure when in fact it was made of stone. *Ibid.*

Warrant authorizing search for "illegally held narcotic drugs" described the contraband with sufficient particularity. *Ibid.*

Affidavit to a narcotics search warrant complied with constitutional and statutory prerequisites and was sufficient to support a magistrate's finding of probable cause that heroin would be found on defendant's person and in a certain house trailer. *S. v. Flowers*, 487.

§ 4. Search Under the Warrant

Police officers were not required to give defendant Miranda warnings prior to asking if he owned the Dodge panel truck parked in front of his house. *S. v. O'Hora*, 250.

STATUTES

§ 4. Construction in Regard to Constitutionality

The presumption is that an act of the General Assembly is constitutional. *S. v. Greenwood*, 584.

§ 5. General Rules of Construction

A statute restricting the practice of an otherwise lawful occupation to a special class of persons must be construed so as not to extend it to

STATUTES—Continued

activities and transactions not intended by the legislature to be included. *Fulton v. Rice,* 669.

§ 10. Construction of Criminal Statute

A statute which imposes criminal penalties for its violation must be strictly construed. *Fulton v. Rice,* 669.

TAXATION

§ 44. Attack on Foreclosure Sale

Where the record in a tax foreclosure proceeding shows on its face that service of process was lawfully had on the delinquent property owner, it is improper, in a subsequent action in ejectment in which the property owner is not a party, to attack the foreclosure judgment collaterally on the ground that service of process was not had on the property owner. *Horton v. Davis,* 592.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

The Utilities Commission did not have jurisdiction over telephone company operated by the University of North Carolina at Chapel Hill. *Utilities Comm. v. Telephone Co.,* 543.

Utilities Commission had authority to inquire into the reasonableness of prices paid by telephone company for its equipment and supplies purchased from an affiliated company and, to the extent it found such prices unreasonable, to reduce the cost basis accordingly. *Utilities Comm. v. Telephone Co.,* 598.

Utilities Commission could properly determine the reasonableness of prices charged by an affiliated manufacturing company by comparing its rate of return on common equity with rates of return experienced by other manufacturing companies in similar fields. *Ibid.*

Utilities Commission erred in reducing telephone company's investment in North Carolina telephone plant for "excess margin in central office equipment." *Ibid.*

Utilities Commission did not err in excluding from the cost of telephone company's property a sum for plant under construction at the end of the test period. *Ibid.*

Utilities Commission's finding of fair value of telephone company's property by first determining original cost and increasing that figure by 6% was unsupported by the evidence and was arrived at by a method which failed to comply with the statutory directives. *Ibid.*

Utilities Commission must make specific findings showing the effect of any finding of inadequacy of service upon its decision fixing rates. *Ibid.*

Evidence of deficiencies in a telephone company's services was such as to provide "other material facts of record" which the Commission was required to consider in its rate determination. *Ibid.*

TORTS

§ 7. Release from Liability and Covenant Not to Sue

An invalid "Confession of Judgment" entered by two defendants in an automobile accident case, and acceptance of proceeds of the judgment by the plaintiff's guardian, could not authorize the trial judge to enter summary judgment in favor of another defendant on the ground that the "Confession of Judgment" had been satisfied within the meaning of the Uniform Contribution Among Tort-Feasors Act. *Ballard v. Hunter,* 613.

Trial court erred in allowing defendant to elicit evidence concerning a covenant not to sue which plaintiff had given to another tort-feasor. *Huss v. Thomas,* 692.

TRESPASS TO TRY TITLE

§ 4. Competency and Relevancy of Evidence

Plaintiffs offered sufficient evidence to support a jury finding that the disputed tract of land was embraced within the description of the deed on which they relied. *Poe v. Bryan,* 462.

TRIAL

§ 10. Expression of Opinion on Evidence by Court During Trial

Trial judge expressed opinion when he sustained his own objections to questions posed by defendant's counsel and when he gave unequal stress to the contentions of plaintiff. *Worrell v. Credit Union,* 275.

Trial court's remark during defendant's cross-examination of plaintiff, "What is the use of all this? It doesn't have a thing in the world to do with the law suit," was not prejudicial. *Little v. Oil Co.,* 394.

Trial judge went beyond clarification stage in his questioning of plaintiffs' witnesses and committed prejudicial error entitling plaintiffs to a new trial. *Southwire v. Mfg. Co.,* 335.

Trial court did not commit prejudicial error in stating in the presence of the jury its finding that defendants' witness was an expert in the field of buying and selling stocks. *Speizman Co. v. Williamson,* 297.

§ 11. Argument and Conduct of Counsel

Trial court did not err in allowing counsel for plaintiff to read in his argument to the jury portions of the final pleadings. *Kennedy v. Tarlton,* 397.

§ 17. Admission of Evidence for Restricted Purpose

The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted. *Jernigan v. R. R. Co.,* 241.

Testimony competent as to one party should not be excluded because it is not competent against another party in the suit. *Brown v. Whitley,* 306.

§ 36. Expression of Opinion on Evidence in Instructions

Trial court did not express opinion on the evidence in summarizing testimony of two doctors. *Spinella v. Pearce,* 121.

TRIAL—Continued

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence

Motion to set aside verdict as contrary to the greater weight of the evidence is addressed to the sound discretion of the trial judge. *Jernigan v. R. R. Co.*, 241; *Mangum v. Surles*, 547.

§ 52. Setting Aside Verdict for Excessive or Inadequate Award

Trial court did not abuse its discretion in refusing to set aside as inadequate an award to plaintiff of $225 damages. *Spinella v. Pearce*, 121.

Trial court properly acted within its discretion in refusing to set aside a $107,500 verdict in favor of a plaintiff who was injured in a collision with defendants' train at a railroad crossing. *Jernigan v. R. R. Co.*, 241.

TROVER AND CONVERSION

§ 1. Nature and Essentials of Actions for Possession of Personalty

Conversion applies only to personal property and does not apply to real property. *McNeill v. Minter*, 144.

UTILITIES COMMISSION

§ 2. Jurisdiction and Authority of Commission

The Utilities Commission did not have jurisdiction over telephone company operated by the University of North Carolina at Chapel Hill. *Utilities Comm. v. Telephone Co.*, 543.

§ 6. Hearings and Orders; Rates

Utilities Commission had authority to inquire into the reasonableness of prices paid by telephone company for its equipment and supplies purchased from an affiliated company and, to the extent it found such prices unreasonable, to reduce the cost basis accordingly. *Utilities Comm. v. Telephone Co.*, 598.

Utilities Commission could properly determine the reasonableness of prices charged by an affiliated manufacturing company by comparing its rate of return on common equity with rates of return experienced by other manufacturing companies in similar fields. *Ibid.*

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Evidence of deficiencies in a telephone company's services was such as to provide "other material facts of record" which the Commission was required to consider in its rate determination. *Ibid.*

VENUE

§ 1. Definition and Nature of Venue

The right to object to the venue of an action may be waived if the objection is not made in apt time. *Collyer v. Bell,* 653.

§ 5. Actions Involving Title to or Right to Possession of Property

Although an allegedly usurious loan is secured by a deed of trust on real property, the action for usury is not an action affecting an interest in real property which may be removed as a matter of right to the county where the real property is located. *Development Corp. v. Farms, Inc.,* 1.

§ 7. Motions to Remove as Matter of Right

District court was without authority to determine plaintiff's motion for temporary alimony and counsel fees pending disposition of defendant's motion to remove action as a matter of right to another county. *Little v. Little,* 353.

Trial court properly granted defendant's motion to transfer a personal injury action to the county in which both plaintiff and defendant resided, where the motion was made within the period allowed for filing answer. *Barker v. Hicks,* 407.

WILLS

§ 4. Holographic Wills

A wife who signed her name at the bottom of her husband's holographic will could not be estopped from challenging her husband's purported devise of entirety property, since the wife's signature constituted a complete nullity. *Glover v. Spinks,* 380.

§ 28. General Rules of Construction

The intent of the testator remains the guiding star in the interpretation of a will. *Stephens v. Bank,* 323.

§ 31. Transmittable Estate

An article in testator's will which mistakenly asserted that the homeplace would go to his wife as the surviving tenant by the entirety, when in fact the record title to the homeplace was in the testator alone, did not constitute a bequest by implication to the wife of the homeplace. *Stephens v. Bank,* 323.

§ 32. Bequest by Implication

A bequest or devise may be by implication, but the implication cannot rest on conjecture. *Stephens v. Bank,* 323.

§ 64. Whether Beneficiary is Put to His Election

A surviving tenant by the entirety who was not a beneficiary under her husband's will was not required to make an election as to that part of the will which attempted to devise the entirety property to the testator's son. *Glover v. Spinks,* 380.

WITNESSES

§ 10. Attendance

Trial court did not err in failing to advise defendant who was not represented by counsel of his right to subpoena witnesses and to assist him in having subpoenaes issued. *S. v. Jenkins,* 387.

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